

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF APPLETON (POLICE DEPARTMENT)

and

APPLETON PROFESSIONAL POLICE ASSOCIATION

Case 402

No. 60132

MA-11534

(Janda Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of the Association.

Ms. Ellen Totzke, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin 54911-4799, on behalf of the City.

ARBITRATION AWARD

Pursuant to the provisions of the 2000-2001 collective bargaining agreement between the City of Appleton (City) and Appleton Professional Police Association (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator to hear and resolve a dispute between them concerning the denial of Sergeant Janda's vacation request for September 28, 2001. The undersigned was designated Arbitrator herein. The hearing in this matter was originally scheduled for September 11, 2001, but was cancelled at the request of the City. The hearing was rescheduled and held on October 16, 2001, at Appleton, Wisconsin. A stenographic transcript of the proceedings was made and received on November 1, 2001. The parties submitted post-hearing briefs by December 3, 2001, which the Arbitrator exchanged for them. The parties waived the right to file reply briefs herein.

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.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case, but they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument in this case, as well as their subjected issues. The Union suggested the following issue:

Should Sergeant Janda have been allowed to use a vacation day on September 28, 2001? 1/

1/ As the September 28th date had passed by the date of hearing herein, the Union did not seek any monetary remedy, merely an interpretation of the contract.

The City's suggested issue is as follows:

Does the City have the management right to deny vacation days pursuant to work and scheduling requirements?

Based upon the relevant evidence and argument herein, I find that the following issue reasonably states the dispute between the parties and it will be determined herein:

Did the City violate Article 8 of the labor agreement and/or the relevant past practices surrounding it by refusing to allow Sergeant Janda to use a vacation day on September 28, 2001?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 – VACATIONS

The vacation policy for the Police Department to be on a work week basis as (sic) follows:

- 1 work week vacation after 1 year of service.
- 2 work weeks vacation after 2 years of service.
- 3 work weeks vacation after 8 years of service.
- 4 work weeks vacation after 12 years of service.
- 5 work weeks vacation after 20 years of service.

Vacation benefits shall be accrued at a rate of one-twelfth (1/12) of the employee's authorized vacation for each full month of employment.

New employees will not be eligible for vacation benefits until they have completed one (1) full year of employment.

Vacation allowances shall not be cumulative and after the qualifications have been met for additional vacation, it must be taken between January 1 and December 31, except that employees entitled to one or two weeks of vacation shall be permitted to carry over up to one week of vacation into the following year and other employees shall be permitted to carry over all or portions of their third, fourth and fifth weeks of vacation into the following year, provided that they notify the Chief of their intent to do so not earlier than October 15 and not later than November 1. Any vacation carried over to the following year must be used by March 31 or it will be forfeited.

In case of termination, for reasons other than discharge for cause, an employee will be paid their accrued and unused vacation, calculated from their anniversary date to their termination date.

The Police Chief shall have a vacation schedule available for members on or before January 1, preceding the year vacations are to run, so that picking vacations can be completed by March 1. The order of picking vacations shall be by seniority. Employees hired on the same date shall be assigned relative seniority for purposes of this Article by the Employer at the time of hire.

. . .

ARTICLE 28 – FUNCTION OF MANAGEMENT

Except as herein otherwise provided, the management of the Department and the direction of the working forces, including the right to hire, promote, demote, lay-off, suspend without pay, discharge for proper cause, transfer, determine the number of employees to be assigned to any job classification or to determine the job classification needed to operate the Employer's jurisdiction is vested exclusively with the Employer.

It is further agreed, except as herein otherwise provided, that the responsibilities of management include, but are not limited to those outlined in this Agreement. In addition to any functions specified herein, the Employer shall be responsible for fulfilling all normal managerial obligations, such as planning, changing, or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work scheduled, (sic) and of applying appropriate means of administration and control. Provided however, that the exercise of the foregoing rights by the City will not be used for the purpose of discrimination against any member of the Association or be contrary to any other specific provision of this Agreement, and provided that nothing herein shall be construed to abrogate the provisions of the grievance procedure.

...

BACKGROUND

In approximately 1984, the City of Appleton created three districts: the Northern, Central and Southern districts. There is nothing in the labor agreement which states that districts should maintain separate seniority lists for vacation selection. Indeed, districts are not referred to in the labor agreement. As vacations are selected only within each district, an employee with less department seniority in one district may be granted Christmas week off while an employee with more department seniority in another district (but less than his/her district colleagues) is denied such a request. Senior employees have never been allowed to bump junior employees from a different district out of their vacation selections.

