BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS
LOCAL UNION #1021, IAFF, AFL-CIO

and

CITY OF MARSHFIELD

Case 137
No. 54936
MA-11298

Appearances:

Mr. Joe Conway, Jr., 5th District Vice-President, International Association of Firefighters, 821 Williamson Street, Madison, Wisconsin 53703, appearing on behalf of the Union.

Mr. James R. Korom, vonBriesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of the City.

ARBITRATION AWARD

International Association of Firefighters Local 1021, IAFF, AFL-CIO, hereafter Union, and the City of Marshfield, hereafter City or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of certain disputes. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a member of its staff as an impartial arbitrator to resolve this dispute. The Commission appointed Coleen A. Burns. Hearing in the matter was held on April 4, 2001 in Marshfield, Wisconsin. The hearing was not transcribed. The record was closed on March 15, 2001, upon receipt of post-hearing written argument.

ISSUE

The Union frames the following issues:

Did the Employer violate Article XIV, Section 2 of the collective bargaining agreement and its associated practice when they denied employees paid holidays that were properly requested and approved per existing policy?

If so, what is the remedy?

The City frames the following issues:

1. Is the grievance timely filed?

2. Is the grievance moot?

3. Did the Employer violate Article 14, Section 2 of the collective bargaining agreement as alleged in the grievance?

The undersigned considers the following statement of the issues to be appropriate:

1. Is the grievance arbitrable?

2. Did the Employer violate Article XIV, Section 2, of the collective bargaining agreement by its response to the paid holiday requests of Jody Clements, Jeff Barth, and Rob Ferguson?

3. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – GRIEVANCE PROCEDURE

Section 1: Definition of Grievance: Any difference of opinion or misunderstanding which may arise between the City and the Union or a member of the Union, involving the interpretation or application of the provisions of this Agreement, shall be handled as follows:

Section 2: Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent. A working day for the purposes of the grievance procedure is defined as any one of five (5) days, 8:00 A.M. to 5:00 P.M., Monday through Friday. Where possible all grievances shall be processed outside the normal work day. The City shall allow Union

representatives the necessary time to process grievances involving health and safety during the course of the duty day.

Section 3: Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

Section 4: Steps in Procedure:

STEP 1: The grievant and or Union shall contact the Deputy Chief within thirty (30) calendar days after he knew or should have become aware with the exercise of reasonable diligence, the cause of such grievance. In the event of a grievance the employee shall perform his assigned work task, unless continued performance affects his health or safety and grieve his complaint later. The Deputy Chief shall within five (5) working days inform the Employee and the Union of his decision.

STEP 2: If the grievance is not settled at STEP 1, the grievant may, within ten (10) working days after the oral decision of his immediate supervisor, prepare a written grievance to the Fire Chief. The Chief shall meet with the employee and not to exceed three (3) on duty Union representatives to discuss the grievance. Said meeting shall occur within ten (10) calendar days of the submission of the written grievance by the employee. The Chief shall then review and further investigate the grievance and inform the aggrieved employee and the Union in writing of his decision within five (5) working days after the meeting between the grievant and the Chief.

STEP 3: If the grievance is not settled in STEP 2, the grievance may be appealed to the Finance, Budget and Personnel Committee through the Personnel Department. This appeal shall take place within five (5) working days after receipt of the written decision of the Fire Chief. The Finance, Budget and Personnel Committee shall then answer the appeal after reviewing the record and investigating the grievance within ten (10) working days. The Personnel Department shall inform the aggrieved employee and the Union in writing of its decision.

Section 5: Group Grievance:

a) Grievances affecting a large number of employees shall be treated as a policy grievance procedure. The Union may appoint representatives for the Union and shall inform the City of the names of the individuals so appointed and of any change thereafter made in such appointment.

Section 6: Arbitration:

a) **Time Limits:** If the grievance is not settled in the third step the grievance may be appealed to arbitration by the employee and the Union giving written notice to that effect to the Personnel Department within thirty (30) calendar days after the written decision in STEP 3 is received.

b) **Selection of Arbitrator:** The Arbitrator shall be selected by the Wisconsin Employment Relations Commission. The decision of the Arbitrator shall be final and binding on all parties except for judicial review.

. . .

