BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 400

and

CITY OF FOND DU LAC (FIRE DEPARTMENT)

Case 152
No. 57595
MA-10685

Appearances:

Mr. Joseph Conway, Jr., State Representative, International Association of Firefighters, Local 400, 821 Williamson Street, Madison, Wisconsin 53704, appearing on behalf of the Association.

Godfrey & Kahn, S.C., by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the City of Fond du Lac.

ARBITRATION AWARD

The International Association of Firefighters, Local 400, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Fond du Lac, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 8, 1999 in Fond du Lac, Wisconsin. At hearing, the parties waived the contractual thirty-day requirement for issuance of an award. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 12, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there are no procedural issues, but were unable to agree on a statement of the substantive issue and agreed the Arbitrator would frame the issues to be decided.

The Union proposed the following statement of the issues:

> Did the Employer violate the labor agreement or past practice when it informed the Union, during an April 23, 1999 shift meeting, that it would not allow vacation selection on January 1, 2, 3, 4, 2000? If so, what is the appropriate remedy?

The City framed the issue as:

> Did the City of Fond du Lac violate Article XVIII Vacation or Article XXVII Management Rights when it precluded employes from scheduling vacations on January 1, 2, 3, 4, 2000 in order to meet any emergencies that arise because of the Y2K problem? If so, what is the remedy?

The issues may be stated as follows:

> Did the City violate the parties' Collective Bargaining Agreement when it informed the employes that they will not be permitted to schedule vacation time off on January 1, 2, 3 or 4, 2000 due to potential emergencies arising from the Y2K problem? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions to the parties' 1998-2001 Collective Bargaining Agreement are cited:

Article XVIII

Vacation Time

. . .

Vacations will be administered by the Chief.

. . .

Vacations will be selected by seniority on a rotating basis. Employees will be allowed to float days earned that are less than a three day cycle (one day after 15 years, one day after 20 years, or two days after 22 years.) or days that are in excess of picking the first or last cycle in a year that does not constitute a full three day cycle. Those employees authorized to float vacation days may utilize vacation days provided they request those days on or before their regularly scheduled work day prior to the day requested. No more than three (3) employees may be off on vacation at any one time.

. . .

Article XXVII

Rights Of Employer

It is agreed that the rights, functions and authority to manage all operations and functions are vested in the employer and include, but are not limited to, the following:

1) To prescribe and administer reasonable rules and reasonable regulations essential to the accomplishment of services desired by the City Council.

2) To manage and otherwise supervise all employees in the bargaining unit.

3) To hire, promote, transfer, assign and retain employees and to suspend, demote, dismiss or take other disciplinary action against employees as circumstances warrant.

4) To relieve employees of duties because of lack of work or for other legitimate reasons.

5) To maintain the efficiency and economy of the City operations entrusted to the administration.

6) To determine the methods, means and personnel by which such operations are to be conducted.

7) To take whatever action may be necessary to carry out the objectives of the City Council in emergency situations.

8) To exercise discretion in the operation of the City, the budget, organization, assignment of personnel and technology of work performance.

Nothing contained in this management rights clause should be construed to divest Local 400, Fond du Lac Fire Fighters, of any rights granted by Wisconsin Statutes.

. . .

Article XXIX

Maintenance Of Benefits

The City agrees that, as a result of this contract, no benefits previously granted employees by the City shall be either withdrawn or reduced unless specifically stated in the collective bargaining agreement.

BACKGROUND

The City's Fire Department has approximately 68 members housed at three stations. A fully-staffed shift is comprised of 20 employes: three on each of three engines; two on each of three ambulances (often run a fourth ambulance), two on the aerial tower and one in the Chief's vehicle. Minimum staffing is 17 on a shift and if it falls below that, "call backs" are instituted (employes are called in). Before the employes on the shift go off duty, they must wait until the employes on the oncoming shift have arrived. A shift is 24 hours and begins at 8:00 a.m., and employes work a 1 on – 1 off; 1 on – 1 off; 1 on – 4 off schedule.