When special events occur in the City, officers are sometimes assigned to those special events pursuant to requests of the Operations Coordinator, even if the event occurs in a different district than the officer is normally assigned to. There is no mention in the labor agreement that a one-week vacation request shall prevail over a single day request.

The City holds more than 80 special events, at least nine of which are offered annually. The largest special event in the City has been Oktoberfest. Oktoberfest has been offered annually on the Saturday of the last weekend of September for at least 12 years. 2/ Also, for many years, the City has offered "License to Cruise" which begins after 4:00 p.m. on the Friday prior to Oktoberfest. In 2001, "License to Cruise" attracted approximately 50,000 participants, and Oktoberfest attracted approximately 150,000 participants. These numbers were significantly higher (by from 10,000 to 50,000) than the City had ever experienced before regarding these events.

2/ Sergeant Janda admitted that he knew Oktoberfest was regularly held during the last weekend of September.

Annually, the Chief of Police issues separate vacation calendars to each Police Department district (Northern, Central and Southern). All officers then select one week of vacation at a time according to district seniority in rounds by submitting "Work Assignment Request" forms 3/ and their picks are recorded on each district's calendar. The three districts do not coordinate vacation together and they do not share their vacation calendars. The deadline for the first week's request is generally set for the end of January each year. Week long vacation requests must be submitted by March 1 each year in order to be granted on a district seniority basis. After March 1, vacation is selected and granted on a first-come/first-served basis except that if an employee (even one with less district seniority) requests a full week's vacation after March 1, that request will be given priority by the District Commander over a single day request made on the same day, even when the single day request is made by an employee with more district seniority.

3/ These forms are also used before and after March 1st each year by officers to request sick leave, compensation time off and funeral leave, as well as vacation.

Department managers have had a practice of highlighting days with a yellow marker on which the department will need more on-duty staff due to special events. These days are known as "yellow out" days and they are used to alert district schedulers to special scheduling/staffing needs on a particular day. Only during Christmas week and deer hunting have district managers denied one-week vacation requests because of the large number of requests made for time off.

The City does not have formal minimum manning levels. Each district determines its own staffing needs and grants vacation requests for each work day without regard to what other districts have done. District managers do not cancel vacations once they are granted. District managers are not aware of how many employees have been granted time off in other districts.

The City Police Department employs an Operations Coordinator, Rudolph Nyman, who coordinates City special events across district lines. Nyman generally issues a memo in March or April of each year regarding upcoming special events. Then, approximately 30 days before each event, Nyman sends out a memo to all district managers seeking the number of staff each district can offer him to cover that special event. Normally Nyman lists the number of officers he will need for each event in this memo. Nyman is not informed of vacation and comp time requests that have been granted in each district until the day of the special event when Nyman can view the overall schedule for that event. As such, some District Commanders may offer Nyman more (or less) staff for each special event than others, based upon each District Commander's judgment regarding his/her general flexibility or lack thereof in granting employee vacation. Nyman must then fill in with officers on overtime for special event openings, or he can hold over officers who have finished their regular shifts for a period of overtime, or he can cancel officers' last day off to cover overtime openings. Nyman also uses Community Service Officers, who are students from University of Wisconsin or Fox Valley Technical College, to fill in at special events in non-critical, non-emergency positions such as traffic control, etc. Nyman does not go back to the District Commanders and tell them to deny vacation requests if he is in need of more officers to fill slots for a special event.

In 1998, Sergeant Janda requested New Year's Eve off and his Captain found someone to work for him. The school liaison officers were ordered into work that year to accommodate vacation requests of regular full-time officers. 4/

4/ New Year's Eve is considered a special event in the City of Appleton which requires extra manpower.

In 1997, then-Lieutenant Klauk issued a memo concerning comp time requests, vacation picks, 5/ as well as shift trading to all Northern district officers, including Sergeant Janda. This memo, which listed all officers on the back of the memo by their district seniority, read in part as follows concerning trading:

. . .

With the selection for next years shifts being completed, I felt that this was a good time to review the district scheduling procedures. Most of these procedures have been in place for several years and most are the same across the districts.

. . .

DAY-FOR-DAY SCHEDULE CHANGES

Individuals wishing to take off on a scheduled work day and work back on a scheduled day off, shall make the request in a timely manner in order to give the scheduler adequate consideration to facilitate the change. The day-for-day change will, when possible, take place within 30 days of the two transaction dates. The switch may only be approved by a Northern District Supervisor and the pay back day will be scheduled when the request is approved. The day to be worked back should be one which will assist the district to meet its scheduling needs.

