BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTON PROFESSIONAL POLICE ASSOCIATION,
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION

and

VILLAGE OF CLINTON

Case 2
No. 57189
MA-10544
(Kitzman Vacation Grievance)

Appearances:

Mr. Mark Hollinger, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the Clinton Professional Police Association.

James H. Fowler Law Office, 20 East Milwaukee Street, Suite 206, Janesville, Wisconsin 53545-3061, by **Attorney James H. Fowler**, appearing on behalf of the Village of Clinton.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the Clinton Professional Police Association (hereinafter referred to as the Association or the WPPA) and the Village of Clinton (hereinafter referred to as the Village or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the appropriate increment for vacations. The undersigned was so designated. A hearing was held at the Village Hall in Clinton, Wisconsin, on June 2, 1999, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs which were exchanged through the arbitrator on August 12, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties agreed that the arbitrator should frame the issue in his Award. On reviewing the grievance documents and the record as a whole, the issue may be fairly stated as follows:

> Did the Village violate the collective bargaining agreement when it paid the grievant for his vacation time at 8 hours per day? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV SENIORITY

> Section 4.01 - Seniority shall be determined by the employee's length of service as a full-time officer in the department as of the first date of employment by the Employer.
>
> . . .
>
> Section 4.05 - Full time employees shall be given preference in regard to selection of regular work schedules, based on seniority within the Department, except for the regular work schedule denominated E, assigned to the Community Policing Officer. Any language in this Agreement to the contrary notwithstanding, the officer to be assigned to the position of Community Policing Officer shall be selected by the Chief in his sole discretion, without regard to seniority, and may be any full time officer interested in that position. In the event no full time officer is interested in the position, the position of Community Policing Officer shall be assigned to the full time officer with the least amount of seniority. . . .
>
> . . .

ARTICLE V GRIEVANCE PROCEDURE

Section 5.01 - Definition: The term "grievance" means a dispute between the Employer and the Association concerning the interpretation, application or violation of this agreement. . . .

. . .

Section 5.02 - Procedure: A grievance shaft be handled in the following manner:

. . .

Step 5: Arbitration: . . .Upon completion of the hearing, the arbitrator shall render a written decision to both parties which shall be final and binding except for judicial review. The arbitrator may consider or decide only the particular issue or issues presented to the arbitrator by the parties. The arbitrator shall be limited to the interpretation or application of the provisions of this agreement, and shall have no power to add to, subtract from or modify any of the terms of this agreement.

. . .

ARTICLE VII HOURS OF WORK WEEK, HOURS AND OVERTIME

Section 7.01 - Regular Work Schedules: During the term of this agreement, there shall be defined five regular work schedules, denominated A, B, C, D and E. Each of these schedules shall consist of consecutive periods of fifteen (15) calendar days with each such period to consist of five (5) days on duty, then two (2) days off duty, then five (5) days on duty, then three (3) days off duty. The on-duty work day shift shall be an eight (8) or eight and one-half (8-1/2) hour shift, as set forth below. Each scheduled shift shall include a one-half (1/2) hour paid lunch period during which time the employee shall be on call. Each shift shall, in addition to the paid lunch period, include two (2) fifteen-minute paid breaks. . . .

. . .

ARTICLE XII VACATION

Section 12.01 - Full time employees shall earn a period of vacation during the first full year worked, and during each full year worked thereafter. The period of vacation shall be taken during the year in which it is earned, and

prior to the anniversary of the employee's first day worked. An employee shall give notice to the police chief of intent to take vacation time, and the amount of vacation to be taken, at least thirty (30) days before the vacation is to begin. The police chief shall approve or deny the request in writing as soon as possible. Seniority shall be the deciding factor on vacation requests submitted under this Section. Shorter notice of intent to take vacation may be approved by the police chief, in the police chief s discretion, absent scheduling conflict. Appropriate notice shall be given to the clerk/treasurer, the Wednesday before vacation is to begin, for advance of vacation pay. Vacations shall be earned as follows:

During first year…… one (1) week.
During second year..... two (2) weeks.
During third and subsequent years……. two (2) weeks plus one (1) additional day for the third full year and each subsequent full year up to a maximum of five (5) weeks.

Section 12.02 - Any full-time employee who has earned more than two (2) weeks of vacation shall be required to use at least five (5) days vacation in one block. All remaining days may be taken in single days or any combination thereof.

. . .

ARTICLE XIII HOLIDAYS

Section 13.01 - Full time employees shall receive nine (9) paid holidays for which they will be paid at their straight hourly rate for eight (8) hours as follows:

. . .

