BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS
LOCAL 407, AFL-CIO

and

CITY OF WAUKESHA

Case 140
No. 59200
MA-11216

(Vacation Carry-over - James Staehler)

Appearances:

Fuchs, Snow, DeStefanis, S.C., by **Attorneys John F. Fuchs** and **Rebecca D. Boyle,** 620 North Mayfair Road, Milwaukee, Wisconsin, 53226-4253, for the Union.

Attorney Vince Moschella, Assistant City Attorney, City of Waukesha, Waukesha City Hall, 201 Delafield Street, Waukesha, Wisconsin, 53188, for the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union and the City jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned as Arbitrator to resolve a dispute as set forth below. By letter dated October 24, 2000, the Commission appointed the undersigned as Arbitrator. Hearing on the matter was held on December 8, 2000, at the Waukesha City Hall, Waukesha, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on March 9, 2001.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUE

Did the City violate Article 13, Section 5, of the contract when it refused to allow the carry-over of vacation into the next calendar year?

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FACTUAL BACKGROUND

Facts Giving Rise to the Instant Dispute

James Staehler, hereinafter the Grievant, is a member of the City of Waukesha Fire Department and Local 407 and holds the rank of equipment operator.

The Grievant selected the dates of December 24, 26 and 28, 1999, as vacation days.

The Grievant was then placed on sick leave due to a serious heart problem effective December 8, 1999. He carried his sick days to December 23, 1999.

The Grievant wanted to use December 24, 26 and 28 as sick days, rather than vacation days. He asked the Department to carry over the vacation days into the next year until such time as he was no longer on sick leave by means of carry-over under Section 5, Article 13 of the collective bargaining agreement.

By letter dated February 16, 2000, Fire Chief Robert W. Stedman denied this request as follows:

. . .

> This letter is in regards to your request to be allowed to carry over vacation time from 1999 to the year 2000. The dates you requested to carry over were the vacation days of December 24, 26, & 28, 1999.
>
> As I have told you before, and as you learned from a previous grievance you filed in 1998 the City does not allow the carry-over of vacation time from one year to the next. In your 1998 grievance, the Personnel Committee in Step 4 of the grievance process denied your request to carry-over vacation.
>
> Therefore, your request to carry over the vacation can not be approved. We did leave you in vacation status on the dates of December 24, 26, & 28, 1999, which in essence means you saved three sick leave days you would have had to use because at that time your Doctor had stated you could not return to work.
>
> As a result, you saved those three sick leave days and will be able to still use them in the future, since they do carry-over. It is my understanding from what you told us your disability retirement could not take effect until you have used all of your sick leave time. The end result is you still get the three days before your retirement.

. . .

By letter dated March 24, 2000, David Walter, President of Local 407, filed a grievance over the City's refusal "to allow Jim Staehler to reschedule vacation days of December 24, 26 and 28, 1999 pursuant to the Collective Bargaining Agreement, 1998-2000, Article 13, Section 5. . . ." The grievance was processed through the steps of the parties' contractual grievance process to the Step 4 Grievance Hearing before the City's Human Resources Committee. By letter dated June 15, 2000, the City denied the Step 4 appeal, in relevant part, as follows:

. . .

> The appeal to this step of the grievance procedure states the following alleged contract violation:
>
> "This grievance addresses (your) refusal to allow Jim Staehler to reschedule vacation days of December 24, 26, and 28, 1999 pursuant to the Collective Bargaining Agreement, 1998-2000, Article 13, Section 5. . . ."
>
> Dave Walter, President of IAFF, stated that Jim Staehler suffered an illness that caused him to be placed on sick leave starting in early December. Dave Walter stated that Mr. Staehler had vacation scheduled for December 24, 26, and 28, 1999. He stated Staehler asked that these days be rescheduled and that his request was denied. Mr. Walter stated that the grievance is about those three days. He stated that Article 13, Section 5 permitted the rescheduling of vacation under these circumstances subject to mutual agreement. On April 5, 2000, Mr. Walter sent a letter to Chief Stedman protesting the denial decision and requested a step 3 meeting. On May 17, 2000, a 3rd step grievance meeting was held, followed by a letter from the Chief denying any contract violation. On May 22, 2000, the union (sic) the matter to step 4.
>
> Representing Management, Chief Robert stated that Mr. Staehler had scheduled his vacation for December 24, 26, and 28, 1999. He said that James Staehler was on sick leave on all of those dates. The Chief said that subsequently the December 24, 26, and 28 sick leave dates were changed to reflect vacation leave. The Chief said that he turned down the grievance because the request was not to reschedule the vacation within the year but to carry it into another. The labor agreement does not allow for vacation carry-over from year to year. City policy states that vacations are calendar year and can not be carried over. The Chief stated that as he has said before and as the union learned from a previous grievance (filed in 1998, same grievant & issue) that the City does not allow the carry-over of vacation from one year into the next.
>
> Human Resources Director, Tom Wisniewski stated that the labor agreement does not provide for vacation carry-over and that vacation scheduling and use is based upon a calendar year. He noted that the grievant was on paid status

