

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**JACKSON COUNTY PROFESSIONAL POLICE ASSOCIATION**

and

**JACKSON COUNTY**

Case 127  
No. 58233  
MA-10891

(Dennis Wathen Grievance)

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Appearances:

**Mr. Richard Thal**, General Counsel, Wisconsin Professional Police Association, appeared on behalf of the Union.

Laabs, Skolos & Millis, LLP, by **Attorney Gerald Laabs**, appeared on behalf of the County.

**ARBITRATION AWARD**

The Jackson County Professional Police Association (herein the Union) and Jackson County (herein the County) were parties to a collective bargaining agreement, dated July 27, 1998, covering the period from January 1, 1997 through December 31, 1998, and providing for binding arbitration of certain disputes between the parties. On November 24, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the County's nonpayment of certain benefits to Dennis Wathen upon his separation from employment with the Jackson County Sheriff's Department and requested the appointment of a member of the WERC staff to arbitrate the issue. At the time the grievance arose, the parties were in a hiatus period between contracts. The undersigned was designated to hear the dispute and a hearing was conducted on February 17, 2000. The proceedings were not transcribed and briefs were filed on March 27, 2000.

**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 stipulated to the following framing of the issue:

Did the County violate Article 8, Section 4 of the collective bargaining agreement when it failed to pay Dennis Wathen the unused vacation and personal holiday time that he had accumulated?

If so, what is the appropriate remedy?

## PERTINENT CONTRACT PROVISIONS

### ARTICLE VIII - VACATIONS

Section 1: Regular, full-time employees shall earn and accumulate up to twenty-four (24) days of vacation as follows:

1. During the first through the fifth year of service, one (1) day per each month of service.
2. During the sixth through fifteenth year of service, one and one-half (1½) days per each month of service.
3. After fifteen years of service, one and two-thirds (1 2/3) days per each month of service.

Vacation time shall not be taken in units of less than one (1) day.

Section 2: The number of officers on vacation at any period shall be determined by the Sheriff and/or Chief Deputy. Choice of vacation time shall be requested in writing at least thirty (30) days in advance of the commencement of the vacation. The written request shall be submitted to the employee's non-union supervisor or designee who shall approve or deny such request within six (6) days. Each officer shall also post his vacation request on the Association bulletin board and within five (5) days thereof an officer of greater seniority within the respective seniority unit may claim part or all of the vacation time requested and the less senior officer shall select a different vacation period. Said approval or denial shall be determined on the issue of whether or not such vacation interferes with the Departmental program. Exceptions to time limits may be granted upon approval and in the sole discretion of the Sheriff and/or Chief Deputy.

Section 3: One (1) week vacation shall consist of the number of days in a normal work week, or five (5) working days. Holidays and off days shall not be considered as part of vacation. Should they occur during an officer's vacation he shall be granted credit for the same.

Section 4: Any employee who is laid off, retired, or resigns from the service of the Employer prior to taking his vacation, shall be compensated in cash for the unused vacation he has accumulated at the time of separation; provided, however, that any employee who resigns must give the Sheriff and/or Chief Deputy and the Personnel Department two (2) weeks notice thereof to be eligible for said accrued vacation pay.

#### ARTICLE IX – HOLIDAYS

Section 1: The following holidays shall be recognized and observed as paid holidays for regular, full time employees:

New Year's Day	Thanksgiving Day
Good Friday	Christmas Eve Day
Memorial Day	Christmas Day
Independence Day	New Year's Eve Day
Labor Day	(1) Floating Holiday

. . .

Section 6: Floating holidays shall be taken at the discretion of the employee subject to the approval of the employee's immediate non-union supervisor.

#### OTHER RELEVANT LANGUAGE

#### ARTICLE IV – DISCIPLINE AND DISCHARGE

The County shall have the right to discipline, demote, suspend or discharge any employee for just cause. Any such disciplinary action shall be communicated in writing to the affected employee and the Association. Such written communication shall set forth specifics upon which the discipline is based.

### BACKGROUND

The Grievant, Dennis Wathen, was a deputy in the Jackson County Sheriff's Department between 1981 and 1999, rising to the position of detective over that period. During that time, he also served on the Union bargaining team at various times and held offices in the local union. He was president of the local at the time this grievance arose.