ARTICLE XIV – HOLIDAYS

Section 1: All employees shall receive the following ten (10) holidays:

New Year's Day	Thanksgiving Day
Labor Day	Memorial Day
Christmas Day	Veterans Day
July Fourth	Three Floating Holidays

Section 2: All employees shall receive a full day's pay in addition to regular pay for four (4) paid holidays and compensatory days off for the other six. If an employee desires and time is available, the employee may take other holidays as compensatory time off instead of pay. However, it is mandatory that each employee shall take at least six (6) compensatory days off.

Section 3: The payment check for holidays not taken off as compensatory days will be paid with the payroll check prior to Thanksgiving, unless the Comptroller's office is experiencing extenuating circumstances that would prohibit such payment.

. . .

ARTICLE XXV – RESERVATION OF RIGHTS

Section 1: The City retains all of the rights, powers, and the authority exercised or had by it prior to the time the Union became the collective bargaining representative of the employees here represented, except as specifically limited by express provision of this agreement.

ARTICLE XXVI – AMENDMENT AND RENEWAL PROVISION

Section 1: This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union, where mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all of its terms and conditions.

RELEVANT BACKGROUND

Prior to February 25, 2000, Jody Clements, a member of the Union's collective bargaining unit, looked at the calendar and concluded that April 8, 2000 was available to be used as a paid holiday. Thereafter, Clements booked a trip for a vacation that included April 8, 2000.

On February 25, 2000, Clements wrote "Clements –PH" on the calendar space for April 8, 2000. At that time, there may have been one other name on the calendar space for April 8, 2000, i.e., Esker. When Clements requested Deputy Chief Erickson to sign off on the paid holiday, Erickson responded that he would get back to Clements. When Clements subsequently discussed the issue with Erickson, Clements was informed that his request would not be approved at that time, but could be approved at a later time. Upon receiving this information, Clements started to work on a trade for April 8, 2000. On March 4, 2000, Erickson approved Clements request to have April 8, 2000 as a paid holiday and Clements received the day as a paid holiday.

On March 3, 2000, Jeff Barth, a member of the Union's collective bargaining unit, looked at the calendar; concluded that March 11, 2000 was available to be used as a paid holiday; and wrote "Barth P.H." on the calendar space for March 11, 2000. At that time, the only other name on the calendar was that of "Dolens", who was off sick. Understanding that Lieutenant Marsh had approved his paid holiday, Barth was subsequently surprised to learn that the calendar indicated that his request for a paid holiday on March 11, 2000 had been denied. When Barth asked Erickson why the request had been denied, he was told that it was

because Lieutenant Marsh was going to be off for surgery. Marsh was off sick on March 11, 2000 and Barth did not receive this day off.

Approximately one month prior to June 14, 2000, Rob Ferguson, a member of the Union's collective bargaining unit, looked at the calendar; concluded that June 14, 2000 was available to be used as a paid holiday; and wrote "Ferguson PH" on the calendar space for June 14, 2000. At that time, there was one other name on that calendar space. Ferguson brought the calendar to Erickson and Erickson placed his initials next to "Ferguson PH." A few weeks later, Ferguson looked at the calendar and saw that he had been denied a paid holiday on June 14, 2000. When Ferguson discussed the denial with Erickson, he was told that he was denied the paid holiday because Dolens was off with an injury. Ferguson eventually received June 14th off as a paid holiday.

On or about May 3, 2000, the Union filed a grievance on behalf of all the members of Local 1021. The grievance contained the following "Description of What Happened":

> During the April union meeting there was a discussions of Local 1021 members being denied to place down paid holidays on their "kelly" calendars. There was time available in the calendars. This practice of management lasted throughout the month of April.

The grievance contained the following "Reason for Grievance":

> This is a change in working conditions and does not follow a long-standing practice of allowing members to place their paid holidays down.

The grievance contained the following "Request for Settlement":

> That the City of Marshfield Fire and Rescue Department management personnel cease and desist the practice of not allowing members to place their paid holidays down when time is available.