David Flagstad has been the Chief of the Department for the past ten years and has been a member of the Department since 1970. Thomas Kania is a Lieutenant in the Department and has been in the Department since 1985. Kania has been President of the Union for the past ten years and previously was Vice-President for two years.

At a staff meeting on March 18, 1999, Chief Flagstad made an announcement about action he was taking regarding the anticipated Year Two Thousand ("Y2K") computer problem. That announcement was summarized as follows in the minutes of that meeting:

Y2-K

Chief Flagstad gave a brief update on the Y2-K situation. Each City department head will be responsible for the continuation of his or her department services. It is anticipated that we will receive more service calls than we normally do. A posting will be put up asking for people to sign up to work overtime from 2000 on December 31 to 0800 on January 1, 2000. Vacations will not be able to be picked for January 1-4, 2000. Two to three management people are also being requested to work overtime during this same time frame.

Kania was not present at the March 18th meeting, but on March 23, 1999, the Chief sent Kania the following e-mail:

From: David Flagstad

To: Thomas Kania

Date: Tue, Mar 23, 1999 7:56 AM

Subject: Y2K Overtime

FYI – I am planning on posting a voluntary overtime slip for 8:00 PM Dec 31 to 8:00 am January 1, 2000 shift to bring in enough staff to staff 4 Engine Companies and 4 Ambulances to handle any increase in calls we may have for the new year change over. I have already got 3 from management who will work. If I can not get enough volunteers to work, we may have to order-in personnel, but I would rather not. If you have any concerns before I put up the posting, contact me before March 29th. Thanks.

Kania subsequently contacted the Chief and indicated his concern about ordering in people. The Chief responded that it was not his intent and that he would post the December 31-January 1 overtime right away, asking for volunteers. Kania suggested that, if necessary, the Chief should repost the overtime nearer to the end of the year.

The overtime was posted in April of 1999, though it is not clear how long the posting was up. No one from the bargaining unit signed the posting for the overtime. The Chief announced that he would not allow vacation selections for January 1 through January 4, 2000 in order to meet potential staffing needs due to a potential increased workload resulting from Y2K problems – power outages, lack of heat in homes, increased alarms, etc.

Although vacation picks for the coming year are not made before December 1st, the Union filed a Step 1 grievance on April 29, 1999, challenging management's intent to not permit employes to select January 1 through January 4, 2000 for vacation. In denying the grievance, Chief Flagstad responded as follows:

> Dear Mr. Kania:
>
> I have received your letter of April 30, 1999 in which you question my decision to limit vacations the first four days of January, 2000. The City has always retained the right to make decisions on staffing issues and adjust staffing accordingly to the needs of the department.
>
> The change of the clock into year 2000 brings much uncertainty as to what will occur and what response will be needed from the emergency services we provide. I have determined that staffing on the first four days of the year should be at its maximum to insure that we will be able to respond adequately to the expected increase demand for our services. This decision is no different than making decision regarding long term staffing levels or if staffing levels would have to be adjusted for a short term to deal with situations out of our control.
>
> The contract clearly states that the Chief shall have the right to administer vacations.
>
> The decision is a reasonable approach to provide our services, it is a right of management and therefore will be administered without further ado.
>
> Sincerely,
>
> David L. Flagstad /s/
> David L Flagstad
> Fire Chief

The parties attempted to resolve their dispute, but were unsuccessful and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position it has established its right to bargain the number of employes off on vacation on any given day of the year and that number now stands contractually at a maximum of three employes off per day without limitations. If the City wishes to modify that number, it must negotiate the change, and has failed to even make such an attempt in this case.