Employees shall obtain from the Village police chief prior approval of the day on which the floating day may be taken.

Section 13.02 - For each holiday listed in Section 13.01, an employee shall receive eight (8) hours pay at the employee's regular hourly rate, whether or not the holiday is worked. If an employee works on a holiday, the employee will receive additional pay for each hour worked at one and-one-half (1-1/2) times

the employee's ordinary hourly rate. Hours actually worked on a holiday may be paid or accumulated as compensatory time, at the employee's option, subject to the limitations on compensatory time contained in Section 7.02.

. . .

ARTICLE XVIII SEPARABILITY, CONDITIONS OF AGREEMENT, AMENDMENTS AND SAVINGS CLAUSE

Section 18.01 - This agreement constitutes an entire agreement between the parties and no verbal statement shall supersede any of its provisions.

. . .

Section 18.05 – This agreement may not be amended, altered, or added to except by the mutual consent of the parties in writing.

. . .

BACKGROUND

The Village provides general municipal services to the people of Clinton, in south central Wisconsin. Among the services provided is police protection. Since 1990, the Union has been the exclusive bargaining representative of the non-supervisory police officers of the Village's Police Department. The Village and the Union have negotiated three labor contracts in that time, covering 1991-1993, 1994-1996 and 1997-1999.

Prior to 1994, officers were assigned to one of three work schedules. Two of these schedules rotated 8 hour and 9 hour shifts, while the third was a consistent 8 hours. In 1995, a fourth officer was hired and the parties bargained an additional 8-hour shift. In the current contract, the shift schedule was changed to accommodate the addition of a Community Policing Officer (CPO). The CPO works a schedule rotating between 8 hour and 8-1/2 hour shifts, generating 1,936 hours per year. The other officers work flat 8-1/2 hour shifts, generating 2,056 hours per year. Negotiations over this contract were lengthy, and the new contract was not signed until August 28, 1998. The new schedules were implemented at that time.

Since their first labor agreement, the parties have had a provision for paid vacations:

Section 12.01 - Full time employees shall earn a period of vacation during the first full year worked, and during each full year worked thereafter. . . .

> Appropriate notice shall be given to the clerk/treasurer, the Wednesday before vacation is to begin, for advance of vacation pay. Vacations shall be earned as follows:
>
> > During first year..... one (1) week.
> > During second year..... two (2) weeks.
> > During third and subsequent years..... two (2) weeks plus one (1) additional day for the third full year and each subsequent full year up to a maximum of five (5) weeks.
>
> . . .

The Deputy Clerk-Treasurer is responsible for tracking payroll. Sandra Mutchler held that position until mid-September of 1996. While Mutchler was the Deputy Clerk-Treasurer, vacation days were paid on the basis of the number of hours the officer was scheduled to work. Thus an officer on a 9-hour shift would receive 9 hours of pay for a day of vacation, while an officer on an 8-hour shift would receive 8 hours of pay. 1/ Pam Franseen replaced Mutchler. Franseen calculated vacation credit by taking the number of days due the officer and multiplying by 8 hours. In mid-1998, Franseen started issuing a quarterly report to employes showing the number of hours they had on the books for vacation and sick time, and the balances shown were based on 8 hours per day of vacation. When, in the late summer of 1998, she calculated the back pay for the 1997-99 contract settlement, she used eight hours for the computation of vacation pay, although this was not broken out separately on the officers' retroactivity checks.

1/ Mutchler kept an internal record showing an available bank of vacation hours. She figured the hours on the basis of 9 hours per day of vacation, but employes were in fact allocated vacation in daily increments. An employe with five weeks of vacation would nominally be credited with 225 hours. However, that employe could not take more than 25 days off, even if all 25 days were scheduled for 8 hours.

In late 1998, the grievant, Brad Kitzman, was assigned to a shift of 8-1/2 hours per day. He took vacation on November 20, 21, and 22nd. When he got his paycheck on November 27th, he saw that he had received 24 hours of pay, rather than 25-1/2 hours of pay. The instant grievance was thereafter filed, protesting the Village's failure to pay 8-1/2 hours of pay for vacation days. The Village denied the grievance and it was referred to arbitration.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the Association

The Association takes the position that the Village has violated the contract. While the Vacation provision may have some ambiguity, there is a clear and consistent past practice which clarifies its meaning. From 1991 through 1996, the Village always paid officers for vacation time in accordance with their work schedules. Officers on an 8-hour schedule received 8 hours of vacation pay for each day of vacation. Those on a 9-hour schedule received 9 hours of vacation pay. Every witness, including management's witnesses, confirmed the existence of this practice. A clear past practice is the most reliable guide to what the parties intended by ambiguous language. Thus this practice must be treated as being part and parcel of the collective bargaining agreement. The Village must negotiate any change with the Association.

