BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1021, AFL-CIO

and

CITY OF MARSHFIELD

Case 146
No. 61071
MA-11793

(Vacation scheduling grievance)

Appearances:

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

Von Briesen & Roper, S.C., by **Attorney James R. Korom,** 411 East Wisconsin Avenue, Suite 700, Milwaukee, WI 53201-3262, appearing on behalf of the City.

ARBITRATION AWARD

The International Association of Fire Fighters, Local 1021, AFL-CIO, hereinafter the Union, with the concurrence of the City of Marshfield, hereinafter the City, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as Arbitrator to hear and decide the instant dispute involving vacation scheduling and in accordance with the grievance and arbitration procedure contained within the parties' collective bargaining agreement dated January 1, 1998, through December 31, 2000, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On July 10, 2002, a hearing was held in Marshfield, Wisconsin. The hearing was not transcribed. On September 16, 2002, the parties submitted their initial briefs. On October 11, 2002, and following the parties' election to waive their reply briefs, the record was closed.

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 stipulated to the following issues:

1. Did the City violate Article VIII, Section 4, of the Agreement when it denied the vacation requests of Lieutenant Zeidler on March 27, 2001, Firefighter Bauer on March 5, 2001, and Firefighter Jozwiak on February 25, 2001?

2. If so, what is the remedy?

PERTINENT AGREEMENT PROVISIONS

ARTICLE VIII – VACATIONS

Section 1: The Fire Chief shall administer the vacation schedule according to the terms of this agreement. He shall reserve the right to determine the number of personnel to be on vacation at any one time.

. . .

Section 4: All employees who are eligible for vacation shall submit their choices of dates to their department head by April 1. When two or more employees request the same dates, the senior employee shall have first choice and the selection of the 2 senior employees shall be honored. Vacation periods of all employees, except those not entitled to one week, shall be administered as follows:

1. Single vacation day picks prior to the first round picks shall be limited to January 1 through April 30.

2. First round vacation day picks shall be taken in minimum three day units within the work cycle.

3. Following first round picks, single vacation days may be taken from May 1 through December 31.

However, the choice and length of vacation may be changed by mutual agreement between the employee and the department head.

. . .

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.

. . .

BACKGROUND

The City is a municipal employer and operates a Fire and Rescue Department, hereinafter the Department. The Union represents all regular full-time employees within the Department, excluding the Chief and the Deputy Chiefs of the Department.

The parties offered Joint Exhibit 9 as evidence, among other things, of the parties' bargaining history regarding vacation. 1/ That exhibit indicates that prior to 1981, the parties' collective bargaining agreement contained the following pertinent language:

. . .

ARTICLE VIII

VACATIONS

All vacations shall be based on the calendar year . . . .

. . .

All employees who are eligible for vacation shall submit their choices of dates to their department head by May 1. Where two or more employees request the same dates, the senior employee shall have the first choice. Vacation periods of all employees except those not entitled to one week shall be taken in units of not less than one week. However, the choice and length of the vacation may be changed by mutual agreement between the employee and the department head.

. . .

Vacation credits must be used each year and shall not accumulate.

1/ Jt. Ex. 9 is the CITY OF MARSHFIELD, WERC, MA-6705 (SCHIAVONI, 12/19/91), hereinafter the Schiavoni decision.

In 1981, the current language in Article VIII, Sections 1 and 4, of the Agreement was adopted by the parties, with the exception of the last sentence in Section 4, which was subsequently added. Cf., Jt. Ex. 9, p.5. It is not known from Joint Exhibit 9, or from other evidence offered at the hearing in this case, when or why the last sentence in Section 4 was added.

In 1983, and pursuant to an interest arbitration award, the City implemented a 3-platoon system. At this time, the firefighters were organized into 3 sixteen-person platoons. Previous to this, there was a 2-platoon system. Jt. Ex. 9, p.5.

The firefighters are now organized into three ten-person shifts. 2/ If a shift drops below eight firefighters, then management will usually call additional firefighters into work so that that shift is at full staff. Calling one or more firefighters back into work under these circumstances is called a "work back." Firefighters that perform a work back receive an overtime rate of pay for those hours worked.

2/ Although the use of the word "shift" was recalled by the undersigned during the hearing, it is presumed that that word is synonymous with the word "platoon."