Switching shifts with another district officer will be allowed but requests are not to be submitted more than six weeks in advance.

ACROSS-DISTRICT CHANGES

If an officer can not (sic) be granted an authorized absence from an assigned shift, as a last option, an across-district work schedule change can be arranged. This must meet with the approval of both individuals involved and their respective schedule lieutenants. Once again, the request must be done in a timely manner (generally 7 days) to give all parties involved adequate time to complete the change. The day for day switch will only be for one day and will occur within a 30 day time frame, within the same calendar year. Both officers (sic) signatures will be needed on the PD form #15.

The other condition attached to an across-district change involves case transferring lengthy follow-up investigations. These will be transferred to the

district officer who would have normally been assigned the call had he or she not made the change. This helps to keep the follow-up time in the involved district with the appropriate district officer assigned. 6/

. . .

5/ The memo did not detail the vacation selection procedures. Rather, it stated, "The seniority practice for vacation week picks will continue as before."

6/ The Association never disputed the applicability of this memo and never contended Janda did not receive it or that he was unaware of it.

The evidence was undisputed that this memo is still in effect in the Northern district.

FACTS

Grievant, Sergeant Thomas Janda, has been employed by the City's Police Department for the past 12 years. At all times relevant hereto, Janda was assigned to the Northern district on the 8:00 a.m. - 4:00 p.m. shift. 7/

7/ Captain Klauk, Commander of the Northern district, at all times relevant to this case, has regularly allowed Janda to work 10:00 a.m. - 6:00 p.m. on weekdays and 8:00 a.m. - 4:00 p.m. on weekends as an accommodation to Janda.

On April 14, 2001, Janda, who had one week and one day of vacation left to select, requested a single day's vacation for September 28, 2001. At this time, September 28 had not been "yellowed out" by management. On April 20, Northern district's scheduler, Lieutenant Watch, "yellowed out" September 28 and denied Janda's request for vacation that day, stating that it was due to the Oktoberfest event. Janda was then transferred for September 28th to work in the Central district on a walking beat from 8:00 a.m. - 4:00 p.m., so that his shift would have ended prior to the start of the special event, "License to Cruise." However, in late August, 2001, Lieutenant Watch changed Janda's assignment to 12 noon - 8:00 p.m. on September 28 in the Central district based on a request from District Commander Klauk. 8/

8/ Captain Klauk had requested that employees on the 8:00 a.m. - 4:00 p.m. shift on September 28 be moved to the 12 noon - 6:00 p.m. shift so that they could be held over in case they were needed to cover the "License to Cruise" event.

Janda thereafter sent Lieutenant Watch an e-mail requesting to be put on a patrol assignment, not on the special walking assignment in the Central district, due to a prior back injury he had suffered which made it difficult for him to walk on concrete for long periods of time. Janda's request was granted by Lieutenant Watch and Captain Klauk. Janda could have traded with another officer to get September 28th off. When Lieutenant Watch denied Janda's vacation day request for September 28, Watch also told Janda he could still arrange a trade. 9/ Janda chose not to attempt trading for September 28. It is undisputed that Janda would have been granted vacation for September 28 had he asked for that day as a part of a full week's vacation request.

9/ Indeed, Northern district Officers Blessing and Fischer traded off for the weekend of September 28 after Janda's vacation request was denied because they arranged trades with other officers.

Northern district Commander Captain Klauk also stated that it is his practice to try to keep everyone who is scheduled to work during a special event at work in case more staff is needed by the City. Klauk stated herein that two weeks before Octoberfest one of his officers resigned unexpectedly and that another officer had resigned earlier in the year so that Klauk was shorthanded in his district. Klauk stated that there is no specific time by which his scheduler, Lieutenant Watch, must "yellow out" special event days and Klauk admitted that Lieutenant Watch has been known to procrastinate in this area. On September 28, 2001, for "License to Cruise," Special Events Coordinator Nyman employed 6 officers on overtime; for Octoberfest, Nyman employed 39 officers on overtime; and Nyman employed 10 officers on overtime for the Fox Cities marathon (held September 30th).

Officers Miles and Glice are junior to Janda in departmental seniority, but they are employed in districts other than the Northern district. Each of these officers made one-week vacation requests after April 14th and they were granted vacation time off for one week, which included September 28. Officers Konkle and Ostermeier, less senior than Janda and also not employed in the Northern district, were granted compensation time off on September 28 upon their request therefor after April 14. 10/

10/ Officer Janda was granted September 29 off as he had attended a hostage training session on behalf of the City on one of his off days in March and the City owed him a day off. Captain Klauk stated that he does not like to owe an officer a day off in such a situation for a long period of time.