In a memo dated May 17, 2000, Human Resources Specialist Lara Baehr advised Union President Brad Breuer that, per Article IV, Step 3, the grievance had been placed on the June 6, 2000 agenda of the Finance, Budget and Personnel Committee. In a memo dated June 6, 2000, Deputy Chief Erickson advised Breuer of the following:

> **SUBJECT:** Grievance – Denial of Paid Holiday Dates
>
> This is a request for Local 1021 to provide the following information pertaining to the grievance on, ''denial of paid holidays". Please provide the following:

1. Name(s) of your member(s) claiming the denial of a paid holiday(s).

2. The date that your member(s) had requested a paid holiday(s) for approval, and

3. The date(s) that the member(s) states they submitted that request for approval.

You are aware that we only have until the 20th of this month, so for the lack of time we are requesting this information in a timely manner. We would like to receive the information by this Friday, June 9th, 2000, so we have adequate time to look into the information. If you are unable to come up with it by that date, please contact either myself or Chief Cleveland.

Breuer responded with the following:

I would like to present to you the information you requested per your letter dated June 6th, 2000.

1. Jeff Barth requested March 11, 2000 off on March 3, 2000.

2. Jody Clements requested April 8, 2000 off on February 25, 2000.

3. Rob Ferguson requested June 14, 2000 approximately four weeks prior to that date.

If you have any questions regarding this memo, please feel free to contact me.

By letter dated July 12, 2000, Breuer notified Baehr of the following:

I would like to inform you that the Local 1021 will appeal for arbitration in regard to Grievance No. 05-00-01.

If you have any questions regarding this matter, please feel free to contact me.

Baehr responded with the following memo dated November 3, 2000:

> This memo is to confirm the status of the above listed grievances. I received a letter from you dated June 15, 2000 informing me that Local 1021 intends to appeal for arbitration in regard to grievance No. 04-00-01. A second letter from you dated July 12, 2000 informed me that Local 1021 intends to appeal for arbitration in regard to grievance No. 05-00-01. A third letter from you dated September 12, 2000 informed me that Local 1021 intends to appeal for arbitration in regards to grievance No. 07-00-01 and No. 07-00-02.
>
> Since receiving your letters, I have received no other paper work confirming that Local 1021 has filed for arbitration on the four grievances listed above. If the City doesn't receive confirmation that the four grievances listed above have been filed for arbitration within 30 days, the City will consider grievance No. 04-00-01, 05-00-01, 07-00-01 and 07-00-01 dropped.

On November 29, 2000, Baehr issued the following memo to Breuer:

> This memo is in response to your letter to me received on November 27, 2000, regarding the above listed grievances. On November 3, 2000, I sent a memo to you to let you know that the City will consider the four grievances listed above as void if we do not receive notice confirming the filing of the grievances for arbitration within 30 days from the date of the letter. Thirty days are up as of December 3, 2000.
>
> In your letter to me received on November 27, 2000, you asked for an extension of the thirty days. I am denying the extension. The Union has had over 5 ½ months on grievance No. 04-00-01, 4 ½ months on grievance No. 05-00-01 and 2 ½ months on grievance No. 07-00-01 and 07-00-02 to file for arbitration.

Thereafter, this matter was scheduled for arbitration.

POSITIONS OF THE PARTIES

Union

The Union filed its grievance on May 3, 2000, following information that was provided at the April Union meeting, which is the first Wednesday of the month. The grievance was filed within thirty (30) days of April 5, which was the first Wednesday of April in the year 2000. There is no claim by the Employer that the Union did not exercise "reasonable diligence" in discovering the grievance.

It is true that the actual denials of Barth and Clements exceeded the thirty (30) calendar-day limit, but the fact remains that the Union officers did not have knowledge of the denials until that April Union meeting. The grievance clock starts to tick on that day, the first day of knowledge by the individuals who enforce the terms and conditions of the labor agreement.

Considerable discussion took place at the April Union meeting, and thereafter the Union started its investigation into whether or not there was a contract violation. The calendar used as the "official record" of recording the use of paid holidays is not the clearest document. There has been use of "white-out" and additions or changes are undated and at times illegible. It is reasonable to assume that it would be next to impossible to determine what, if any, contract violations occurred from looking at this document.

The Employer makes no issue of timeliness in the two memos of Lara Baehr, confirming the status of a number of grievances including this grievance. Ms. Baehr clearly states: ". . .The City will consider the four grievances listed above as void if we do not receive notice confirming the filing of the grievances for arbitration within thirty (30) days from the date of the letter. Thirty days are up as of December 3, 2000."