On April 29, 1999, the Grievant was informed that he was the subject of an investigation by the County into certain allegations of wrongdoing on his part. At that time, he was placed on administrative leave, with pay, pending the outcome of the investigation. Pursuant to law, the Grievant could have remained on paid administrative leave status indefinitely until the disciplinary matter was resolved. Shortly thereafter, the Grievant determined to terminate his employment with the County. On May 17, 1999, in a meeting with Chief Deputy Dennis Blanchard, he presented the following letter:

May 17, 1999

Sheriff Richard Galster  
Jackson County Sheriff's Office  
30 North Third Street  
Black River Falls, WI 54615

Dear Sheriff Galster:

When I joined the department in 1981 I expected I would be there until I retired. I'm not telling you anything you don't already know, when I say things do not always turn out as we expect them to. I am proud of my 18 years of service to the department and the people of Jackson County.

The time has come for me to move on and pursue other goals. I have decided to leave law enforcement. I will be returning to school at WWTC in LaCrosse to finish my associate degree in computer science. From past conversations I'm sure it comes as no surprise to you that I am pursuing my interests in programming.

According to county payroll records I have 62.91 hours of comp time, 186.0 hours of vacation, and 8.0 hours personal holiday accumulated. I would

like to use comp time and vacation days to cover my work schedule until the hours are paid out of my leave account.

Sincerely,

D. Wathen /s/

Dennis Wathen,  
Detective

Blanchard discussed the matter with the Grievant and expressed regret that the Grievant was leaving the department, but nothing was specifically discussed about the content of the letter. Blanchard then forwarded the letter to Sheriff Galster and to Alan Moeller, the County Corporation Counsel/Personnel Director. The Grievant did not receive a response from either the Sheriff or the Corporation Counsel/Personnel Director.

On May 21, 1999, the Grievant received his paycheck for the period ending May 14, which reflected 152.16 hours of accrued vacation, 62.91 hours of accrued compensatory time and 8.0 hours of accrued personal holiday. On June 4, 1999, the Grievant received two checks from the County. The first, in the amount of fifty-nine dollars and fifty-six cents (\$59.56), reflected eight hours, or one day's, pay from the previous pay period, less deductions. The second, in the amount of five hundred thirty-five dollars and seventy cents (\$535.70), represented the payout of the Grievant's accumulated compensatory time, less deductions. The pay stubs on both checks reflected eight hours of unused holiday time, but no accrued vacation. The Grievant called the County payroll office to inquire as to why his vacation time was not reflected on the stub and was informed that his accrued vacation was forfeited because he had not complied with the contract's notice requirements prior to resigning. On June 9, 1999, Moeller sent the Grievant the following letter:

June 9, 1999

Dennis Wathen  
P.O. Box 195  
Taylor, WI 54659

Re: Vacation Pay Payout

Dear Dennis:

This letter is in response to your inquiry regarding the decisions [sic] of the County to not pay you for accrued vacation time at the time of your resignation. I apologize for the short delay in responding.

On May 17, 1999 you submitted your resignation to Sheriff Galster in which you requested that you be continued on the schedule in order to receive payment for vacation leave, comp-time and personal holiday. Your resignation was accepted by the Sheriff.

Article VIII – Section 4 states that “any employee who resigns must give the Sheriff or Chief Deputy and Personnel Department two (2) weeks notice thereof to be eligible for said accrued vacation pay”. You had not previously been scheduled for vacation or personal leave. Article VIII further states in relation to vacations that “Exceptions to time limits may be granted upon approval and in the sole discretion of the Sheriff and/or Chief Deputy.” No exception has been granted in your case.

I hope this clarifies the County’s position in regard to this matter.

Sincerely yours,

Alan D. Moeller /s/

Alan D. Moeller  
Personnel Director

On June 24, 1999, Union representative Michael Peterson wrote to Moeller, asking him to reconsider his position. The record does not indicate whether Moeller responded, but in any event the decision remained unchanged. On July 15, 1999, therefore, the Union filed a grievance, maintaining that the Grievant’s resignation was contingent upon his being allowed to amortize his accrued vacation and leave time, and that his resignation was not effective until his accrued leave was used up, which would have been well in excess of two weeks from his May 17 letter. The grievance was denied at each step of the grievance process and the matter proceeded to arbitration.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The County violated the collective bargaining agreement when it denied the Grievant his accrued vacation and holiday pay. At the time he submitted his letter of resignation, the Grievant had accumulated 152.16 hours of vacation, 62.91 hours of comp time and 8 hours of paid holiday. His letter of resignation requested that these hours be paid out until exhausted and clearly makes his resignation contingent upon the request being granted. Nothing in the letter suggests that it was intended to take effect immediately, and, in fact, it is clear he did not

intend to resign until his accrued leave time had been exhausted. At no time did the Sheriff or Chief Deputy object to the Grievant receiving his paid leave. He only became aware of a problem when he received his final paycheck, along with a check for his accrued comp time, and noticed that his vacation had been deleted. Only after he then contacted the County Personnel Director was he told his vacation was forfeited because he hadn't given adequate notice of resignation.