Firefighters request vacation between January 1 and March 31 of each year. The time period during which vacation requests are made has changed over the years. Sometime after the 1991 Schiavoni decision, but before the beginning of the Agreement, the deadline for submitting vacation requests was moved from May 1 to April 1. There was no evidence at the hearing regarding the reason for this change.

As far as which vacation dates are selected, the firefighters designate dates from April 1 of the year in which their request is made through March 31 of the succeeding year. The time period for scheduling has also changed over the years. From sometime prior to 1981 until February 15, 1999, all vacations were selected during the calendar year. Jt. Ex. 9, p.3. On February 16, 1999, the parties agreed that the firefighters would designate their requests for vacation from April 1 through March 31 of the succeeding year. See, Jt. Ex. 8, and as stated below.

The order in which firefighters select their vacation begins with the most senior firefighter writing his or her "first round pick" upon the Department calendar and then passing on the calendar to the next most senior firefighter to do the same, and so on. First round picks must be requested in increments of three days. After all of the firefighters have completed their first round picks, the calendar goes through the firefighter ranks again, which is called "the second round pick." Second round picks may be taken either in increments of three-day blocks or single days. The first and second round pick process was created sometime after the 1991 Schiavoni decision**,** but before the Agreement. The vacation dates selected during either the first round pick process or the second round pick process are collectively referred to as the "pre-4/1 pick" cycle.

Sometimes, the firefighters will "hold" or will reserve some of their credited vacation and will make a request for their remaining vacation dates after the pre-4/1 pick cycle. In these circumstances, the firefighters will request single vacation dates sometime during the period of April 1 through March 31 of the following year. These type of reserved vacation requests are referred to as "post-4/1 picks." It was not made clear at the hearing when post-4/1 picks began or how it evolved.

On February 16, 1999, the parties agreed to the following as part of a settlement of grievances:

> This letter will confirm the understandings reached by the representatives of the City of Marshfield and Local 1021 at the grievance arbitration proceeding involving certain grievances filed by local 1021 over the blocking of days on the firefighter work schedule for training purposes.
>
> The parties agreed after lengthy discussions to the following understandings:
>
> - As part of the vacation selection process, firefighters will be allowed to pick vacation days for the period of April 1 of one year through April 1 of the succeeding year. This time frame for the vacation pick process will be implemented in calendar year 1999 in accordance with the normal vacation pick procedures used by the membership of Local 1021. The City continues to have the right to block off day [sic] through April 1, 1999 for training purposes.
>
> - After the vacation pick has been completed each year (being the period between January 1 and March 31), the Fire Chief or designee has the right to block out specific days to be used for training purposes other than routine departmental training. A firefighter will not be allowed to take vacation on the days blocked off the schedule unless the firefighter has designated the day as a vacation day prior to the time the day has been blocked off for training purposes.
>
> - If a firefighter has not designated a day of vacation during the vacation selection process (January 1 through March 31) and the firefighter obtains approval pursuant to the contractual procedures to take vacation on a particular day before the day is blocked off to be used for training purposes, the firefighter's approved vacation day shall be honored by the Department.

. . .

On March 14, 2001, the Union filed the three instant grievances alleging that the City had violated Article VIII, Section 4, of the Agreement when it denied, Lieutenant Zeidler's, Firefighter Rod Bauer's, and Firefighter Jozwiak's separate requests for single vacation days. As such, the Grievants were denied vacation days that they had saved from the pre-4/1 pick cycle the prior year.

At the hearing, the parties stipulated that if the City had granted the grievances and had approved the vacation requests, then those affected shifts would have been less than fully staffed and management would have had to call in firefighters to work a "work back" as described above. Consequently, the City would have been obligated to pay overtime to other firefighters called into work to cover for the grievants. The parties further stipulated at the hearing that the grievances were timely filed and were properly processed through all of the steps of the Agreement's grievance procedure. The grievances were then advanced to arbitration.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The Union

The Union makes several arguments. First, Article VIII, Section 4, of the Agreement unambiguously states that for purposes of vacation scheduling, "the selection of the 2 senior employees shall be honored." Neither the Agreement, the parties' policies or the parties' past practice (with the exception of days blocked out by management for non-routine training) limits the number of firefighters that can be off on vacation if those days are selected after April 1st of each year. The limitation of employees who are allowed off on vacation after the April 1st selection deadline is not memorialized anywhere. Nothing uses April 1st as the cutoff for the number of firefighters allowed on vacation at any given time. Therefore, up to two firefighters shall have the right to schedule vacation days off, regardless of the time of year that the selection is made.