The Union complied with the City's deadline and filed with the Wisconsin Employment Relations Commission on December 3, 2000. Thus, it must be concluded that the City did not consider the grievance as being "dropped" or "void."

The Union clearly complied with the requirement of Article IV, Section 6, by providing written notification on July 12, 2000 to Ms. Baehr that the Union intended to appeal to arbitration "grievance no. 05-00-01." This notice followed the Fire Chief's June 20, 2000 written concurrence of the denial of the grievance by the Finance, Budget and Personnel Committee. The labor contract does not require the Union to file with the WERC in thirty (30) days after the conclusion of Step 3 of the grievance procedure. The only requirement is for the personnel department to be notified. The grievance is valid and timely.

The Employer's claim that the grievance is moot because the Union failed to point to specific contract language that was violated is baseless. Article XIV, Section 2 provides for mandatory compensatory days. It is the procedure used to ensure that these mandatory compensatory days are taken that is at issue in the grievance. Inasmuch as the grievance involves the application of Article XIV, Section 2, it is a grievance within the meaning of Article IV, Section 1.

The policy set forth in Joint Exhibit 3 reduces to writing the mutually understood procedure for selecting paid holidays. This policy provides that paid holidays can't be put down more than 60 days in advance and that they will not be pulled if they are marked down before any long-term sickness or schooling is put on calendar. The Employer pulled paid

holidays in violation of the policy and past practice, and as such, the grievance must be sustained.

The Employer incorrectly asserts that there were two people off at the time the grieved employees requested their paid holidays off. With respect to Jeff Barth, Dave Marsh's dates were not listed on the calendar. At the time Barth placed his paid holiday on the calendar, the only name there was Dolen's. Barth had no knowledge that Marsh was going to be off.

Additionally, Barth was not told of the Deputy Chief's denial of his paid holiday. It is clear that Line 1 of Employer Exhibit 8 contained an entry that later was whited out. No witness was able to testify as to what is beneath the whited-out area. It is entirely possible that beneath the whited-out area is a March 11, 2001 approval of Barth's paid holiday by Lieutenant Marsh.

With respect to Jody Clements, the Employer asserts that his request for April 8, 2000 was placed on "hold" pending the return date of Michael Huber. The Employer maintains that Kelly Esker and Michael Huber were the two people on leave prior to his request. It is clear from Employer Exhibit 3 that the only names on the calendar for April 8, 2000 are Esker and Clements.

Huber's name appears on other places on the calendar, i.e., 1st, 3rd, 17th and 19th. Huber's name was never placed in the calendar on April 8, 2000. Thus, per the established application of Article XIV, Section 2 and past practice, Clements should have been able to place his paid holiday down at the time of his request and not have this request be unreasonably delayed.

With respect to Rob Ferguson, the Employer asserts that he was given the day in error. Again, there is no notation in the calendar that the day in question was unavailable at the time of Ferguson's request. The notation "one off" was added at a later date. Again, there is a "white-out" on the document, and no available testimony to determine what is beneath it.

In Ferguson's case, the Employer did not make an error, but followed the established past practice. Although the Employer stated that he was given the day, Ferguson found out that the paid holiday he placed on the calendar was denied two days later by Deputy Chief Erickson. The reason stated was because of Dolen's "ACL tear".

As Ferguson testified, Dolen's name was not on the calendar at the time that Ferguson marked his name down on the calendar. Ferguson's request for the paid holiday was unreasonably delayed by the Employer not following the established procedure of marking absences on the appropriate calendar. Until those absences are marked, the day is open and an employee has the right to take the day as a paid holiday.

The Employer has made no argument that the existing practice creates an undue hardship, financial or otherwise, on the City of Marshfield. As the Fire Chief testified, in cases where absences create a shortage of available personnel, personnel have been hired back at the appropriate overtime rate to fill in for those absences. The Employer has failed to provide evidence that it was unable to fill shortages created by having more than two personnel off on a given day.