through December 31st without loss of pay and benefits. That in his tenure with the city no employee has been allowed to carry vacation over from one year to the next.

The Human Resources Committee reviewed the facts offered at the hearing, current contract language, and its previous grievance decision on this matter. The City was very clear in its 4th Step response, when it issued a grievance denial on March 1, 1999. It is noted that the union did not file an appeal. The Human Resources Committee restates its previous denial of no contract violation of Article 13, Section 5. It is noted that the language of Article 13, Section 5, remains unchanged since the previous grievance denial. Further, it is noted that vacations are scheduled and used on a calendar year basis and that the Labor Agreement does not provide for vacation carry-over from one year into the next. Lastly, it is the Committee's opinion that this grievance is not the proper subject for a grievance, since the union filed a previous grievance on vacation carry-over, was issued a Step 4 denial, and then never appealed that denial.

. . .

The Grievant was paid vacation, not sick pay, for the 24th, 26th and 28th of December.

Bargaining History

The 1979-80 collective bargaining agreement was ultimately settled through interest arbitration and signed around six or seven months after its expiration. That agreement contained the following clause:

ARTICLE 14

SICK, INJURY, MILITARY AND FUNERAL LEAVE

. . .

Section 5: In the event any unit member suffers a loss of vacation time due to any of the foregoing leaves he shall be entitled to schedule an alternate vacation after recovery to the extent that such can be completed in the same calendar year. At the discretion of the Chief such vacation selections may be carried into the following year.

. . .

The above clause was proposed by the Union through arbitration and was won in arbitration.

The City was not happy with the above language from the 1979-80 agreement which permitted vacation carry-over for the first time. As a result, the City took the strong position during the 1981 bargain that vacation carry-over would not be permitted and that rescheduling had to take place within the calendar year.

On September 17, 1981, the City made the following proposal in the event an employee lost scheduled vacation due to serious illness or injury: "the employee will be permitted to reschedule such lost vacation time at a time of mutual agreement." At the time Marshall Berkoff, the City's chief negotiator, communicated to the Union that this language meant "'prior to beginning of vacation' without carryover." (Emphasis in the original) John Brendel responded, on behalf of the Union, that the Union wanted to have some time to look at the City's proposal.

On September 21, 1981, the Union proposed the following language: "such employee will be permitted upon request to reschedule his lost vacation at a time of mutual agreement." The parties agreed to this language on September 21st and it was ultimately placed in the collective bargaining agreement. This language has remained unchanged in all of the City's agreements with the Union since 1981.

The Union has never asked for express vacation carry-over language in any subsequent bargain.

Practice

The City has never allowed a member of the bargaining unit represented by the Union to carry over vacation from one year to the next under the language of Article 13, Section 5.

The City does not allow vacation carry-over for any other represented or unrepresented employees.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 13 – VACATIONS

. . .

> Section 5: In the event an employee is on sick leave for at least two (2) consecutive duty days prior to his regularly scheduled vacation or if the employee is hospitalized for any reason or is incapacitated due to serious illness or suffers a duty-related injury or non-hospitalized surgery which would cause him a loss of normal usage of scheduled vacation time, such employee will be permitted upon request to reschedule his loss (sic) vacation at a time of mutual agreement.

. . .

ARTICLE 17 – GRIEVANCE PROCEDURE

. . .