The City's definition of "administration" in Article XVIII is inconsistent with what would be a reasonable interpretation of that term as used in the contract. The City claims that the phrase "vacations will be administered by the Fire Chief", gives the Chief the unilateral ability to modify the procedure by which vacation time is selected. However, vacation time is selected in accord with the vacation provision of the Agreement and someone has to be responsible for running the selection process and that responsibility falls to the Chief in order to insure that the vacation selection procedure is followed correctly, i.e., the Chief "administers" that procedure. That the Chief administers the vacation selection process according to the contract is recognized by the then-City Manager's letter in February of 1991 noting that "Chief Flagstad has administered vacations according to contractual language. . .", recognizing that the Chief's authority is limited by the contractual vacation language. The City's definition is inconsistent with the dictionary definition of "administration" as well.

While the Chief testified that the vacation selection procedure is not a benefit that is subject to negotiations, it is clear that the City has recognized its duty to bargain vacation selection procedures in the past, unsuccessfully attempting to modify those procedures during contract negotiations. The claim is also inconsistent with Section 111.70, Wis. Stats., as well as the parties' bargaining history. Union Exhibit 9 summarizing the bargaining history since 1992 regarding the vacation selection language demonstrates that the parties have entered into numerous discussions concerning vacation amounts and procedures. It is also clear that the parties have substantially changed the vacation selection procedure over time. Union Exhibit 4, a packet of documents from the grievance arising in December of 1986 when the then-Chief, informed the Union that it was his intention to reduce the number of firefighters that could be off on vacation from three to two beginning January 1, 1987, and culminating in a Memorandum Of Understanding dated February 3, 1987, demonstrates that when the City attempted to assert its management rights to unilaterally limit the number of employes off on vacation at any given time from three to two, it was challenged by the Union and a settlement negotiated which set the number of employes to be allowed off on vacation at any given time during the year. That Memorandum of Understanding has since been expanded and codified in the Agreement. Since 1987, the City's only avenue for modification of the vacation selection procedure is through bargaining.

The Chief also asserts a past practice of a vacation blackout where no such practice exists. There is no dispute that prior to 1987, no one was allowed to select vacation for the last two weeks of each year, due to increased fire hazard from Christmas trees and decorations and this was referred to as the "Christmas vacation blackout". While the City argues that the pre-1987 "blackout" establishes a practice enabling the City to unilaterally impose vacation blackouts as it sees fit, there is no evidence as to how this Christmas vacation blackout was implemented, i.e., whether it was through negotiations or unilaterally imposed. However, the point is now moot, since the Christmas vacation blackout was eliminated in 1987 and there have been numerous collective bargaining agreements negotiated between the parties modifying the vacation selection policy since that time. The current vacation policy permits up to three employes off at any given time. The City has clearly bargained away its ability to implement a vacation blackout on the basis of a past practice, and no such practice any longer exists.

Article XXIX, Maintenance of Benefits, provides that ". . .no benefits previously granted employes by the City shall be either withdrawn or reduced unless specifically stated in the collective bargaining agreement." There is no provision in the Agreement that provides the City with the ability to withdraw January 1 through January 4 from the vacation selection schedule without bargaining. Thus, the Chief's "Y2K" blackout violates Article XXIX.

The January 1 through January 4 vacation blackout is also inappropriate as the Chief has not reasonably researched the "Y2K" situation. The Chief stated that his decision to institute the vacation blackout came from seminars conducted by the utility companies. No evidence was produced as to what information was provided at these seminars. While the City submitted a large amount of background material on the "Y2K" situation, the Chief testified that he had not read any of that material prior to announcing his decision at the March, 1999 staff meeting. Had the Chief read the material, he would have discovered reasonable guidelines for dealing with the situation. There is no evidence that the City or Fire Department has a "Y2K" contingency plan, nor whether or not the City or Fire Department has done a risk assessment as described in the City's "Y2K" background material, nor is there evidence that the Chief is acting in accord with the guidebooks produced by FEMA or the USFA set forth in those background materials. The Chief's "Y2K" contingency plan, i.e., his January 1 through January 4 vacation blackout, is no contingency plan at all, but is only a continuation of the 12-year battle over management rights and vacation selection procedures.