The practice of approving paid holidays has worked without causing the City any undue hardship. The City cannot unilaterally alter an existing past practice and violate the collective bargaining agreement. Rather, the City must negotiate any changes that it seeks to make in the selection process of paid holiday compensatory time. The grievance must be sustained and the established past practice of the application of Article XIV, Section 2, must be enforced by the arbitrator.

Employer

Prior to taking testimony in this case, the City properly objected to the jurisdiction of the Arbitrator to hear this matter on the grounds of timeliness, mootness and substantive arbitrability. The arbitrator should refuse to address the merits of this case on these grounds.

The collective bargaining agreement contains clear time limitations on the filing of grievances. Step 1 states that the grievant and/or Union shall contact the Deputy Chief within thirty (30) days after he knew or should have become aware, with the exercise of reasonable diligence, the cause of the grievance. The word "he" clearly must refer to the employee and not the Union. Throughout the contract, the Union is referred to as a party, and not by the definition pronoun "he". Any attempts to argue that the Union has thirty (30) calendar days after one of their members finally decides to get around to telling the Union about an event they claim violates the contract would be an inappropriate interpretation of clear contract language.

The three individuals affected in this case all fail to meet the timeliness requirements of the collective bargaining agreement. Clements was certainly aware, on February 25, 2000 and for several weeks thereafter, that his request had not been granted. There is no dispute that the day off was granted on or before April 1, 2000. Thus, the period during which his rights under the contract were allegedly violated ended more than thirty days prior to the filing of the grievance on May 3, 2000.

Barth had his request denied and such denial continued through March 11, 2000, the date he wanted to be off. Clearly, he had thirty calendar days from (at the latest) March 11, 2000 to file a grievance, but failed to do so.

Ferguson's claim of contract violation cannot legitimately be part of this case. The facts that gave rise to his concerns occurred well after the grievance in this case was filed.

The Employer timely objected to these grievances. In Employer Exhibit 9, page 2, the Employer recommended the members of the Finance, Budget and Personnel Committee reject the grievances because they "did not meet the time frame limitation" contained in the contract. This objection was first raised at this stage of the grievance process because it was not until a day or so prior to the meeting that the Union first identified the facts giving rise to the alleged grievance. Case law clearly supports the principle that, where the agreement contains a clear time limitation for the initiation of a grievance and the employer timely objects to an untimely grievance, then the Union has no right to demand arbitration of the grievance.

The Union may argue that Article IV, Section 5, provides a process whereby the Union can file a "group grievance". However, as the Union President acknowledged, he did not tell the City that this was a group grievance; he did not "appoint" representatives for the Union; and he did not "inform the City" of the names of any appointed representatives of the Union. Nor did the Union take any other steps to indicate that the Union considered this to be a "group grievance." This grievance clearly does not affect a large number of employees.

The mootness doctrine applies to Clements and Ferguson because both received the days off. Only Barth did not. Any delay in approving the requests of Clements and Ferguson was a minor imposition. Arbitrators do not make it a practice of deciding theoretical cases.

The Union did not cite a specific provision of the agreement in the grievance. Article XIV, Paragraph 2, was referenced in the Union's statement of the issue. This clause, however, does not express any limitation on the Employer's right to control the work schedule. Given the absence of any serious contention that any specific provision of the agreement, as written, is applicable to this case, the arbitrator is deprived of substantive jurisdiction.

The Union seemingly claims that the City is bound by a "stand-alone" past practice. Arbitrators have widely recognized and attempted to avoid the danger inherent in attempting to decide a case based solely on past practice.

Assuming arguendo, that the evidence supports the practice claimed by the Union, the arbitrator is without power to enforce it. Article XXV specifically retains to the City all rights and powers exercised or had by the City "prior to the time the Union became the collective bargaining representative of the employees. . . except as specifically limited by express provisions of this Agreement." Article XXVI goes on to state the Agreement is subject to amendment, alteration or addition only by a "subsequent written agreement between and executed by the City and the Union . . ."

There can be no serious question that the City had the unfettered right to schedule employees and to deny requests for time off prior to the Union becoming the collective bargaining representative for these employees. It is equally clear that Union and management have not executed any "amendment, alteration or addition" to the terms of the collective bargaining in writing.