Moreover, the City's attempt to lump time off for vacation with time off for reasons other than vacation such as sickness, injury or because of an unfilled position, ignores the contractual right for two firefighters to be off on vacation on a given day for any reason. The right to have two firefighters off at any given time is separate from and cannot be categorized with other reasons for firefighters being off work. If the City wants to limit the firefighters' right to select vacation because of mitigating factors such as employee sickness and the City's inability to fill a position, then it must negotiate those changes through bargaining. The City may not seek such changes through the arbitration process.

Second, the City's assertion that a sustained grievance will incur a significant increase in overtime costs should not carry weight. Fire Chief Cleveland testified that no employee has had a vacation request denied until the circumstances underlying this grievance. Such testimony would go to say that every vacation request up until the instant grievance has been honored and the City should have suffered increased overtime costs because of this abuse of the system. However, there was no evidence that any abuse has occurred. Further, the City's evidence regarding the expenditure of money for overtime costs deals with potential costs, not actual costs. Given the amount of time that has elapsed since the Schiavoni decision, it is reasonable to expect that the City would have had evidence of actual overtime costs. The lack of evidence of actual costs indicates that the City's financial hardship must either be negligible or nonexistent.

Third, and as an alternative argument to the Union's first argument, the parties have had a past practice since 1991 of allowing up to two employees off on vacation at any time and regardless of employees being off for reasons other than vacation. In addition, the City's assertion that it revoked any past practice does not have merit. By letter dated December 28, 2000, the City advised the Union that any past practice will be terminated effective at "the end of the current labor agreement." However, the Agreement states that it "shall remain in full force and effect until a subsequent agreement has been reached . . ." Therefore, if there has not yet been a successor agreement, and if the Agreement has not "ended," then the City's letter of revocation is ineffective and the parties' past practice continues in full force and effect, citing Elkouri and Elkouri, How Arbitration Works, 4th Edition, pp. 447-448 (1985).

Fourth, the City's position that Article VIII, Section 1, provides it with the exclusive right to determine how many employees are off on vacation following the April 1 vacation selection process deadline, ignores the Schiavoni decision. That decision harmonized and interpreted Article VIII of the Agreement and limited the effect of Section 1 on Section 4 of Article VIII. The result was that the City was ordered to honor the vacation selections of the two most senior bargaining unit employees with no limitations or time restrictions by the Chief. There is no evidence that the City ever contested this decision.

Fifth, the historical development of Article VIII, Section 4, should be considered to understand its full meaning. The language which was added since the Schiavoni decision modifies the date for the submission of vacation requests from May 1 to April 1. The language also inserts three bullet points within the body of the original Section 4:

1. Single vacation day picks prior to the first round picks shall be limited to January 1 through April 30.

2. First round vacation day picks shall be taken in minimum three day units within the work cycle.

3. Following first round picks, single vacation days may be taken from May 1 through December 31.

The above language changes merely provide a procedure for the selection of vacation days. It does not modify how many firefighters are allowed to be off at any given time. Contrary to any assertions by Chief Cleveland, there is nothing in the Agreement, or any other document, that uses April 1st as the cutoff for the number of firefighters allowed to be on vacation at any given time.

Sixth, and with regard to the side letter agreement dated February 16, 1999, it has three significant aspects: 1) it increased the period for employees to select vacation from the time of May 1 through December 31 (Article VIII, Section 4, paragraph 3) to the time of April 1 through April 1 of the succeeding year; 2) it placed a limit on days selected after April 1 with regard to "training purposes other than routine departmental training;" and 3) it determined that vacation selections after the initial vacation selection period "shall be honored by the Department" as long as those selections are done "before the day is blocked off to be used for training purposes." This document also codifies the parties' past practice of requesting vacation after April 1.

In addition, and when the parties executed the February 16, 1999 agreement, that document became a part of the Agreement. This process of modification does not run contrary to and is in agreement with Article XXVI, Section 1, of the Agreement. Moreover, the fact that this document has become a part of the Agreement negates the City's unilateral attempt to evaporate it by its letter dated December 28, 2000.