Even if the arbitrator determined that the clear past practice somehow did not constitute a formal part of the contract, the Village cannot unilaterally change the practice. It is well established that a clear and consistent past practice can form an independent and binding commitment. Parties are presumed to have negotiated the contract on the basis of the then-existing practices, and unless the Employer gives unambiguous notice during negotiations that it is terminating the practice, thus allowing the Association an opportunity to bargain, it is required to maintain the status quo ante until the contract expires. Here, it is undisputed that there were no discussions of the vacation pay practice in the negotiations over the 1997-99 contract. Given this, the Village cannot now repudiate the provision.

Finally, even if no practice is shown, the equities of this case require that the arbitrator fill in the gaps of the contract with a solution that is fair and equitable for both parties. The Village's position would cheat the great majority of police officers of pay each and every time they use vacation. The Village should not receive a windfall and the officers should not suffer a forfeiture as the result of an ambiguity in the contract.

For all of these reasons, the Association urges that the grievance be sustained and the affected officer be made whole.

The Arguments of the Village

The Village takes the position that the grievance is without merit and should be denied. The contract is the source of the arbitrator's authority, and there is no basis to be found in the contract for granting this grievance. The vacation language provides for a number of weeks of vacation based on years of service, and everyone agrees that a week means five work days. However, the contract is utterly silent as to how many hours constitute a day of vacation.

From 1991 to 1995, the parties followed a practice of paying an officer for a day based on the number of hours he or she would have been scheduled to work. From 1996 to the present, vacation days have been paid at a flat rate of 8 hours. At most, the silent contract and the conflicting practices must yield the conclusion that the parties had no meeting of the minds on this issue.

While arbitrators are frequently invited to engage in "gap-filling" where the contract is silent, there must be some principled basis on which to perform this essentially legislative function. Here there is no basis for arbitral intervention. The contract specifically provides that the arbitrator may not "add to" the agreement, and if the parties have a disagreement, the appropriate answer is for them to bargain a solution.

Should the arbitrator feel that gap-filling is appropriate, the Village asserts that he should adopt its interpretation. The Village's position is the more equitable, in that it prevents the officer assigned to the shorter work shift from receiving a lesser benefit than officers of equal seniority who work the longer day. There is support for this approach in the contract itself. The parties have agreed that holiday pay is based on 8 hours, no matter what the officer's actual work schedule would have been. Having negotiated this as the basis for other paid time off, it is reasonable to assume that the parties, had they thought about it, would have adopted the same system for vacations. For all of these reasons, the Village urges the arbitrator to deny this grievance and allow the parties to negotiate a solution to this dispute.

DISCUSSION

The contract gives employes the right to vacation time off with pay. The provision speaks in terms of weeks (which the parties agree means five work days) and days of vacation. The officers work varying hours in a day. Four officers work 8-1/2 hour days, and one works an 8-hour day. The dispute here centers on how many hours of pay an officer should receive for a day of vacation.

The grievance arbitrator's role is to discern and enforce the intent of the parties as expressed in their collective bargaining agreement. The familiar rule is that clear contract language is to be applied, since the intent is self-evident. By definition, clear language is that which is capable of sustaining but one plausible interpretation. If more than one plausible interpretation can be drawn, the language may be said to be ambiguous. Ambiguous language must be interpreted to determine its meaning. The language of the vacation article here is silent as to what constitutes the appropriate basis for calculating hours of vacation pay, and both parties concede the existence of at least some ambiguity.

Interpreting the Language Used

Absent evidence to the contrary, parties are generally presumed to have used words in the same sense throughout their contract. Here the parties have provided for "weeks" and "days" of paid vacation. Since a "day" of vacation refers to time off from work, its meaning can be understood by looking at how a work day is defined by the contract. Section 7.01 of the Agreement provides that "The on-duty work day shift shall be an eight (8) or eight and one-half (8-1/2) hour shift, as set forth below. . ." Thus a day of work can mean either 8 hours or 8-1/2 hours. This does not make its definition free-floating. Instead, the definition of a work day is contingent, and depends upon which shift the officer selects. With regard to individual officers, the duration of a work day becomes fixed at one of the two definitions once the officer's shift is determined. For four of the five officers, the work day within the meaning of the contract is 8-1/2 hours long. For the CPO, it is 8 hours long.