Vacation pay is a form of deferred earnings; therefore, express and unambiguous contractual language is required before a forfeiture of vacation pay can be decreed. PHALO CORP., 52 LA 837, 838-839 (MURPHY, 1968). In a case where a collective bargaining agreement requires two-weeks' notice of resignation to receive accrued vacation benefits, there must be no doubt that the notice was not given in order to cause a forfeiture. Since the Grievant did not intend to resign until he had used up his accrued leave, however, he gave, in effect, more than five-weeks' notice of his intended resignation.

When the Grievant turned in his resignation, the Sheriff accepted it without comment. Because the resignation was contingent upon the granting of the Grievant's request to use up his accrued leave, the County must be deemed to have accepted this condition. Had the County told the Grievant that his request was denied, he could have stayed on the payroll until the County's investigation was complete, which could have taken several months. Instead, the Grievant was allowed to resign, but not told he would lose his accumulated leave until it was too late to revoke the resignation. Under the circumstances, the County must be required to honor the Grievant's request for payment of his accrued leave and the grievance should be sustained.

### The County

This case turns on the language of Article VIII, Section 4 of the contract, which requires a resigning employe to give two weeks' advance notice of resignation in order to receive a payout of accrued vacation time. The Grievant did not do this and, therefore, was not eligible for the vacation payout.

The Grievant's letter of resignation says nothing about two weeks' notice, but very clearly indicates the Grievant's intention to "move on and pursue other goals." The fact that the letter mentions no effective date indicates the resignation was to take effect immediately. The request to receive his comp time and accrued vacation does not reflect any alternative intent. In a normal situation, an employe would give two weeks' notice, work the remaining two weeks, and then receive the vacation payout in a lump sum at the time of separation. The Grievant, however, was on administrative leave, although on pay status. By requesting that his leave payout commence immediately, he indicated his intent to resign at once.

The testimony of Chief Deputy Blanchard further supports this construction. When the Grievant gave him the letter he said nothing about two weeks' notice and left the Chief Deputy with the definite sense that he was resigning immediately. This intention was also understood by the Corporation Counsel/Personnel Director, who issued a Vacation/Sick Leave Payout at Termination indicating a resignation date of May 17, 1999. The Grievant's subsequent contention that his letter of resignation constituted a two-week notice has no merit and the grievance should be denied.

### DISCUSSION

This grievance centers on the Grievant's claim to entitlement to payment of accrued vacation benefits after his resignation. Most arbitrators hold that vacation benefits are a form of deferred compensation and should not be forfeited unless clearly required by the collective bargaining agreement. The Common Law of the Workplace, § 9.1, p.306 (T. St. Antoine, 1<sup>st</sup> ed. 1998). We must, therefore, first scrutinize the relevant contract language to determine the Grievant's rights and obligations.

Article VIII, Section 4 provides for the payout of vacation benefits upon separation from employment. In the case of resignation, however, it conditions the payment upon the employe giving two weeks' advance notice prior to the effective date of the resignation. If the notice is not given as prescribed, the benefits are forfeited. This language exists as an inducement to employes to give adequate notice prior to resignation and is intended to provide the County with some protection from having employes just walk off the job.

In this case, the County contends that the Grievant's resignation was effective immediately upon his giving his letter of resignation to the Chief Deputy on May 17. This was the inference drawn by the Chief Deputy at the time, and also by the County Corporation Counsel/Personnel Director in later denying the vacation benefits. The analysis does not end there, however. Due to the heavy presumption against forfeiture it is necessary to determine, if possible, the Grievant's actual intention and, if other than immediate resignation, at what time the resignation was intended to take effect. Further we must conclude whether such intention may be reasonably deduced from the Grievant's statements and actions at the time.

To begin with, it is important to be aware of the backdrop to these events, which is that the Grievant was, at the time, on paid administrative suspension, pending the outcome of an investigation and possible disciplinary proceeding. He was not working or filling shifts, therefore, but would have continued to receive compensation under the statutes governing such suspensions until such time as the investigation was completed or his resignation took effect. The record does not indicate how long the investigation would have continued in the absence of the Grievant's resignation, but since his suspension only commenced on April 29, and taking into account his various hearing and appeal rights under the statutes, it is reasonable to assume that the process could have continued for several months. Further, failure to give the required



notice under these circumstances did not inconvenience the County as the immediate resignation of an officer on active duty would have, because it did not create any immediate staffing problems. In fact, it saved the County from having to pay an additional two weeks' wages while the Grievant was under suspension. On the other hand, so far as the record shows, an immediate resignation was of no benefit to the Grievant whatsoever.