The February 16, 1999, document puts one limitation on vacation dates selected after April 1: an individual cannot select a day of vacation when non-routine training is blocked out for that day. There are no other limitations, express or implied. At the time of this agreement, the City had the opportunity to bargain any other limitation, but it failed to do so.

The City

The City makes various arguments in support of its position. First, Article VIII, Section 4, sentence one, of the Agreement must be read in context with sentence two of that same section. Sentence one states: "Employees who are eligible for vacation shall submit their choices of dates to their department head by April 1." This means that employees may not submit a vacation request at any time during the year. However, this sentence cannot be an independent provision in its own right. Rather, it must be read in the context of the sentence two: "When two or more employees request the same dates, the senior employee shall have first choice and the selection of the 2 senior employees shall be honored." The term "when" in the sentence two should be construed as a qualification or an expansion of thought on the mandatory term "shall" in sentence one. Sentence two provides guidance if the circumstances in sentence one arise, citing CITY OF BELOIT, WERC, MA-8965 (BUFFET, 10/03/96). Therefore, and contrary to the Union's assertion, there is no "plain and clear" unambiguous language that any two of the most senior employees may take vacation on any day throughout the year, citing Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 470 (1997).

Second, Article VIII, Section 4, cannot be read in a vacuum, citing CITY OF GREEN BAY PARKS DEPT., WERC, MA-9895 (HEMPE, 06/05/98). Article VIII, Section 1, states: "[The Fire Chief] shall reserve the right to determine the number of personnel to be on vacation at any one time." Therefore, Article VIII, Section 4, must be read in that context and not in isolation from Article VIII, Section 1. Otherwise, Article VIII, Section 1, would have no meaning and effect, and that provision would become a nullity. A better construction would be to provide meaning and harmony to the entire agreement, giving effect to all provisions, citing Elkouri and Elkouri, SUPRA, pp. 492-493, and cases cited therein. Moreover, a construction which gives reasonable meaning to every provision of the contract is preferable to one leaving part of the language useless or meaningless, citing STANHOPE V. BROWN COUNTY, 90 WIS.2D 823, 848-49 (1979).

Similarly, Article XXV, Section 1, states: "The City provides a reservations of 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." This section retains the City's staffing rights. The Union's interpretation of Article VIII, Section 4, runs contrary not only to Article VIII, Section 1, but it also runs contrary to Article XXV, Section 1, a general reservation of rights clause. The Agreement must be read as a whole.

Third, the parties' settlement dated February 16, 1999, provides guidance to the parties' intent of Article VIII, Sections 1 and 4. Specifically, it states that vacation days must be selected prior to April 1st of each year, that the Chief retained the right to block out dates for training purposes, and that unless the firefighter successfully sought approval from management the firefighter could not schedule a particular vacation day after March 31 where management had previously scheduled that day for training purposes. That settlement document does not support the Union's interpretation. Any reliance by the Union upon this document is misplaced.

Fourth, the parties' past practice has been that supervisors uniformly deny single day vacation requests made after the deadline for requesting vacation if on the date requested there are eight or less persons scheduled for that shift, for any reason. Chief Cleveland testified that he has denied such vacation requests many times in his more than nine years of tenure. Further, Cleveland testified that most firefighters will not make a vacation request if there are two firefighters already unavailable for a particular shift. According to Cleveland, there were a number of instances where a firefighter would be off for an extended period which caused a shortage in staff. In those instances, either the Chief or his command staff would write "no vacations" directly on the schedule so as to notify firefighters that certain dates would not be approved. The fact that there were no grievances filed over the City's actions in that regard further supports the City's position.

Moreover, Chief Cleveland testified that his staff went through every calendar month for the past eight years and did not find a single instance following the April 1 deadline for submission where the City granted a single day vacation request and where there were already

two or more firefighters unavailable on that date. In addition, the Union has not provided any evidence of a past practice which would support its interpretation, despite the Union having access to City documents prior to the hearing, and despite the Union failing to respond to the City's pre-hearing request for any evidence supporting such a position. The Union has not met its burden of proof that a past practice existed upon which it relies, citing Elkouri and Elkouri, SUPRA, at 472-473, and BRODHEAD SCHOOL DISTRICT, WERC, MA-5343 (ENGMANN, 07/21/89).