Assuming that this arbitrator had a desire to enforce the non-contractual past practice presented in this case, care must be taken to limit the alleged past practice to the facts which gave rise to it. There is one area of agreement between the parties, i.e., if an employee placed his request for time off on the schedule when no other time off was listed on the schedule, it was often granted, but only because the City was at full staff, or only missing one person.

The Union is attempting to extrapolate an alleged practice to a new situation, i.e., where two or more people are unavailable and their names have not been entered on the calendar. The Union offered no evidence concerning this set of facts. City Exhibit 1 and 2 and the testimony of then-Union members and now Deputy Chiefs Haight and Erickson confirm that the practice in the past was to deny the request. No arbitrator should lightly conclude that an employer has abdicated its responsibility and authority to protect the interests of the taxpayers in controlling the quality and cost of its staffing.

The party wishing to rely on past practice bears the burden to prove it exists. The Union has failed in its burden of proof.

Shift trades are routinely granted with only a 24-hour advance notice requirement. Thus, denial of this grievance will not work an injustice on any member of the Union.

The effective date of the collective bargaining agreement between the parties should not be lost on this arbitrator. The Union has the opportunity to ask for specific contract language incorporating what it believes to be the practice in the case.

The grievance is procedurally flawed and not substantively arbitrable. Consistent with the legitimate interests of the parties, the grievance should be denied.

DISCUSSION

ARBITRABILITY

Substantive Arbitrability

As the Employer argues, the written grievance does not allege that the Employer has violated any provision of the collective bargaining agreement. Rather, the written grievance

challenges a change in "working conditions" that "does not follow a long-standing practice of allowing members to place their paid holidays down." Indeed, it is not evident that the Union made any allegation that a specific provision of the collective bargaining agreement had been violated until hearing, when the Union framed an issue that alleges a violation of Article XIV, Section 2, of the collective bargaining agreement and "its associated practice."

Article IV, Section 1, of the contractual grievance procedure defines a grievance as the following:

> Any difference of opinion or misunderstanding which may arise between the City and the Union or a member of the Union, involving the interpretation or application of the provisions of this Agreement, . . .

Paid holidays are expressly provided for in Article XIV, Section 2. Thus, a grievance challenging a change in "working conditions" that "does not follow a long-standing practice of allowing members to place their paid holidays down" involves the application of a provision of the agreement. Accordingly, the grievance is substantively arbitrable.

Procedural Arbitrability

As the Employer argues, Article IV, Grievance Procedure, Section 4, contains certain time limitations for filing a grievance. The Employer, contrary to the Union, argues that the Arbitrator lacks jurisdiction to decide the merits of this grievance because the Union failed to file the grievance within these time limitations.

As the Employer asserts, Chief Haight's June 20, 2000 "Memorandum" to the Finance, Budget, and Personnel Committee Members includes the following statement: "The Union offered no evidence that any violation has occurred and, by the Union's own admission, two of the three requests were not subject to grievances because they were not filed in a timely manner." It is not evident, however, that the Union received a copy of this memo prior to hearing.

The record fails to establish that, prior to hearing, the Employer made a claim to the Union that the grievance was not timely filed. Thus, the evidence of the conduct of the Employer demonstrates that the Employer accepted the grievance as filed.

Article IV, Section 2, of the collective bargaining agreement recognizes that the grievance procedure time limitations may be extended by the mutual consent of the parties. Assuming arguendo that the grievance was not filed within the contractual time limitations, the Employer, by its conduct in accepting the grievance as filed, has consented to an extension of these time limitations. Accordingly, the undersigned rejects the Employer argument that the

Arbitrator lacks jurisdiction to decide the merits of this case because the Union failed to file the grievance within the time limitations set forth in the parties' collective bargaining agreement.

The written grievance was filed on or about May 3, 2000. As the Employer argues, the request for and initial denial of Ferguson's paid holiday occurred after this date. The grievance, as filed, focused upon "a change in working conditions" that "did not follow a long-standing practice" with respect to paid holidays, rather than upon a specific denial of a paid holiday request. Thus, the Ferguson incident falls within the scope of the written grievance.