The Chief has not made a reasonable attempt to increase staffing via the use of overtime. Only one attempt was made to increase staffing for the "Y2K" situation, an overtime posting in early April of 1999. Kania testified that the posting was inconsistent with other postings, as it was done nine months in advance. It is unreasonable to expect any employe to sign up for a short overtime nine months in advance, when normal practice is no more than one month in advance. The Chief made no attempt, nor does he plan to, to post any overtime for January 1 through January 4 of 2000. However, overtime is the "past

practice" for increasing staffing, for emergency callback, or for the staffing of special events. The Chief has this avenue contractually available to him. Sustaining the grievance does not limit the Chief's ability to increase staffing on any given day, but merely enforces the language in the Agreement and steers the Chief to the appropriate method of handling any "Y2K" situation.

Finally, the Chief conceded that the impact of the "Y2K" situation would be determined during the first few hours of the new year. However, the impact of limiting vacation will commence at 0800 hours on January 1, 2000, a full eight hours after the start of any potential "Y2K" system malfunctions. There is no additional staffing gained from the vacation blackout during what many have deemed to be the most critical time period of the "Y2K" situation. The evidence demonstrates that there will be three firefighters on vacation during that critical "Y2K" evaluation period. Thus, the Chief is allowing vacation during the heart of the "Y2K" situation, but not during the days following that critical period. That contradiction makes suspect the Chief's motives in restricting the vacation. At 0800 every day, the Chief has available to him two entire shifts of personnel (up to 34 firefighters and officers) available to respond to any ongoing emergencies if so directed. It is unreasonable to limit the vacation of up to three people during the holiday period when the Chief has the availability of 34 of the Department's 68 employes as of 0800 on January 1. Thus, the Chief can adequately staff for the "Y2K" situation without violating the labor agreement by limiting vacations. The Union requests that the grievance therefore be sustained.

City

The City first asserts that the Chief has not yet denied an employe his/her request for vacation, as it is not until late November or early December that vacation selection for the year 2000 would be distributed. Thus, there has been no contractual violation and the grievance should be dismissed until such time as an employe's request has been denied.

As to the merits, the "Y2K" issue represents a serious concern that the Department must be prepared to handle. The Chief is concerned about utilities cutting off power to citizens, as well as emergency services being provided to citizens needing medical attention due to health conditions. The City presented numerous exhibits demonstrating state and federal concern for the "Y2K" problem. While it is uncertain what will happen, the common advice from state and federal officials who have studied the issue is to be prepared. The State has adopted a six-point strategy for dealing with the issue and concludes that contingency planning may be the most important aspect of community-level "Y2K" preparedness.

In responding to the "Y2K" issue, the Chief decided to staff four engines and four ambulances, as opposed to the normal three engines and three ambulances, because of his concern about an increase in the number of calls at the beginning of the new year. While he

posted a notice in April of 1999 for employes to voluntarily sign up for additional duty on the evening of December 31-January 1, no one volunteered. As a result, the Chief was concerned the Department would not have sufficient staffing to handle the increased workload, since firefighters may be off on sick leave, personal leave, family medical leave, compensatory time, etc. Calling in employes for overtime may not produce enough employes to handle the increased workload. The concern is with employes declining overtime due to New Year's Eve celebrations, and the reluctance of employes to be ordered into work by not answering the phone after a first attempt to obtain firefighters for overtime on a voluntary basis. The Chief testified that for the Department to meet its mission, it needs to be at full staff on January 1 and the immediate work period following that time. Arbitrators have held that staffing levels are an appropriate factor management can consider in scheduling vacation and can deny vacation requests based on reasonable business concerns. UNIVERSAL ENGINEERING DIVISION OF STANWICH INDUSTRIES, INC., 90 LA 895 (Roumell, 1988). The "reasonable business concern" in this case is to be fully-staffed and prepared for the "Y2K" problem. In developing a contingency plan for the "Y2K" concern, one of the main features of the plan was to make sure there was sufficient staff to meet the anticipated demand for services. Based on the evidence, the Chief has acted responsibly in meeting the uncertainty of the "Y2K" issue. The prohibition on selecting vacation was necessary according to the Chief to meet the expected fallout from the "Y2K" issue.