If a "day" of vacation time off for the grievant is 8-1/2 hours long, it is difficult to understand how his vacation pay can be 8 hours, just as it would be difficult to explain paying the CPO 8-1/2 hours of vacation pay if he does not work his 8 hour shift. The essence of the Village's position is that there is no connection between the amount of vacation time off and the amount of vacation pay, but in general the point of a paid vacation is to allow employes to take time off from work without losing pay. Certainly the parties could negotiate some different basis for paying vacation days, but there is nothing in the contract to suggest that they did so. On the subject of holidays, by contrast, the parties specifically agreed to pay on a flat 8 hour per day basis:

> Section 13.02 - For each holiday listed in Section 13.01, an employee shall receive eight (8) hours pay at the employee's regular hourly rate, whether or not the holiday is worked. . . .

The language of Article XIII strongly suggests that, where the parties intended to pay for time off on the basis of something other than the actual work schedule, they were capable of clearly expressing that thought. The fact that they did not do so in the area of vacations leads to the inference that they intended to treat pay for vacation time off differently than pay for holiday time off.

Reading the contract as a whole, and applying the principles of interpretation related to the normal usage of language, provides very strong support for the Association's position in this case.

Past Practice

The Association makes a strong appeal to past practice, either as proof of the parties' intent in crafting the language of Article XII or as proof of a free-standing right to be paid for the full amount of vacation time off. The Village contends that the practice is, at best mixed.

The customary statement of the elements of a past practice is that, in order to be enforceable, the practice must be shown to have been (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as fixed and established practice accepted by both parties. Because past practice is looked to as an aid to determining mutual intent, the degree of proof required to show each of these elements varies depending upon the purpose for which the practice is being cited. Past practice is generally cited for one of three purposes in contract interpretation cases:

1. To prove the meaning of ambiguous language;

2. To enforce a benefit or working condition that is not specifically provided in the labor contract;

3. To amend the actual language of a labor contract.

In the case of ambiguous contract language, there is some proof of mutuality simply by virtue of the language itself. The parties clearly agreed on something, and thus the arbitrator's task is to decide exactly what it was. In that case, the practice does not need to be absolutely clear and consistent, because it is simply one item of proof in the case.

In the case of enforcing an extra-contractual benefit, past practice is the only evidence of mutuality. In that case, there must be strong evidence of the factors proving the practice. The theory behind enforcement of an extra-contractual practice is that the parties reasonably expect such practices to be continued, and approach contract negotiations with that expectation. Allowing unilateral termination of such practices is therefore inequitable, since the other party might well have changed its demands in negotiations if it had known the practice would be discontinued. 2/

2/ Because mutuality is the essence of a binding past practice, and the existence or non-existence of the binding practice is a matter of reasonable inferences, arbitrators are far less likely to find them where management rights rather than employe benefits are involved, on the theory that management is unlikely to have intended to be bound to a particular management practice, and the Union is unlikely to have expected them to be bound.

Where a past practice is offered to show that the parties have implicitly countermanded some otherwise clear provision of the contract, the evidence must be overwhelming. This is because there is written evidence of mutuality, and that evidence is contrary to the alleged practice. Thus the proof of mutuality in the practice has to overcome the contrary proof of mutuality in the contract language.

In this case, there was a clear practice of paying officers vacation pay for the length of their scheduled shifts from the beginning of the labor contracts in 1991 up until September of 1996, when the Deputy Clerk-Treasurer was replaced. The new Deputy Clerk-Treasurer believed that she had been told in training to pay vacation at 8 hours per day, and she began doing so. Thus for the first 69 months of this bargaining relationship, there was a clear and consistent practice favoring the Association's interpretation. In the 14 months between Franseen's hiring and the filing of this grievance, there was a consistent practice favoring the Village's interpretation.

With some minor variations, this is not a case of a mixed practice. The Village did not sometimes pay officers for their normal shift and sometimes pay officers for a flat 8 hours. Instead the Village always paid for the normal shift before September of 1996, and always paid a flat 8 hours after that time. The question is what conclusion should be drawn from these two conflicting practices. For purposes of interpreting the contract language, it is difficult to attach as much weight to the post-September 1996 practice as to the practice before that point. The change in the system did not result from collective bargaining or some change in the underlying circumstances. It took place because there was a change in the Village's administrative personnel. If the purpose of looking to past practice is to determine what the parties to the contract intended, the fact that Franseen on her own motion changed the system says nothing about what the language meant when it was bargained in 1991. 3/ On the other hand, the fact that the language was administered according to the Association's interpretation from the day it was bargained to the day Franseen took over as Deputy Clerk-Treasurer does have some significance in discerning intent. When language is first bargained, there is generally some internal discussion on the employer's side as to how it should be implemented and presumably Mutchler, the former Deputy Clerk-Treasurer, had some reason for administering this language as she did after it was first bargained. There is a substantial likelihood that Mutchler's administration of this language reflected actual bargaining intent. There is no possibility that Franseen's did.