By letter dated June 6, 2000, Deputy Chief Erickson requested that the Union supply certain information pertaining to the grievance on "denial of paid holidays." The information so requested included the name of the members claiming the denial of a paid holiday; the date of the paid holiday request; and the date on which the requests were submitted for approval. The Union responded by providing information on three members: Jeff Barth, Jody Clements; and Rob Ferguson. The information provided on Ferguson indicated that he requested "June 14, 2000 approximately four weeks prior to that date." Deputy Chief Haight's "Memorandum" of June 20, 2000 reveals that Ferguson's request was presented to the Finance, Budget and Personnel Committee as a part of the Union's grievance on the denial of paid holidays.

In summary, Ferguson's request falls within the scope of the grievance that was filed by the Union on or about May 3, 2000. Additionally, it was considered by the parties to be a part of this grievance as it was processed through the contractual grievance arbitration procedure. The Employer's argument that Ferguson's claim is not legitimately a part of this grievance is without merit.

The Employer, contrary to the Union, argues that the claims of Jody Clements and Rob Ferguson are moot because each received the requested day off. A case is moot if a determination is sought that cannot have a practical effect upon an existing controversy.

As a review of the grievance documents establish, the "controversy" involved in the grievance is that the Employer changed "working conditions" by not following a long-established practice of approving paid holidays. Although the Employer eventually approved the paid holiday requests of Clements and Ferguson, it is not evident that, in doing so, the Employer acknowledged that it had changed "working conditions," as alleged by the Union.

The fact that Clements and Ferguson eventually received the requested days off is relevant to issue of remedy. It does not, however, render this grievance moot because the controversy raised in the grievance continues to exist.

Merits

Article XIV, Section 1, provides for ten holidays. Article XIV, Section 2, provides as follows:

> **Section 2:** All employees shall receive a full day's pay in addition to regular pay for four (4) paid holidays and compensatory days off for the other six. If an employee desires and time is available, the employee may take other holidays as compensatory time off instead of pay. However, it is mandatory that each employee shall take at least six (6) compensatory days off.

Article XIV is silent with respect to the selection of paid holidays. In the face of such silence, it is reasonable to conclude that management has retained the right to regulate the selection of paid holidays.

Consistent with the testimony of Union President Brad Breuer, Deputy Chief Robert Haight acknowledges that, at the time of the grievance, management followed this policy:

HOLIDAYS POLICY

1. Paid holidays can be put down 60 days in advance. They will not be pulled if they are marked down before any long term sickness or schooling is put on calendar.

2. If deputy chief has vacation or paid holiday, no hire backs. Example: One firefighter on vacation, one on personal holiday. If deputy chief takes vacation day or personal holiday, the firefighter wanting personal holiday loses it; unless it was marked down prior to deputy chief's pick, and within 60 day time limit.

3. When you fill out holiday usage form; list current date under **DATE SELECTED**. List date you will use holiday under **DATE TAKEN**. If traded to someone else, list that person's name under **TRADED TO**.

4. An officer must initial your pick or trade to be valid. If this is not done; you will lose the day if a conflict arises. It can be an officer of any shift.

By management policy and contract language, the Employer has retained the right to approve, or to not approve, paid holiday requests of employees. Given this right, the evidence that "an officer" has always approved the paid holiday requests of employees that have placed his/her name down on the calendar when the calendar indicated that two or more employees

were not already off on the shift reflects the exercise of management discretion. A "practice" involving the exercise of management discretion is not a "practice" that is binding upon the Employer.

Notwithstanding the Union's argument to the contrary, an employee's right to receive a paid holiday is not governed by entries on the calendar. Rather, it is the approval from "an officer" that entitles an employee to receive the paid holiday.

In summary, Article IV, Section 2, provides for paid holidays. Under this Article, as well as under Employer policy, management retains the discretion to approve, or to not approve, employee requests for paid holidays. Management, however, must exercise this discretion in a manner that is not arbitrary, capricious or in bad faith.

The record indicates that, when the Department is fully staffed, two employees may be off on each shift without reducing staffing levels below the levels that management deems appropriate and without incurring overtime costs. Thus, by not approving paid holiday requests for days on which management has a reasonable basis to believe that two or more employees will be off on a shift, management has not abused its management discretion. However, given the guarantees provided in Item 1 of the Employer's "Holidays Policy," it is an abuse of management's discretion to "pull" a paid holiday that has been approved by "an officer", unless the "pull" is warranted by exceptional circumstances such as an inability to otherwise ensure minimum staffing.

Clements requested the April 8, 2000 paid holiday on February 25, 2000. Approval of his request was delayed until March 4, 2000.

The record demonstrates that, on February 25, 2000, management knew that Kelly Esker would be on family leave for April 8, 2000 and that Michael Huber was on indefinite sick leave. The record further demonstrates that management delayed approving Clements request until it received confirmation that Huber would be returning prior to April 8, 2000. Management did not abuse its discretion by delaying approval of Clements paid holiday request of April 8, 2001.

On March 3, 2000, Jeff Barth requested March 11, 2000 as a paid holiday. The record demonstrates that, at the time of the request, management knew that Roy Dolens was on an indefinite leave and that Dave Marsh would be on medical leave on March 11, 2000.

At hearing, Barth testified that he was sure that Lieutenant Marsh had initialed his request in the calendar, thereby approving the request. Marsh did not testify at hearing.

The calendar introduced at hearing does not contain Marsh's initials, nor does it otherwise indicate that Marsh had approved Barth's March 11, 2000 paid holiday requests. Barth's "Holiday Usage" form does indicate that changes were made to Line 1, but it is not possible to determine the nature of these changes.

The record, taken as a whole, does not establish that Marsh had approved Barth's request for a paid holiday, as Barth believes. Given the lack of evidence that Barth's paid holiday request had been "pulled" after it had been approved by "an officer," the undersigned is not persuaded that management abused its discretion by denying Barth's request to receive a paid holiday on March 11, 2000.

Approximately one month prior to June 14, 2000, Rob Ferguson requested a paid holiday by placing his name on the calendar space for June 14, 2000. Ferguson then had this request initialed by Chief Deputy Erickson. It is undisputed that Erickson was "an officer" with authority to approve or deny Ferguson's paid holiday request.

Shortly after approving Ferguson's request, another management employee advised Erickson that two employees other than Ferguson were off on June 14, 2000 and, thus, Erickson should not have approved Ferguson's paid holiday request. Considering Erickson's approval to be a "mistake," management then "pulled" approval of Ferguson's request.

Erickson recalls that, on the same day that he had approved Ferguson's paid holiday request, he had a conversation with Deputy Chief Haight. Erickson further recalls that, during this conversation, Haight stated that earlier in the day he had denied Ferguson's request for a paid holiday for June 14, 2000 on the basis that two employees were already off. While Haight recalled that Ferguson made a paid holiday request, he could not recall when this request was made and he did not relay any details of this request. The record, taken as a whole, does not provide a reasonable basis to discredit Ferguson's testimony that he did not talk to Haight about the June 14, 2000 paid holiday prior to taking his request to Erickson.

Prior to approving Ferguson's paid holiday request, Erickson could have consulted with other management employees to make sure that he had the most current information regarding employee absences. His failure to do so does not provide management with a right to ignore the guarantees that it made to its employees when it implemented it "Holidays Policy." While Erickson's "mistake" in approving Ferguson's paid holiday request may have resulted in additional overtime costs, it is not evident that Ferguson's presence was required to ensure that the Department met its minimum staffing requirements.

In conclusion, the record fails to establish that the Employer has unilaterally changed a past practice in violation of the collective bargaining agreement. However, by "pulling" Ferguson's June 14, 2000 paid holiday request, in violation of guarantees made by the

Employer in an existing Employer policy, the Employer has exercised its management discretion to approve, or to not approve, paid holiday requests in an arbitrary and capricious manner. By this conduct, the Employer has violated Article XIV, Section 2, of the parties' collective bargaining agreement. Inasmuch as Ferguson eventually received this day off as a paid holiday, Ferguson has received the remedy that is appropriate for the Employer's contract violation.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following:

AWARD

1. The grievance is arbitrable.

2. The Employer violated Article XIV, Section 2, of the collective bargaining agreement by its response to the paid holiday request of Rob Ferguson, but did not violate Article XIV, Section 2, of the collective bargaining agreement by its response to the paid holiday requests of Jody Clements and Jeff Barth.

3. The Employer's contract violation was remedied when the Employer provided Rob Ferguson with a paid holiday on June 14, 2000.

Dated at Madison, Wisconsin this 20th day of November, 2001.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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