Next, the City asserts that it has the authority, pursuant to Article XVIII, to "administer" vacations, which includes the right to approve or disapprove vacations for a legitimate reason. That provision states in relevant part, "Vacations will be administered by the Chief." While the City agrees with the definition of the word "administer" offered by the Union, it also cites the following definitions:

Black's Law Dictionary defines "administer" as:

> To manage or conduct, to discharge the duties of an office; to take charge of business; to manage affairs; to serve in the conduct of affairs, in the application of things to their uses;
>
> To "administer" a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language.

Black's Law Dictionary, 6th Edition, 1990.

Roberts' Dictionary of Industrial Relations, defines "administration" as:

> In collective bargaining, the machinery established to effectuate or administer the provisions of the labor-management contract. The term is also applied to the process of carrying out or enforcing a statute, or management procedures to effectuate a policy set out by the executive.

Given those definitions, it is clear that the Chief has the authority, pursuant to the express language of the Agreement, to manage the application of vacations. It means the Chief has the right to enforce and effectuate the provisions of the Agreement, resolve conflicts and interpret the language as a whole. The Chief has exercised his express contractual right to regulate the selection of vacation days, and so long as he exercises his discretion in a reasonable manner and for a legitimate reason, his decision should not be disturbed. Having conclusively proved the need to staff employes at a higher level than normal for the beginning of the new year due to the "Y2K" uncertainty, and because the "Y2K" issue is a legitimate concern of the City, the Chief has exercised his contractual authority under Article XVIII in denying vacation during the first block of worktime available in the new year.

Further, this same interpretation of the word "administer" has been provided to the Union previously when the former director of personnel for the City, in analyzing a grievance filed in 1986, stated:

> The decision of when to allow employees to take vacation or how many employees are allowed off on vacation at a given time is a Management prerogative so long as Management is reasonable in its application of this right. I understand that the policy to allow three people off during a given vacation period is a long-standing policy, but Management's ability to change that policy is in no way contractually limited.
>
> In this instance the contract is clearly stated that administration, and I would interpret this to mean scheduling of vacation, is the prerogative of the Chief. This gives Management the specific right to coordinate vacation schedules. The contract places no limitations on this right other than the general obligation to administer the contract in a reasonable fashion. The contract for instance does not state that Management will make every effort to schedule vacation according to the employees' request.

Thus, since 1986 the Union has understood the City's position as to the word "administer". The Union has made no attempt to bargain any language in the contract that would restrict the Chief's ability to "administer" the selection of vacation dates. Thus, the

City's interpretation of the word "administer" has been a long-standing interpretation with which the Union has agreed. Since the Union has made no attempt in bargaining to circumvent the Chief's ability to administer the scheduling of vacations, this remains a right that has been enjoyed by the City pursuant to the language of Article XVIII.

In that regard, the right of employes to select vacation dates is not absolute. In exercising its right to "administer" vacations, and as part of the process, the City has the right to evaluate whether vacations may be taken on any given day. Here, the City has retained its right, recognized by the Union, to administer vacations consistent with its right to determine appropriate staffing levels to meet the "Y2K" anticipated increase in workload. Thus, the grievance should be denied.