> The decision of the arbitrators shall be final and binding. The arbitrators shall have no authority to add to or modify the terms or conditions of this Agreement or to decide on issues not submitted.

. . .

POSITIONS OF THE PARTIES

Union's Position

The Union initially argues that the disputed contract language clearly provides, without limitation, that the employee is permitted to reschedule his vacation at a time of mutual agreement. The Union concludes that the City, by refusing to allow the Grievant to reschedule by mutual agreement, is in violation of the plain language of the contract.

The Union rejects the City's assertion that the phrase "mutual agreement" carries with it the clear inference that the rescheduling must be within the calendar year by pointing out that the clear language of the contract carries no such inference.

The Union concludes that since the contract provision is clear and unambiguous on its face, parol testimony or evidence is unnecessary and inadmissible.

Alternatively, the Union argues that if the Arbitrator considers parol evidence, the evidence submitted by the City supports its position. In this regard, the Union first argues that the City's policies precluding vacation carry-over beyond the calendar year, as they relate to any other bargaining unit or to non-represented employees, are irrelevant. The Union next argues that because the local had earlier grieved this issue there has been no waiver, acquiescence, or mutuality to the City's practice of denying vacation carry-over so as to support the City's interpretation of the disputed contract provision.

The Union also argues that bargaining history supports its position. In this regard, the Union claims that the City has written policies regarding other employment units which contain clear language prohibiting the carry-over of vacation hours into the next calendar year. The Union also points out that the agreement in question contains that specific prohibitory language in unrelated clauses. The Union further points out that a prior agreement specifically and clearly contained language which prohibited the carry-over of replacement vacation days to the next calendar year. However, the Union notes that the current agreement contains no such limiting language.

The Union adds that during bargaining the City proposed language specifically limiting carry-over to the next calendar year, but this language did not make its way into the contract. To the contrary, the Union points out that the contractual provision as it exists today, and as it has existed since 1981, was drafted by the Union. In effect, the Union claims the City is unilaterally interpreting into the contract the very specific prohibition eliminated by bargaining.

Finally, the Union rejects the City's argument that allowing vacation carry-over into the next calendar year creates an undue financial burden on the City because of the potential for overtime pay necessitated by the rescheduling. The Union also rejects the City's position that limitations on carry-over would have no adverse impact on employees.

Based on the above arguments and the record evidence, the Union requests that the Grievant be granted the carry-over of three additional vacation days from the year 2000 to the year 2001 to be scheduled by mutual agreement between the Grievant and the Chief. The Union also requests a direction that the contract provision in issue does not preclude or prohibit carry-over of vacation to a subsequent calendar year.

City's Position

The City maintains that this case turns on the clear and unambiguous language of Article 13, Section 5, of the contract. According to the City, that provision provides that when an employee is on sick leave for two consecutive duty days prior to his scheduled vacation "such employee will be permitted upon request to reschedule his loss (sic) vacation at a time of mutual agreement." (Emphasis in the original) The City points out that it never agreed to reschedule the Grievant's vacation so that it would be carried into the next year. The City concludes that in the absence of any mutual agreement, the clear and unambiguous language of the contract operates to deny the Grievant's request for carry-over.

The City also maintains that the word "reschedule" as applied to vacations in Article 13, Section 5, means that vacation may be rescheduled within the same calendar year, not that vacation may be carried over into the next year. The City contends that the word "reschedule" represents a different concept than "carry-over" and since carry-over is not specifically mentioned in said section an express right to "carry-over" does not exist in that language of the contract.

The City further maintains that both bargaining history and past practice support its position that the plain language of Article 13, Section 5, has never been interpreted to include vacation carry-over.

For the reasons stated above, the City requests that the Arbitrator "declare that Article 13, Section 5 of the Collective Bargaining Agreement does not provide for the carry-over of vacation and that the City's denial of the grievance is sustained."

DISCUSSION

At issue is whether the City violated Article 13, Section 5, of the contract when it refused to allow the carry-over of vacation into the next calendar year. The Union argues that the City violated the aforesaid contractual provision by its actions while the City takes the opposite position.