The Grievant's letter of resignation is also very instructive. He does not specifically indicate an effective date for his resignation, but does say, "I would like to use comp time and vacation days to cover my work schedule until the hours are paid out of my account." (Joint Exhibit 3) The record reflects that, between accumulated vacation, comp time and personal holiday, the Grievant had over 5 weeks of available paid leave at that point. Setting aside the fact that the Grievant did not have a "work schedule" per se, he does not appear to be requesting a payout of his vacation benefits subsequent to resignation, pursuant to Article VIII, Section 4. Rather, he appears to be requesting to go on leave until such point as his various paid days are exhausted, pursuant to Article VIII, Section 2 and Article IX, Section 6, and announcing his intention to resign at that point. Further, according to the Grievant's unrefuted testimony, other resigning employees have been permitted to do this in the past. Consequently, I do not concur with the County's contention that the Grievant's May 17 letter constituted an immediate resignation, or that he intended it as such.

It is true that under Article VIII, Section 2, the Grievant's request was untimely and, therefore, was subject to approval at the discretion of the Sheriff and/or Chief Deputy. Neither the Sheriff, nor the Chief Deputy told the Grievant, however, that his request was denied. In fact, the Grievant was unaware that he would not be paid his vacation time until he received his June 4 paycheck and made inquiry to the personnel office as to why his vacation time had been eliminated. At that point, the Corporation Counsel/Personnel Director wrote him and stated, in pertinent part:

Article VIII – Section 4 states that "any employee who resigns must give the Sheriff or Chief Deputy and the Personnel Department two (2) weeks notice thereof to be eligible for said accrued vacation pay". You had not previously been scheduled for vacation or personal leave. Article VIII further states in relation to vacations that "Exceptions to time limits may be granted upon approval and in the sole discretion of the Sheriff and/or Chief Deputy". No exception has been granted in your case.

The testimony of Chief Deputy Blanchard, however, was to the effect that the decision to not pay the vacation benefits was not made within the Sheriff's Department. This is consistent with the testimony of the County Clerk, Kyle Deno, and the Personnel Office Benefit Specialist, Deborah DeGroot. Both testified that the decision to deny the Grievant's request

for vacation benefits was made by the Corporation Counsel/Personnel Director, Alan Moeller. Under the terms of the contract, however, Moeller had no authority to act on the Grievant's request.

More to the point, even had the Sheriff or Chief Deputy denied the Grievant's request to use his accumulated leave, this would not have changed the character of the request itself. Once informed of such denial, the Grievant would have had a number of options. Under Article VIII, Section 2, he could have submitted another request to begin using his vacation in 30 days, and have remained on administrative suspension for an additional 30 days until he was eligible to begin using his vacation time. Under Article VIII, Section 4, he could have made his resignation effective two weeks from the date of the denial, and then have received his accrued benefits in a lump sum thereafter. 1/ A denial by the Sheriff, in and of itself, however, would not have turned his request into an immediate resignation, such that his benefits would be forfeited thereby.

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*1/ Notably, either alternative would have involved more cost to the County than merely allowing the Grievant to use up his accrued leave, as requested, since he would have remained on paid administrative leave until he became eligible to either use his vacation days or receive a cash payout for them.*

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In sum, therefore, I find that the Grievant's May 17 letter was not an immediate resignation, but a request to begin using his various types of accrued leave immediately, to be followed by his resignation. The Sheriff was authorized to, and apparently did, accept the Grievant's resignation, but neither he, nor the Corporation Counsel/Personnel Director, could, by denying the leave request, unilaterally alter the resignation's effective date.

In effect, by characterizing the Grievant's letter as an immediate resignation and acting thereon accordingly, the County constructively discharged the Grievant on May 17. Under Article IV of the collective bargaining agreement, such action requires a showing of just cause and written notice to both the employe and the Union. These requirements were not met here and in so doing the County abrogated the Grievant's rights under Article VIII to either use up his accrued paid leave prior to resignation, or resign after the prescribed notice and receive a payout of his accrued benefits.

For the foregoing reasons, and based upon the record as a whole, I hereby make the following

**AWARD**

The County violated the Article VIII, Section 4 of the collective bargaining agreement when it refused to pay the Grievant's accrued vacation and holiday benefits subsequent to his separation from County employment. Therefore, the County shall pay to the Grievant the sum of two thousand three hundred seventy-five and 27/100 dollars (\$2,375.27), representing 8 hours of holiday pay and 152.16 hours of vacation pay at the Grievant's hourly wage rate of \$14.83, without interest.

Dated at Eau Claire, Wisconsin, this 8<sup>th</sup> day of June, 2000.

John R. Emery /s/

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John R. Emery, Arbitrator