Under Article XXVII, Rights Of Employer, the City has the right to manage all operations and functions of the Department. As the contract is silent regarding the scheduling of vacations, the City retains the right under that provision to prescribe reasonable work rules, to supervise employes, to maintain efficiency and economy and to exercise discretion in determining personnel by which operations are to be conducted, and to take whatever action is necessary in emergency situations. All of those management rights apply in this case. Regarding the right to prescribe reasonable rules and regulations, the City has promulgated a rule to prohibit vacations during the first work cycle of the new year in order to respond to increased staffing needs due to "Y2K" concerns. The City is also managing employes by ensuring that a full complement of staff are available to handle the increased workload, and is maintaining efficiency by ensuring that employes are prepared to respond to emergencies. In responding to this grievance, the Chief noted that the issue of how employes should be staffed at any one time is clearly within the rights retained by the employer, and that he determined that staffing on the first four days of the year should be at its maximum to ensure the Department's ability to respond adequately to an expected increase in demand for services. He noted that the decision is no different than making a decision regarding long-term staffing levels or if staffing levels have to be adjusted for a short term to deal with situations out of the Department's control.

The City also has the right under Article XXVII to take whatever action is necessary in emergency situations. The "Y2K" uncertainty is such a situation. While no one knows what will happen, all state and federal officials studying the "Y2K" issue have advised communities to be prepared, and the Chief has followed that advice in ensuring that staffing levels are to be at maximum level to respond to any emergencies caused by the "Y2K" problem. Arbitrators have upheld employers' attempts to approve or deny vacations based on a valid reason. One arbitrator noted that "it is one of the prerogatives of management to schedule vacations at such time as best meets the needs of the business," although employers will often do their utmost to meet the wishes of their employes. SINCLAIR REFINING CO., 12 LA 183 (Klamon, 1949).

Other arbitrators have similarly held that where the contract is silent, determining adequate manpower levels is an inherent right of the employer, so long as its decision is not arbitrary, capricious or unreasonable, or have upheld the denial of vacation requests where the employer provided sound business reasons for doing so. In this case, the City has provided such a reason.

It is the unrefuted testimony of the Chief that the City has exercised its authority to administer vacations previously when employes were prohibited from 1969 to 1987 from taking vacations during the last two weeks of December of each year due to the increased chances of fires from Christmas trees and hot lights, as well as increased store inventories. He testified that this prohibition was not "bargained", but merely a rule adopted by the then-Chief. This is important because it shows that the City has exercised its authority to administer vacations by blacking out certain times due to anticipated increased demand for services. It is a matter of common sense, and the 18-year practice of prohibiting vacations for that two-week period directly parallels this case. Here, in order to meet the need for increased staffing available to respond to any emergencies due to the "Y2K" problem, the Chief has "blacked out" the first work cycle, following the same rationale used by the former Chief from 1969 to 1987. This further evidences the City's ability to regulate and administer vacations based upon anticipated staffing needs. The arbitrator should uphold the City's ability to schedule vacations as the City has exercised that right previously without objection from the Union.

The language of Article XVIII relied upon by the Union, i.e., that "no more than three (3) employes may be off on vacation at any one time", does not grant employes the unfettered and absolute right to take vacation on any given day, rather it must be harmonized with other provisions of the contract. The argument that the language gives an employe the right to take vacation on a particular day is inconsistent with other provisions of the contract that give the City the right to "administer" the vacation policy and the management rights giving it the right to determine staffing priorities on any given day. The Union's position is unreasonable, as it would negate the other provisions of the Agreement. In interpreting contract language, arbitrators attempt to harmonize the provisions of the agreement if at all possible. The language relied upon by the Union is stated as an absolute limit on the number of employes who can take vacation on any one day in order to protect the City's interest in meeting staffing needs. That does not mean that the City has somehow relinquished its right to approve vacations or schedule vacations pursuant to its management rights. Approval and scheduling of vacations is still subject to the City's interests in meeting the Department's mission. In this case, the City's legitimate interest in protecting its citizens with regard to the "Y2K" issue takes precedence over the limit of employes to take vacation on any one day. The language also does not prohibit the City from blacking out a period of time based on legitimate concerns. Rather, the language stands for the proposition that once the City has allowed vacations to be scheduled on a particular day, then no more than three employes can be scheduled off on that day.