Article 13, Section 5, provides that if an employee is on sick leave for at least two (2) consecutive duty days prior to his regularly scheduled vacation the employee "will be permitted upon request to reschedule his loss (sic) vacation at a time of mutual agreement." The resolution of the instant dispute turns on the meaning of this phrase.

Both parties rely on the "clear" language of Article 13, Section 5, bargaining history and past practice to support their positions.

The Grievant was on sick leave for at least two consecutive days prior to his scheduled vacation. It is undisputed that the City did not agree to his request to carry-over vacation into the next calendar year. As noted above, the question is whether the City violated Article 13, Section 5, by its refusal.

It is true, as argued by the City, that the unambiguous language of this section requires "mutual agreement" in order to "reschedule" a vacation due to illness or injury. It is also true, as pointed out by the Union, that the unambiguous language of this section provides that the Grievant "<u>will be permitted</u> upon request to reschedule his loss (sic) vacation at a time of mutual agreement." (Emphasis added) In the opinion of the Arbitrator, the "clear" language of the disputed contract provision provides that the Grievant "will be permitted" to reschedule his vacation "at a time of mutual agreement."

An interpretation of the disputed contract language in this manner is also supported by bargaining history.

The record indicates that the predecessor language of the current language for this section is found in the 1979-80 contract. It provided, in material part, the following: "At the discretion of the Chief such vacation selections may be carried into the following year." This language had come from a recent interest arbitration award and the City had made its removal a priority in the subsequent bargain. During bargaining, the parties discussed different types of language and carry-over. (Tr. p. 17). The City took the position from the beginning of bargaining through the signing that any new language would not include carry-over, that rescheduling had to take place within the calendar year. (Tr. p. 17). On September 17, 1981, the City made the following proposal in the event an employee lost scheduled vacation due to serious illness or injury: "the employee will be permitted to reschedule such lost vacation at a time of mutual agreement." The City's chief negotiator made it clear at the time of the offer that "this language means '<u>prior</u> to beginning of vacation' w/o carryover." (Emphasis in the original). (City Ex. No. 16). However, the Union made a counter-offer on September 21,

1981, which provided: "such employee will be permitted upon request to reschedule his lost vacation at a time of mutual agreement." (City Ex. No. 17). This proposed language was ultimately agreed to by the City, and is the language which exists in the contract currently. (Tr. p. 19). There is no persuasive evidence in the record that by proposing this language the Union agreed with the City's position that there would be no vacation carry-over. Nor is there any persuasive evidence in the record that when the aforesaid language was agreed to the parties expressly agreed that the language would prohibit vacation carry-over.

To the contrary, the City admits that there is no sentence or provision in the current contract that expressly prohibits carry-over of vacation. (Tr. p. 28).

The City also argues that the word 'reschedule' in Article 13, Section 5, represents a different concept than "carry-over." In this regard, the City argues that while the City agreed to "reschedule" within the same calendar year it made no agreement to allow vacation to be carried over into the next year. The City adds that since the word or concept of "carry-over" does not appear in the provision the right to "carry-over" does not exist in the language of the contract.

The problem with this approach is that there is no persuasive evidence in the record that the Union agreed to the conceptual differences between the two terms as argued by the City when agreement was reached to the language of Article 13, Section 5. Absent a showing that some special meaning should attach to the terms "reschedule" and "carry-over", the plain meaning of the terms must be applied. The American Heritage Dictionary, Second College Edition, 1985, defines "carry-over" at page 243 as: "2. To continue at another time; put off." The Dictionary then defines "schedule" at page 1097 as: "2. To make up a schedule for. 3. To plan or appoint for a certain time or date." The Dictionary adds regarding "re" at page 1029: "1. Again; anew: rebuild." Based on the foregoing, the Arbitrator finds there is no substantive difference between the two terms. In the context of Article 13, Section 5, this means that an employee will be permitted upon request to reschedule his lost vacation, either within the calendar year or into the next calendar year, at a time of mutual agreement.

Other evidence of bargaining history supports the Union's interpretation of the disputed contract language. In this regard, the Arbitrator notes that the City acknowledges that, unlike the instant situation, the policy for non-represented employees, by its language, specifically prohibits carry-over into the next calendar year. (Tr. p. 35). Similar limiting language can also be found within the collective bargaining agreement itself in reference to other forms of benefits. (Jt. Ex. No. 1 -- Article 14, Section 3).