Fifth, any past practice relied upon the Union was revoked by the City's letter to the Union dated December 28, 2000. Therefore, the effect of this revocation nullifies any claim of a past practice by the Union.

Sixth, the facts and arguments advanced in this case are similar to those found in CITY OF MARSHFIELD, WERC, MA-11298 (BURNS, 11/20/01). In the latter case, Arbitrator Burns determined that the City had retained its discretion to approve or not approve employee requests for the use of floating holidays and concluded that the union had failed to prove the existence of a past practice. In this case, the Union has similarly failed to prove the existence of a past practice. In addition, the City has retained the right to "approve" a single day vacation request following the deadline for submission.

Lastly, an interpretation favoring the City's position would avoid a harsh, absurd or nonsensical result. Conversely, an interpretation favoring the Union would work a forfeiture against the City not only in terms of an unanticipated financial impact, but also in terms of an unreasonable liability regarding employee and public safety.

DISCUSSION

This case is one of contract interpretation. It is widely accepted that arbitrators seek to interpret collective bargaining agreements to reflect the intent of the parties and that such intent is determined from various sources, including the express language of the agreement, statements made at precontract negotiations, bargaining history, and past practice. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 479 (1997).

Article VIII, Section 4, of the Agreement states: "All employees who are eligible for vacation shall submit their choices of dates to their department head by April 1. When two or more employees request the same dates, the senior employee shall have first choice and the selection of the 2 senior employees shall be honored . . . ."

The parties take irreconcilable positions regarding the interpretation of the above express language. The Union asserts that when two or more employees request the same vacation date, then the latter half of second sentence unambiguously mandates the City to honor the vacation selections of the two senior firefighters, regardless of the time of year when

the requests are made. The City asserts that this second sentence must be interpreted within the context of the first sentence such that the mandate applies only to those requests made by April 1 and during the pre-4/1 pick cycle. Further, the City asserts that since none of the grievances in question pertain to vacation requests made during the pre-4/1 pick cycle, then the above language is ambiguous and Article VIII, Section 1, applies, reserving the Chief's right to determine how many firefighters are allowed on vacation for these types of requests.

I agree with the Union that the second sentence of Article VIII, Section 4, is clear. It unambiguously states that the vacation selection of the two senior firefighters "shall be honored." The term "shall" is mandatory language and the intent of that word is self-evident. However, the first sentence of Article VIII, Section 4, is equally clear. It lays down a specific date deadline for requesting vacation, i.e., "by April 1." In addition, the City is correct in its assertion that this means vacation requests cannot be submitted on any date. This interpretation is implicit. If this were not the case, the parties would not have identified and selected April 1 as a date for the deadline when submitting vacation requests.

It is generally accepted that an interpretation which tends to render meaningless words in a contract should be avoided because of the presumption that parties do not create words intended to have no effect. See, Elkouri and Elkouri, SUPRA, at 493. I agree with this general rule of interpretation and I apply it here. I interpret the first and second sentences of Article VIII, Section 4, together so as to give meaning to both. In doing so, I reject any suggested assertion that the first sentence has no bearing or application to the second sentence. I agree with the City that the second sentence must be viewed in the context of the first and that the first sentence cannot be interpreted in isolation. Thus, I harmonize the express language of the first and second sentences of Section 4. I interpret them together to mean that when two or more firefighters request the same vacation date, and that date is requested by April 1, the selections of the two senior firefighters shall be honored.

In its opening remarks at the hearing, the City asserted that Article VIII, Section 4, of the Agreement is silent with regard to the vacation selection process for those dates requested after April 1 and outside of the pre-4/1 vacation pick cycle. I agree. Section 4 does not refer to the option of firefighters holding their vacation days and making requests for vacation after the contractual request deadline for submission. In addition, there is no language in any other part of Article VIII, nor is there language elsewhere in the Agreement, that expressly references this option.

There is, however, express language regarding management's general right to determine the number of firefighters to be on vacation. Article VIII, Section 1, states: "The Fire Chief shall administer the vacation schedule according to the terms of this agreement. He shall reserve the right to determine the number of personnel to be on vacation at any one time." This is broad residual language. It reserves the right in management to decide how many firefighters are allowed on vacation at a time. The question then becomes how to interpret Section 1 against Section 4 of Article VIII.