The bargaining history cited by the Union is irrelevant, since both the previous and current agreements dealt with a limit on the number of employes who could take vacation on any one day. In the 1996-98 Agreement, the number of employes allowed to take vacation on any one day was two or three, depending on the time of the year. In the 1998-2001 Agreement, the limit was raised to three employes year-round. That change has no bearing on this case. As discussed above, that number is an absolute limit on the number of employes who can take vacation on any one day, and it does not follow that the City is precluded from denying vacations when there is a legitimate staffing need.

The previous grievances cited by the Union are distinguishable from the facts in this case, and therefore are irrelevant. Upon cross-examination, Kania admitted that none of those grievances dealt with the issue in this case and further admitted that the parties resolved all of those grievances short of arbitration. The grievances do show that the City has been consistent in its position that it has retained the right to schedule vacations pursuant to the management rights clause and the right to "administer" vacations.

The Union's reliance upon Article XXIX, Maintenance Of Benefits, is also misplaced. That clause is not relevant as the Agreement is silent as to the scheduling of vacations, and there is nothing in the contract that limits the City's ability to schedule vacations. Article XXIX clearly applies only to language that is "a result of this contract". As there is no contractual benefit regarding employes scheduling vacation, the provision does not apply. Secondly, the scheduling and approval of vacation is not a "benefit" covered by Article XXIX. Third, the City has not withdrawn or reduced a benefit, since employes are not losing any of the vacation to which they are entitled. Rather, the City is merely shifting the amount of time during which vacation can be taken based on legitimate needs of the City to staff at an appropriate level in an emergency situation. There also has been no evidence showing that its members have had their vacation reduced or withdrawn as a result of the Chief's prohibition. The Chief testified that no employe would suffer a loss of vacation. Fourth, the Union has waived its right to argue that Article XXIX applies, as the City had placed the Union on notice at least since 1986 that vacation selection was not a benefit protected by Article XXIX. Further, the Union accepted the blackout of vacation from 1969 to 1986, and thus there has been no withdrawal or reduction of a benefit, since it has occurred previously. In 1986, then-Director of Personnel Richard Brewer stated, "Vacation scheduling is not included in the labor agreement. I do not think that vacation scheduling *per se* can be defined as a benefit. Obviously, Management must act in a reasonable fashion and must facilitate employe utilization of the vacation benefit." (Union Exhibit 4). The Union has done nothing since receiving that analysis in the bargaining process that would change the City's perspective in this regard, nor has it bargained any language that would cause vacation scheduling to be viewed as a "benefit".

Last, the Union has presented no evidence showing that employes have always been approved for vacation on any particular day. To the contrary, the City produced unrefuted evidence showing that for years, the last two weeks of December have been "blacked out", prohibiting the use of vacation due to increased manpower needs during the Christmas season. Based on that practice, the City believes it has clearly documented its right to schedule vacation based upon its needs and the citizens' interests. Since no one has actually been denied vacation and employes will still be able to use their full number of vacation days except for those first four days of January, the grievance must be denied.

DISCUSSION

The City initially asserts that the grievance should be dismissed because there is no individual grievant whose contractual rights have yet been allegedly violated, as no one has yet selected or been denied a vacation day for the period in question. While there are situations in which that argument has merit, as arbitrators are reluctant to issue what amounts to an advisory opinion, it is usually due to a lack of concrete facts in such a case upon which one ordinarily must base his/her decision. That is not the situation in this case. The Chief has taken action, i.e., he has advised employes that they will not be permitted to pick vacation for January 1-4, 2000, and he has stated his reasons for doing so. Equally important in this case, if the Union were to be required to wait until an employe requests vacation for one of those days and is denied, it would be too late to obtain a remedy if a violation was established. Under these circumstances, the grievance is deemed to be ripe for decision.