The City also relies on past practice to support its position. Past practice, to be binding on the parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, How Arbitration Works, (BNA, 5th Ed., 1997), p. 732. The City offered testimony that the policy of no vacation carry-overs also existed in all of the

City's other collective bargaining agreements. (Tr. p. 21). The City also prohibits vacation carry-over for non-represented employees. (Jt. Ex. No. 2). However, as pointed out by the Union, the City's policies, as they relate to any other employee unit or non-represented employees, are irrelevant.

The only past incident of which the City offers evidence relative to the Grievant involved an earlier matter on vacation carry-over which the Union grieved, but then decided not to appeal following a Step 4 denial. (Jt. Ex. No. 12). This single incident is insufficient to form the basis for a past practice, particularly in light of the fact that the Union clearly did not acquiesce to the practice, as evidenced by the filing of a grievance. The very fact that this matter was earlier grieved demonstrates clearly that there has been no waiver, acquiescence, or mutuality such as to be legally relevant to the contract interpretation.

Finally, the City argues that there is nothing in the section that requires the City to agree to a re-scheduling that results in a carry-over in an end-of-year scenario in order to satisfy any "reasonableness" standard the Union and the Arbitrator might read into Article 13, Section 5.

As noted above, Article 13, Section 5, specifically provides that the Grievant "will be permitted upon request to reschedule his loss (sic) vacation at a time of mutual agreement." (Emphasis added) It is unnecessary, therefore, to read a "reasonableness" standard into the agreement in order to sustain the instant grievance. Therefore, the Arbitrator rejects this argument of the City.

The City argues, however, that ordering such a result would violate Article 17 of the agreement which provides that an arbitrator "shall have no authority to add to or modify the terms or conditions of this Agreement or to decide issues not submitted." However, there is nothing in the agreement which restricts the Arbitrator's authority to enforce clear contract terms so long as the Arbitrator does not, as set out in the aforesaid contractual provision, "add to or modify the terms or conditions of" the agreement or decide issues not submitted. The parties stipulated as to the issue before the arbitrator. Therefore, the Arbitrator does not violate Article 17 of the agreement by deciding whether the City violated Article 13, Section 5, by its actions.

The City also argues that it acted reasonably herein based on the history of the provision. For the reasons discussed above, the Arbitrator rejects this argument. The Arbitrator further rejects the other arguments put forward by the City on this subject; namely, that there would be a disruption of scheduling and additional costs because payment of the overtime in the following year is at the higher rate than overtime in the prior year. There has been no showing by the City that allowing the Grievant to reschedule his vacation into the next calendar year would specifically disrupt any schedule or that any additional costs associated with taking his vacation in the next calendar year would be anything more than de minimis.

Based on all of the foregoing, and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the City violated Article 13, Section 5, of the contract when it refused to allow the carry-over of vacation into the next calendar year. A question remains as to the appropriate remedy.

For relief, the Union asks that the Grievant be granted the carry-over of the three additional vacation days from the year 2000 to the year 2001 to be scheduled by mutual agreement between the Grievant and the Chief. Based on the above finding, the Arbitrator will grant this request.

The Union also requests a determination that the disputed contract provision does not preclude or prohibit carry-over of vacation to a subsequent calendar year.

The City objects to such a ruling because it goes beyond the scope of the grievance. The City requests that the award be specifically limited to the Grievant's situation which occurred under Article 13, Section 5.

While my ruling herein is of course based on the facts of this case, it also is true, for the reasons stated above, that employees under certain unique circumstances can carry over their vacation credits to the next calendar year. As a result, and absent any change in the existing contract language, this is the principle that must be applied in the future.

Based on all of the foregoing, it is my

AWARD

That the written grievance filed in the instant matter on March 24, 2000, at the Second Step by the Union, is hereby sustained, and the City is ordered to grant the Grievant the carry-over of three additional vacation days from the year 2000 to the year 2001 to be scheduled by mutual agreement between the Grievant and the Chief.

Dated at Madison, Wisconsin this 30th day of April, 2001.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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