POSITIONS OF THE PARTIES

Union

The Union argued that the City violated Article 8 of the labor agreement by refusing to schedule Sergeant Janda for vacation on September 28, 2001, while permitting junior employees to take vacation and comp time that day. In this regard, the Union noted that Article 8 requires that vacation requests be granted on a first-come/first served basis by "seniority"; that because Janda was the most senior officer and the first one to make a request, he should have gotten September 28th off. The City's argument that a full week request should get precedence over a one-day request was, in the Union's view, false and should not constitute a defense in this case. On this point, the Union urged that the City granted comp time requests at a later date after Janda requested vacation time off and that only after Janda made his request did the City grant full week vacation requests of other officers in other districts. In addition, the Union noted that the date of September 28th was not "yellowed out" when Janda requested the day off and that four other officers' requests were granted after the date was "yellowed out." Furthermore, the Union urged that Articles 22 and 24 prohibit unilateral policy or bilateral non-executed policy from overriding specific contract language.

The Union urged that the City had no justification for its actions in this case. In this regard, the Union urged that the City could not justify denying Janda's request based on operational need. The Union found it ironic that the two districts (Central and Southern) that both needed help on September 28th had actually granted six employees off, making their need for extra staff essentially a self-inflicted wound. In addition, the Northern district had nine officers scheduled to work on September 28th which was one more than their normal shift complement of eight on regular days. This was so in the Northern district while the District Commanders of the Central and Southern districts had liberally granted vacation and comp time to their employees for the weekend of September 28th. Further, the Union noted that approximately 6 of 24 overtime slots were scheduled for the "License to Cruise" which essentially simply replaced the officers from the Central and Southern districts who had been granted time off on that day. No reason was given why Janda's shift could not have been covered as well by officers working on overtime as was true for officers in the Central and Southern districts.

The Union urged that the City's denial of vacation to Janda cannot be justified based on custom or practice. The Union noted that Chief Peterson stated that the department normally only transfers officers from one district to another in order to accommodate an officer's desire for vacation in exceptional and compelling circumstances. The six employees who were granted either vacation or comp time did not have such exceptional or compelling circumstances to support their cases. Thus, the Union queried why Sergeant Janda could not have had his vacation request also granted.

Further, the Union argued that the City cannot justify denying Janda's vacation request due to the City's organization into three separate districts. Although the City can organize any way it wishes, in the Union's view, it may not destroy the seniority of employees and their right to vacation based on its organizational desires. The Union posed a result which it contended would be absurd that, by arranging its districts in a certain way, the City could deny its most senior officers' vacation rights and allow its most junior officers to take vacation over the senior ones if the City were allowed to do as it did in this case.

Thus, the Union urged that a past practice or acquiescence cannot operate to deny the application of clear contract language as in this case. Article 8 would mean nothing if Janda, who has more seniority, is refused vacation while less senior employees are granted vacation, in violation of the sentence, "The order of picking vacation shall be by seniority." Whether the City acted in good faith or negligently or maliciously or whether Janda tried other alternatives in order to get vacation on September 28th is not relevant in the Union's view. Seniority rights are not rights of last resort. Rather, they are contract rights and in this case, the Union urged that the contract clearly states that vacations must be selected by seniority. Therefore, the City's defense that it tries to accommodate officers' requests for vacation is not a defense. Indeed, the City failed to show that it attempted to accommodate Janda's request in any fashion.

The Union argued that the City violated Article 8 of the labor agreement by arbitrarily refusing Janda's reasonable request to use vacation, without regard to his seniority. The Union contended that there was in fact a question whether "License to Cruise" was the type of big event which might be considered an exception to seniority rules. If this were so, the Union queried why the captain of the Southern district (Captain Bahr) put himself on vacation during the Oktoberfest weekend. Further, the Union noted that the captains of the Southern and Central districts waited until September to make special assignments during the big events on the weekend of September 28th.

The Union noted that no one told Janda that he could trade shifts or that if he took one week of vacation around September 28th that his request would be granted. Thus, Janda was the only employee denied vacation and not told about the trading and precedence of one-week requests. This, the Union found, was arbitrary. Further, the Union urged that the City proceeded backwards – that it does not put any restrictions on its captains in granting vacation and comp time and that Special Events Coordinator Nyman simply fills in with overtime based upon the number of slots he cannot fill with regular officers rather than determining how many officers or slots are needed and then making assignments and keeping track of vacation and comp time requests.