As to the merits of the grievance, the undersigned agrees that, absent contract language to the contrary, management retains the right to grant or deny vacation requests based upon legitimate business concerns and/or operational needs. That right must be exercised in a reasonable manner and where applicable, it must be balanced against the employes' contractual rights to select their vacation times. Here, Article XVIII gives the Chief the authority to "administer" vacations. While this means that the Chief will make the decision on granting or denying vacation requests and makes sure proper procedures are followed, his authority to make such decisions is qualified by the employes' contractual right to select their vacation times pursuant to the contractual procedure. The present wording of Article XVIII provides that, "No more than three (3) employes may be off on vacation at any one time." The evolution of Article XVIII demonstrates that, contrary to the City's assertions, that wording is intended to establish that employes have the contractual right to select vacation for any time during the year, subject to that limitation of no more than three employes being off on vacation at any one time. The wording of Article XVIII in the parties' prior agreement stated, in relevant part,

> Each year employees will be entitled to a maximum of eleven vacation periods per shift in which three employees may be on vacation at the same time. . .All other vacation periods shall have a maximum of two employees on vacation in each period. . .

Further, Union Exhibit 4, containing the correspondence regarding a 1986 grievance filed over the then-Chief's decision to allow only two, instead of three, firefighters off on vacation at any one time, and the resulting memorandum of agreement, establishes that the parties have recognized that the City may not unilaterally generally reduce the number of employes permitted to be off on vacation. Union Exhibit 9, setting forth the City's attempts to obtain contract language that would limit to two the number of employes on vacation, similarly establishes the parties' recognition of the need to bargain such a limitation on selecting vacations. As to the previous Christmas blackout, a practice that ended 13 years ago, and about which no one, including the Chief, can recall whether it originally was negotiated or unilaterally implemented, does not overcome this subsequent bargaining history.

While the City is correct that Article XVIII does not give employes an absolute right to have three employes off on vacation at any one time, it does create a general contractual right in that regard that may only be qualified by the valid operational needs of the Department. In this case, the City's concern is ***anticipated*** "Y2K" problems requiring higher staffing levels to meet the ***anticipated*** increased work load. The Chief, however, conceded on cross-examination that he can call employes in or hold them over from their shift in order to achieve the staffing level he feels is needed. While he voiced concerns about employes possibly being unavailable for call-in because they had been drinking on New Year's Eve, he could not say if that has been a problem in the past. More importantly, the Chief conceded he did not have to wait until the last minute, i.e., that he can schedule the overtime ahead of time with a sign-up sheet, and that employes can be assigned overtime if there are not any voluntary sign-ups or an insufficient number. Although the Chief posted an overtime sign-up sheet for December 31-January 1 in April of 1999, he has not reposted that overtime, nor has he posted a sheet for January 2-4, and he testified that he did not intend to do so, as he was relying on not permitting vacation at this time to achieve the desired staffing levels.

The above establishes that while the City has valid concerns, the Department's staffing needs can be adequately addressed in advance by utilizing overtime, without the need to interfere with the employes' contractual rights under Article XVIII to select their vacation times. Therefore, the City has violated the employes' contractual rights in that regard when the Chief notified employes that they would not be permitted to schedule vacation time off on January 1-4, 2000. It is noted, however, that this conclusion is based on the fact that the "Y2K" problems are only speculation at this point. If on January 1, 2000 there are serious threats to the safety and welfare of the City's citizenry, the City retains its rights under Article XXVII with regard to dealing with an actual emergency situation. Such a situation is not, however, the case presently before this Arbitrator, and no finding is made in that regard.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The City is directed to immediately rescind the prohibition on scheduling vacation for January 1, 2, 3 and 4, 2000.

Dated at Madison, Wisconsin this 22nd day of November, 1999.

David E. Shaw

David E. Shaw, Arbitrator

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