In CITY OF MARSHFIELD, WERC, MA-6705 (SCHIAVONI, 12/19/91), i.e., the Schiavoni decision, arbitrator Schiavoni addressed the interpretive interplay between Section 1 and Section 4 of Article VIII:

> . . . Section 4 is much more specific than Section 1 which grants broad general authority to the Fire Chief to determine the number of personnel to be on vacation at any one time. Section 1, although quite broad, does contain an express limitation, i.e., that the Fire Chief shall administer the vacation schedule according to the terms of the agreement. This caveat or limitation comes before the grant of authority and because of its placement in the paragraph, it is reasonable to conclude that the second sentence is circumscribed by the first sentence. Thus, the Fire Chief's ability to determine the number of bargaining unit employes on vacation at any one time is limited by other applicable provisions of Article VIII. If this were not the case, there would be no need or reason for Section 4 to exist since the Fire Chief would have unfettered authority to determine how many bargaining unit employes could be off at any give time. ID., at 11.

Arbitrator Schiavoni concluded and found that Section 1 must be read in conjunction with Section 4 and that Section 1 is limited by the express language of Section 4. ID.

I agree with Arbitrator Schiavoni's reasoning and conclusion as stated above. However, and I agree with the City, that case is factually distinguishable. Nowhere in that case is there a reference to requests for vacation after the deadline for the submission of vacation requests. More importantly, and in this case, there are no terms in the Agreement which deal with requests for vacation after the deadline for the submission of vacation requests. As I have already found, the Agreement is silent in this regard. Thus, and applying Arbitrator Schiavoni's above reasoning to these facts, Section 1 is not limited by more specific language found in Article VIII because there is none. Consequently, and because of the absence of specific contractual language, Section 1 is applicable to the issue at bar.

Before turning to other evidence which would evince the intent of the parties, the applicability of the February 16, 1999, document must be addressed. While the Union is correct that Article XXVI provides for the amendment of the Agreement through a subsequently signed agreement, there is insufficient evidence that the parties intended to make the February 16, 1999, document a part of their Agreement. First, that document is referred to by the parties in its opening lines as a letter confirming the parties' understandings of a grievance arbitration proceeding. Second, and immediately above the signature by Local Union President Breuer's signature, it states: "I agree to the understandings outlined above and Marshfield Firefighters Local 1021 withdraws the three grievances filed with the City . . ." It seems to me from this language that the scope of this document was intended to apply only to the settlement of those grievances. If there were a broader scope intended, it was incumbent on the parties to so state it. It is also notable that there was no testimony or evidence of bargaining

history or other evidence at the hearing that the parties intended for Article XXVI to apply to any and all agreements signed by the parties. Therefore, I am unable to conclude that this document was intended to become a part of the parties' Agreement.

Although the February 16, 1999 settlement of grievances document is not a part of the parties' Agreement, it is still relevant for purposes of this case. The third bullet of that text sets up the scenario of a firefighter that has "not designated a day of vacation during the vacation selection process (January 1 through March 31)." In that situation, if a firefighter "obtains approval" for a vacation day that is later blocked off by management for training purposes, then that day shall be honored by the Department. The significance of this bulleted text is twofold: 1) it deals with the same post 4/1 picks of vacation requests at issue in this case, and 2) it references an approval process. Regarding the approval process, if management can approve a request for a post-4/1 vacation date, it goes without saying that management can also deny such a request. This inferred denial undercuts the Union's position that it has been the parties' past practice to allow up to two employees off on vacation at any time and regardless of when vacation request is made.

The evidence regarding the City's written policy on vacations was not particularly helpful in ascertaining the parties' intent of what rights the firefighters have or do not have when making their post-4/1 vacation requests. At the top of that document it states that the policy's purpose is "to allow management to provide for a uniform and consistent method for approving vacation . . ." in the Department. Immediately below the purpose language, the document divides "Vacation Policy" into subcategories labeled "First Round Picks," "Second Round Picks," and "Vacation Pick Guidelines." As indicated above, these are terms which are undisputedly understood by the parties to mean pre-4/1 vacation requests. Clearly missing is any subcategory referencing, or reasonably implying a reference, to post-4/1 vacation requests. Thus, there is little interpretive value to this evidence.