3/ Franseen testified that she believed she was told to pay for vacation on an 8-hour basis during her training by the previous Deputy-Clerk. I have no reason to doubt the sincerity of this belief, but it seems unlikely that she is correct. She said she took detailed notes of her training, and that those notes contain no reference to this instruction. Moreover, it is clear that her predecessor never paid vacation on that basis, so it would be very odd for her to instruct Franseen to do so. In any event, even if Franseen was told this, her predecessor was not a bargainer for either party, and she cannot have changed the meaning of the contract simply by telling Franseen to change the Village's system of leave accounting.

The contract does not explicitly address the calculation of vacation pay, but it provides for paid vacation and defines the increments in which vacation can be taken. Thus past practice in this case does not serve to prove the existence of some extra-contractual benefit. Instead it sheds light on the meaning of ambiguous contract language. As noted above, where past practice is used as an one aid to interpreting contract language, proof of the practice need not be as strong as when it is used to establish an extra-contractual provision. Here, the proof of the practice is very strong up to September of 1996, when it was changed for reasons having nothing to do with the mutual intent of the parties. Conclusions drawn from past practice are always in the nature of inferences, but the inference here is quite powerful. The most reasonable conclusion from the conduct of the parties in administering the contract over time is that Article XII intends that employes' vacation pay be based on their scheduled hours, rather than a flat 8 hours per day.

Reason and Equity

Given the choice of two permissible interpretations, it is axiomatic that an arbitrator should favor an interpretation that leads to reasonable and fair results over one leading to unreasonable or unfair results. The Village argues that it is inequitable for the officers working an 8-1/2 hour schedule to receive 8-1/2 hours of vacation pay, because over the course of a year this means that the CPO, who works an 8 hour shift, receives less vacation pay than his colleagues. This argument assumes that vacation benefits are primarily intended to provide vacation pay. A paid vacation is designed to give employes time off from work without loss of income. If the CPO takes a week of paid vacation, and receives 40 hours of pay, he has received the same benefit as one of his colleagues who takes a week off and receives 42-1/2 hours of pay. Each has received a week of paid vacation. Following the Village's reasoning, it is also inequitable to pay the other officers more per year than the CPO simply because they work more hours. The difference in annual gross pay, like the difference in annual vacation pay, is the inevitable result of having officers work different weekly schedules.

Fairness is a subjective judgment, and appeals to equity are always something of a matter of taste. Here the equities are clear and, contrary to the Village's position, they cut in favor of the Association. The inequity here lies in creating a system that gives one officer, the CPO, fully paid vacation while requiring four other officers to lose pay when they take vacation. As discussed above, such a result could be achieved through clear language, but it is not a natural inference one would draw from contract language granting employes paid vacations.

Conclusion

The contract grants employes the benefit of paid vacations, and defines that right in terms of "weeks" and "days." The parties agree that a "week" consists of five days on which

the employe would otherwise be scheduled for work. A day of work under the contract is either 8 hours or 8-1/2 hours, depending on the employe's chosen shift. While the contract does not specifically say so, the normal use of language strongly suggests that a day of vacation pay would be calculated on the same basis as pay for a day of work. The Holidays article buttresses this conclusion, since it expressly provides for a different method of calculation, while the vacation article is silent. Evidence of past practice likewise indicates that a day of vacation pay should be calculated on the basis of the normal work day. That is the basis on which it was paid immediately after the negotiation of the labor contract, when the parties may be presumed to have been giving conscious thought to the meaning and proper application of the language, and for the ensuing 69 months. The change in that practice was not related to bargaining, but to a change in administrative personnel. Finally, the interpretation urged by the Village is not mandated by considerations of reason and equity. To the contrary, the Village's reading of the language denies four employes the right to fully paid vacation while granting it to one employe, while the Association's interpretation grants all employes the same benefits.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Village violated the collective bargaining agreement when it paid the grievant for his vacation time at 8 hours per day. The appropriate remedy is for the Village to pay Officer Kitzman's vacation days at a rate equal to his hourly pay rate multiplied by the number of regularly scheduled hours in the shift that would have been worked but for the vacation.

Dated at Racine, Wisconsin, this 15th day of September, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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