The Union urged that Captain Klauk runs the Northern district strictly and denies vacation requests, while Captain Bahr takes vacation himself and grants liberal vacation and comp time to his employees. This, the Union found, was also arbitrary. Chief Peterson's comment that integrity should operate so that the various captains do not grant too much

vacation while requesting greater assistance from other districts, simply has not worked. Here, the coordinator is really a misnomer – Lieutenant Nyman has no power to deny vacations or even to transfer employees; that Nyman also has insufficient information and that he does not actually coordinate any activities between the districts. Rather, Nyman only takes the number of officers from each district captain and then posts the remaining slots for overtime.

The Union noted that although “management may have the right to be haphazard (in regard to granting vacation and comp time requests), it cannot do so at Sergeant Janda’s expense.” Rather, employers must apply rational standards which treat all similarly situated employees the same or they run the risk of being found to be arbitrary and capricious. Here, the City has been arbitrary and capricious. Thus, the Union sought an order directing the City to grant vacation requests in the future, based upon “seniority.”

City

The City argued that it exercised its reasonable management rights under Article 28 to deny Sergeant Janda’s vacation request for September 28, 2001. In this regard, the City noted that it has the right and the obligation to assign work and establish schedules; that the City makes every effort to accommodate officer requests for time off; and that the Octoberfest weekend is the biggest weekend for police manpower in the City based on the number of people in attendance and the fact that the weekend covers three special events. The City noted that everyone is aware that Octoberfest has occurred annually on the last weekend in September each year, and that those days are generally “yellowed out” by district managers. Therefore, it does not matter if September 28th was “yellowed out” before or after Janda made his request for that day off as it was common knowledge that the weekend of September 28th was a big special event weekend in the City of Appleton.

The City argued that it has complied with Article 8 of the labor agreement. Furthermore, the City argued that there is a clear past practice of accommodating vacation requests on a first-come/first-served basis after the initial seniority picks have been completed by March 1st of each year; that week-long vacation requests have generally been honored over one-day requests and that other options such as trades are available to all officers.

Furthermore, the City argued that vacation and staffing have not been viewed on a department-wide basis. In this regard, the City noted that it has had separate districts for many years and that vacations have been handled separately within each district by each district captain who determines the level of staffing for his/her district and the level of accommodation to be applied in granting requests for time off. The City noted in addition that others in the Northern district did not get time off either, unless they traded, due to Captain Klauk’s decisions regarding the weekend of September 28th. Finally, the City noted that Lieutenant

Nyman filled many open slots during the Octoberfest weekend with officers on overtime and that the City's decisions were in accord with prior WERC arbitration awards concerning vacation scheduling. Therefore, the City urged that the grievance be denied and dismissed in its entirety as no violation of the contract occurred in this case.

DISCUSSION

Article 8 – Vacations states that “The order of picking vacations shall be by seniority.” The Union has argued that this language is clear and unambiguous. However, in the Arbitrator's view, this contract language is ambiguous in that it fails to elaborate regarding what type of seniority – department or district seniority – should control.

Where a contract is silent, past practice or bargaining history can serve to fill in the blanks in certain circumstances. Where a custom or practice is long-standing, mutually understood and agreed upon, it can flesh out ambiguous contract language. Here, the City submitted undisputed evidence which showed that for the past 17 years, the Police Department has been divided into three districts and that since that time, the City has arranged vacations within each district pursuant to Article 8.

For example, the undisputed evidence showed that vacations are never coordinated from district to district and that each district maintains its own vacation calendar. In fact, district captains do not have knowledge of or access to the vacation calendars of other districts. It is also undisputed that more senior employees have never been allowed to bump junior employees in a different district out of their picked vacation and that a junior employee in one district may be granted a certain vacation day or days while a more senior employee in a different district is denied that same day or days, based upon his/her seniority *vis a vis* other employees in his/her district. In addition, no evidence was submitted herein to show that any grievances have been filed regarding the application of district seniority to pick vacations. Thus, in the Arbitrator's view, the City has proven a well-established, long-standing, mutually agreed-upon past practice which demonstrates that the reference to seniority in Article 8 must be read to mean district seniority.