With regard to evidence of a past practice, there were very different accounts offered through testimony at the hearing. Local Union President and Firefighter Brad Breuer testified that when he evaluated the instant grievances, he found that firefighters had been allowed single vacation days without a problem. This is consistent with Breuer's letter to Chief Cleveland dated February 9, 2001, wherein Breuer writes: "Since the adoption of Article VIII, even after the close of the vacation selection period, up to two employees have been allowed off on vacation at the same time." When asked on cross-examination what investigation had been done to make this statement, Breuer said that his conclusion was based upon conversations with other firefighters. In addition, Breuer testified that sometime in 1994 or 1995, he personally requested and received a single vacation day during the post-4/1 pick period which caused "a work back" for the Department.

Chief Cleveland testified that if there have been two or more out of ten firefighters already off, for whatever reason, then it has been the practice to deny vacation requests for that shift. According to Cleveland, when a shift has been fully staffed with eight or more, then

single vacation days requested beyond the deadline for submitting requests have been approved. Moreover, Cleveland testified that this practice has been consistently applied since he joined the Department as Chief on July 17, 1991. To support this claim, Cleveland testified that prior to the hearing management went through the last seven to eight years of Department calendars and could not find a single example where two or more firefighters were already off and a request for a single vacation day was granted and which resulted in a work back. With regard to Breuer's testimony of Breuer being granted a vacation request in 1994 or 1995 which caused a work back, Cleveland testified that he did not recall this situation and that he did not have the prior years' calendars at the hearing to determine the accuracy of Breuer's testimony.

In my opinion, both parties' testimonial evidence of a past practice was not persuasive. The Union's testimony was based either on hearsay conversations with individuals who did not testify or it was based upon a single instance several years ago. Such evidence, without more, is inconclusive of a past practice. Similarly, the City's testimony regarding Cleveland's proffer that there were no instances of vacation granted over the past eight years which caused a work back did not include an examination of the calendar documents.

Nevertheless, the City did offer additional documentary evidence which runs counter to the Union's evidence of a past practice. Employer Exhibit 1 includes a summary of all dates in calendar year 2001 where additional single vacation days, if granted, would have caused a work back. There were such 194 instances. The City asserts that if there was a past practice supporting the Union's assertion, then there should have been several instances of post-4/1 pick single vacation requests that were granted, but there were none. I agree with the City's point. This evidence cuts against the Union's position of a past practice, at least with respect to the calendar year 2001.

With regard to statements made at precontract negotiations and bargaining history, there was little evidence to guide me in an interpretive analysis of the pertinent provisions of the Agreement. Therefore, I do not address these items.

In conclusion, and looking at all of the evidence, I interpret the express language of the first two sentences of Section 4 together such that when two or more firefighters request the same vacation date, and that date is requested by April 1, the selections of the two senior firefighters shall be honored. I also interpret Section 4 as being silent with regard to the types of vacation requests submitted after the contractual deadline and during the post-4/1 pick cycle. Because of this silence, Article VIII, Section 4, does not apply to the facts in this case. Rather, Article VIII, Section 1, applies and management has the reasonable exercise of authority to approve or deny these kinds of vacation requests. Therefore, and since Article VIII, Section 4, of the Agreement does not apply here, it cannot be concluded that the City violated that provision.

Furthermore, there is insufficient evidence of a past practice that two employees have been allowed off on vacation at any time. On the contrary, the evidence submitted would indicate that some form of an approval is first required from management for this type of a

vacation request. In addition, there were an insufficient number of recent examples in 2001 provided as evidence which supports a finding of a past practice. Therefore, it also can not be concluded that the City was acting contrary to an asserted past practice relative to Article VIII, Section 4, of the Agreement.

I do not address the Union's argument that the City failed to terminate a past practice in its letter to the Union dated December 28, 2000, as that point is moot. I have already found that there is insufficient evidence of a past practice as alleged by the Union.

Based on the foregoing, and the record as a whole, I make the following

AWARD

The City did not violate Article VIII, Section 4, of the Agreement when it denied the vacation requests of Lieutenant Zeidler on March 27, 2001, Firefighter Bauer on March 5, 2001, and Firefighter Jozwiak on February 25, 2001. Therefore, the grievances are denied.

Dated at Eau Claire, Wisconsin, this 23rd day of January, 2003.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

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