In the instant case, Sergeant Janda made his vacation request after March 1 for a single day of vacation, September 28, 2001, before that day was “yellowed out.” Whether or when September 28th was “yellowed out” is not particularly relevant to the inquiries in this case. The process of “yellowing out” a day or days is not addressed in the labor agreement. In fact, the Union did not assert that the City “yellowed out” September 28th as a means of denying Janda his rightful vacation time off. Rather, the facts showed that the weekend of September 28th was “yellowed out” because of the three significant special events which annually have fallen on that weekend and which have always required greater than usual manpower. Thus, the City's action in “yellowing out” September 28, 2001, was done to give

City managers a tool to assist them in considering employee vacation requests made on days such as those, when the Department expects to be in need of more law enforcement manpower than usual.

The Union has argued that because the City granted other junior employees (in other districts) comp time and vacation time on September 28th while denying Janda's prior request for September 28th off, this not only violated Article 8 but also constituted arbitrary and capricious action by the City. These arguments must fail based on the 17-year past practice proven by the City and the facts of this case. Janda was treated the same as all other Northern district officers – his vacation request was denied by Captain Klauk who was empowered to make that decision. In this regard, I note that the Chief of Police clearly has the right to contractually delegate the authority to grant or deny vacations to his district captains who must do so as they see fit, according to Article 8 and its accompanying past practices.

The fact that some district captains appear to be more liberal in granting their officers' requests for time off does not mean that Captain Klauk has necessarily been unfair or arbitrary in denying such requests from his Northern district officers. On the contrary, Captain Klauk appeared herein to demonstrate that he was well aware of Article 8 and its accompanying past practices and that he was genuinely concerned that the Department have sufficient staff to man the special events on the weekend of September 28th. Furthermore, it is clear from this record that Captain Klauk was unaware how his fellow district captains were dealing with vacation requests in their districts at the time he (Klauk) denied such requests from his officers. Finally, the facts herein demonstrated that the weekend of September 28th covers the three largest special events held in the City annually which require enhanced police protection.

A great deal of evidence was placed in this record regarding whether a one-week vacation request should be given precedence over a single day request pursuant to the parties' past practice on granting vacation requests. In the instant case, this issue is not squarely before the Arbitrator, as no full week vacation requests, which included September 28th, were granted by Captain Klauk in the Northern district. Indeed, no vacation requests of any kind were granted by Captain Klauk to Northern district officers. Therefore, the award in this case is not intended to and need not comment upon or decide this issue.

The Union argued that Janda was never told by management that if he requested one week's vacation or sought a trade with another officer he could get September 28th off. Captain Klauk stated herein that he instructed Lieutenant Watch to inform Janda of his options to get September 28th off. Lieutenant Watch did not testify herein. However, under the facts of this case, it is difficult to believe that Janda, an officer with the City for the past 12 years, was unaware that he had these options. Indeed, Janda admitted that he knew that Oktoberfest was always held on the last weekend of September when he asked to have September 28th off. Furthermore, Janda admitted he was aware that the districts do share staff to accommodate vacation requests, sick leave, comp time, and special events. Finally, I note that the City

submitted a document herein, a December 1, 1997 memo from then-Lieutenant Klauk regarding district scheduling procedures, which was addressed to all Northern district officers, of whom Janda was one. In that memo, Klauk made clear that day-for-day schedule changes and across-district changes (trades with other officers both within and without the officer's district) were allowable under the district vacation scheduling practices. In addition, I note that on this record, Janda did not specifically deny receiving the Klauk memo and he did not deny knowing that he had these trading options for the day of September 28th.

The Union has argued that the Lieutenant Nyman's "coordinator" position is really a misnomer, as Nyman has no power to deny vacation or transfer employees and he does not, in fact, coordinate any activities between the districts. Whether Lieutenant Nyman actually coordinates special events or merely solicits overtime and posts lists of officers who are to work that overtime is really a function of management, to choose how it wishes to administer these special events. In addition, it is significant that the Police Department does not have formal minimal manning levels that it requires.

In its brief, the Union argued for the first time that the City violated Articles 22 and 24 by denying Janda's vacation request for September 28, 2001. In this regard, I note that the Union failed to argue that these Articles had been violated during the processing of the grievance. The Union also did not mention these Articles at the grievance arbitration hearing. Thus, the Union has attempted to raise these arguments too late and they have not been considered herein.

Therefore, based on the relevant evidence and argument in this case, I issue the following

AWARD

The City did not violate Article 8 of the labor agreement or the relevant past practices surrounding it by refusing to allow Sergeant Janda to use a vacation day on September 28, 2001. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 7th day of January, 2002.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator