BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY SHERIFF DEPARTMENT EMPLOYEES LOCAL 986-B, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 379
No. 61220
MA-11856

(vacation denial grievance of Laurie Magyar dated 3-14-02)

Appearances:

Mr. Neil Rainford, Business Representative, AFSCME Council 40, 14002 County Road C, Valders, WI 54245, appearing on behalf of the Union.

von Briesen & Roper, S.C., by **Attorney James R. Korom**, P.O. Box 3262, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4470, appearing on behalf of the County.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission (WERC) designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' 2000-01 Agreement (Agreement).

The Arbitrator heard the dispute on September 19, 2002, at the County Administrative Office Building in Manitowoc, Wisconsin. Following preparation and distribution of a transcript, the parties summed up their positions in post-hearing briefs and reply briefs, the last of which were exchanged by the Arbitrator on December 31, 2002. An exchange of communications between the parties and the Arbitrator followed regarding objections by both parties to the post-hearing submissions of the other. The Arbitrator ruled in writing on that dispute on January 13, 2003, marking the close of the record.

ISSUES

The parties authorized the Arbitrator to frame the issues for determination. The Union proposed:

1. Did the Employer violate the Agreement when it denied Laurie Magyar's vacation request?

2. If so, what shall the remedy be?

The County proposed:

1. Did the County violate Art. 15.F.2. as described in the grievance?

2. If so, what shall the remedy be?

The Arbitrator frames the issues as follows:

1. Did the County violate the Agreement by its denial of Laurie Magyar's February 26, 2002, requests to take vacation time off on April 26, 27 and 28, 2002?

2. If so, what shall the remedy be?

PORTIONS OF THE AGREEMENT

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

The Employer agrees that all amenities and practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement. . . .

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

. . .

Step 1 The employee and one (1) Union steward shall orally state grievances to the Department Head (Sheriff) or the Sheriff's designee within a reasonable period of time, but in no event later than thirty (30) calendar days after the Union knew or should have known of the occurrence of such grievance.

. . .

f. Decision of the Board: The Arbitrator shall not modify, add to, or delete from the terms of the Agreement.

ARTICLE 12 – HOLIDAYS

All employees shall be granted (10) paid holidays each year. . . .

. . .

ARTICLE 15 - VACATIONS

. . .

D. All employees shall be required to use all accumulated vacation time during the year, and each employee shall be obliged to use his or her vacation within one (1) year of its being earned. In the event of unusual circumstances preventing the employee from taking such vacation, he or she must apply to the Sheriff or Sheriff's designee, subject to the approval of the Personnel Committee, for any deviation from this rule.

E. The listing of vacations as selected by the employees shall be posted on the bulletin board and kept current.

F. Vacation time will be as follows:

1. Department training shall take priority over personal time off from work including vacation and holiday time.

2. Minimum staffing for each shift must be maintained. (This allows at least one (1) bargaining unit employee within the Jail Division not to be written into the work schedule per shift per day.) This includes all reasons for absence from training to vacation/holiday time.

At least one (1) telecommunicator shall be allowed to be off scheduled duty per day for vacation and holidays.

3. Vacation time shall be selected in blocks of time consisting of six (6) work days or consecutive scheduled work days in the employee's work cycle. Unless the choice of dates is for an extended vacation for more than six (6) work days or consecutive scheduled work days in the employee's work cycle.

4. First choice of vacation dates shall be chosen by January 15th of each year. Choices of vacation time shall be done on a rotational basis with management employees receiving first priority in the choice of vacation time followed by union personnel according to seniority and by shift.

With this rotation schedule, any approved first choice of vacation time will be granted over and above any other senior (in both rank and length of service) employee's second or third, etc., vacation request on the same shift. In case of conflict in choice of dates, the senior employee shall have preference provided the conflict is on the same rotational choice of vacation.

G. Vacations shall not be transferable to any other compensatory accounts.

H. Due to unusual circumstances, vacation time for less than a full week may be used. This vacation time will not be scheduled on a rotational basis but will be granted on a first-come, first serve basis. After January 14th of each year a minimum notice of three (3) working days will be required.

I. All employees must give a minimum of one (1) week's notice for the rescheduling of vacation time which is also agreeable with the Employer. Waiver of this notice may be made with the approval of the Employer.

. . .

ARTICLE 30 – ENTIRE MEMORANDUM OF AGREEMENT

A. This Agreement constitutes the entire Agreement between Manitowoc County and the Manitowoc County Sheriff's Department Employees represented

by Local 986-B.

None of the terms and conditions of this Agreement shall be changed unilaterally. Changes may be made by mutual agreement of the parties in writing.

. . .

BACKGROUND

The Union currently represents a bargaining unit of non-supervisory supportive services personnel without the power of arrest employed in the County's Sheriff's Department. The Agreement lists classifications of Cook, Corrections Officer, Secretary/Bookkeeper, Secretary/Clerk and Telecommunicator. The County and Union have been parties to a series of collective bargaining agreements covering non-supervisory Sheriff's Department employees since at least 1989. The unit originally included sworn personnel with the power of arrest; those employees are currently represented by the Wisconsin Professional Police Association (WPPA). Telecommunicators became a part of the unit sometime after 1992.

The Agreement contains a nominal expiration date of December 31, 2001. As of the time of the hearing, the parties' negotiations for a successor to the Agreement were pending and unresolved. Accordingly, although the instant dispute arose in 2002, the parties have processed this case under the grievance and arbitration procedure as set forth in the Agreement.

The Grievant in this case, Laurie Magyar, has been a Corrections Officer in the County Jail at all material times.

It is undisputed that the vacation selection procedure under the Agreement calls for initial selections in January of blocks of 6 or more consecutive scheduled work days in the employee's work cycle, assigned by seniority, and a subsequent selection of the remaining days on a first-come, first serve basis. The vacation requests at issue involved the latter type.

On February 26, 2002, the Grievant requested to take vacation time off on April 26, 27 and 28, 2002. Grievant requested those days with the knowledge that they had previously been granted as vacation days to Brian Nies, a member of the bargaining unit who resigned at about the time that Grievant submitted her request for the three days off. Grievant's requests for those days were each denied on February 28, 2002, on the stated basis of "1 union off already -", i.e., that one bargaining unit employee was already scheduled off on each of the days. As of late February, Union employee Peshka had been absent on sick leave due to a shoulder problem which jail management expected to (and which in fact) continued to prevent his return to work through and well beyond the three dates in April requested by the Grievant on February 26. The Arbitrator finds it appropriate to analyze the case so as to treat Peshka's anticipated absence on sick leave as the reason for the County's denial of the vacation requests

at issue.

On March 14, 2002, the grievance giving rise to this dispute was filed. In it, Grievant asserts that the County's denial of her requests to take vacation on April 26, 27 and 28, 2002, violated Agreement Art. 15.F.2. By way of adjustment, the grievance states "[v]acation for April 26, 27th 28th, 2002 should be approved as there is no bargaining unit employee off on training, vacation or holiday time."

The grievance was denied at various pre-arbitral steps and submitted for arbitration as noted above.

At the hearing, the Union presented testimony by the Grievant and rested. The County presented testimony by Inspector Robert Hermann, Jail Sergeant Michael Herrmann and Personnel Director Sharon Cornils and rested. The Union then presented testimony by Union business representative Gerald Ugland (taken by telephone). The County then concluded the evidentiary hearing by presenting testimony by Sheriff Kenneth Petersen.

It is undisputed that on March 13, 2001, Jail Administrator R. J. Aukamp issued an operational directive to persons including all Local 986-B bargaining unit personnel and their supervisors which read, in pertinent part, as follows:

> Due to the unusual circumstances of a number of individuals on extended leave due to sickness, family leave, training etc. and due to the fact that we have not, as of yet been able to fill the part time opening and the temporary opening currently existing, it is necessary to place certain restrictions on training requests and time off requests. Effective immediately, as per union contract, only 1 union person and 1 management person will be allowed to be written out of the schedule per day.
>
> In addition, all training requests, unless they are on an individual's regularly scheduled day off, will not be approved. In anticipation of the installation of our new computer system, there will be ample training for all employees to cover the 24 hour re-certification requirements, so this should not cause a problem for anyone. As of this date, this training is scheduled to begin on or about 04/16/01.
>
> Again, due to the number of people already out of the schedule, we are asking staff to sign up for the new computer training (Tiburon) on their regularly scheduled days off. You will be compensated with adjustment time for this training. Originally, this training will consist of 3 days of training with the possibility of 2 more days of training to be given at a later date depending on when we go live with the new system. A sign up sheet will be posted next week to give you ample time to arrange your schedules. We will split this training into blocks of 2 days and 1 day so as not to require you to give up all 3 of your regularly scheduled days off on one rotation. We will attempt to do this training

on your regularly scheduled shift hours.

> As soon as possible, the restrictions listed above will be relaxed. This of course will depend on the filling of the open positions and the return to work of those individuals now off. We thank you for your cooperation in this matter. . . .

It is undisputed that the last sentence of the first paragraph of the above-quoted March 13, 2001 directive established a more restrictive standard regarding granting or denying Jail Division training requests and time off requests as compared with the standard that had been applied for many years. Specifically, it changed from a standard whereby a second union person was allowed to be written out of the schedule per shift per day if no management person was written off the schedule, to a standard whereby only one union person would be allowed to be written out of the schedule per shift per day, regardless of whether a management person was requesting to be written out of the schedule for any reason during that shift.

It is also undisputed that since March 13, 2001, jail management has treated anticipated absences due to sick leave and Family and Medical Leave Act leave the same as anticipated absences due to training, holiday time and vacation, for purposes of granting or denying Jail Division training requests and time off requests. However, it is disputed whether such absences were or were not so considered prior to March 13, 2001.

Additional factual background is noted in the summaries of the parties positions and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

Properly interpreted, the language of Art. 15.F.2. requires the County to allow at least one bargaining unit employee within the Jail Division to be absent for reasons of training, vacation or holiday time, regardless of whether one or more bargaining unit employees are known in advance to be absent due to sick leave or other reasons besides training, vacation or holiday time.

Training, vacation and holiday time are the only reasons listed in Art. 15.F.2. Absences for those reasons can be predicted in advance whereas absences for funeral leaves and many sick leaves cannot. It is therefore logical that the express references to training, vacation and holiday were intended to be an exclusive list.

Bargaining history supports the Union's interpretation. The language of Art. 15.F.2. first appeared in an agreement reached in 1989 when the unit included sworn personnel with the power of arrest. After those employees became represented separately, the County reached an agreement with WPPA that changed the last sentence of the first paragraph of Art. 15.F.2

vacation, holiday time, sick leave and training." The County cannot be allowed to achieve the different arrangement that the County obtained in bargaining with WPPA where, as here, the County has not obtained from the Union the same language it obtained in bargaining with the WPPA.

The County's proposed interpretation must also be rejected because it would result in an insufficient number of opportunities for first shift bargaining unit employees to take all of their vacation and holiday days off, eventually causing them to lose some of those days. In fact, first shift employees are entitled to 382 shifts of vacation, holiday and training per year which cannot be scheduled within the 365 days in a year if the County's interpretation is upheld. The parties cannot be deemed to have intended Art. 15.F.2. to defeat the rights of employees to take the full measure of vacation and holidays provided for them under the Agreement.

The County's interpretation is also inconsistent with longstanding past practice in effect prior to the issuance of the March 13, 2001 directive and therefore the amenities and practices clause contained in Art. 3. The evidence shows that the practice was to allow two union persons to be written off the schedule for training, vacation or holiday time where no management person was requesting time off for those purposes on the same shift and day. Since issuance of that directive, the County has allowed only one union person to be off the schedule regardless of whether a management person requests to be written off the schedule for one of those purposes.

The County's objection to the timeliness of the grievance and its other reliance on past practice since the March 13, 2001 directive was issued must be rejected because of the assurances that were given to the bargaining unit by the County both in the directive and by various supervisors that the change implemented on March 13 was only temporary. The Union's reliance on those assurances was reasonable and fully explains the passage of time before the instant grievance was filed.

The County's reliance on bargaining history is also misplaced. The Union's 1995 proposal to change the third sentence of the first paragraph of Art. 15.F.2. was clearly labeled as a "CLARIFICATION" of that sentence. The Union also explained at the table that it was not attempting to alter the way vacation was then being administered. Rather, it was merely intended to replace a clumsily worded sentence with one that more clearly stated the parties' mutual intent as reflected in the way vacation was then being administered. In those circumstances, the Union's withdrawal of the proposal does not undercut the Union's contention that the existing language of Art. 15.F.2. requires the County to administer vacation the way it did in 1995 and before the changes that were made on March 13, 2001. Especially so where, as Ugland testified, the Union withdrew the proposal in response to a bargaining table statement from then Jail Inspector Petersen that the County never denied bargaining unit members' vacation requests.

The County has a number of means to cover employee absences while maintaining sufficient opportunity for the remaining employees to use their leave and to use it at meaningful times. The County could hire more staff to insure that minimum staffing is maintained. It can also schedule the existing staff to work more often to maintain minimum staffing and accept the additional overtime cost that is a natural result of an aging workforce in a stressful, physically demanding and dangerous environment. However, in this case, the County improperly elected to overreach its authority and to unilaterally implement a policy that has made it impossible for jailers on the Grievant's shift to use their contractually-guaranteed leave at all, and has made it impossible for all jailers to use their leave at times that are personally significant.

For those reasons, the Arbitrator should declare that the County's denial of the Grievant's requests violated Art. 15.F.2. By way of remedy, the County should be ordered to cease and desist from enforcing the March 13, 2001 memo and to return to the prior practice described above.

The County

Properly interpreted, the language of Art. 15.F.2. requires only that the County allow at least one bargaining unit employee within the Jail Division to be absent for all reasons, including but not limited to training, vacation or holiday time.

The language of Art. 15.F.2. reflects that that was what the parties' intended. The first sentence clearly requires that minimum staffing for each shift be maintained, and the Agreement allows management to determine the minimum staffing level needed to meet operational needs on each shift based on a day to day assessment of operational needs. The reference in the second sentence to "not to be written into the work schedule" is consistent with doing so for any reason and not for a limited list of reasons that excludes sick leave and others. The third sentence expressly confirms that "[t]his includes all reasons for absence" and the "from training to vacation/holiday time" does not exclude sick leave or other reasons besides training, vacation and holiday time. Rather, that sentence is inclusive, from training time that is scheduled by the Employer for its benefit to vacation/holiday time that is scheduled by the Employee for his/her benefit with everything in between, such as sick leave, which benefits the Employee but often cannot be scheduled ahead of time.

Past practice supports the County's interpretation. It is undisputed that from the issuance of the March 13, 2001 directive until the instant grievance was filed in April of 2002, the Union did not object to or grieve the issuance of the March 13, 2001 directive, indicating that the Union understood that directive to be within the rights of the County under the Agreement to issue and implement. Furthermore, the evidence is clear that since that directive was issued, the County has uniformly denied bargaining unit members' requests for vacation

sick leave. To the extent that the County allowed more than one union person to be written off of the schedule for any reason prior to March 13, 2001, that was a matter left to the County's discretion under the "at least one" language of Art. 15.F.2, but the County did not thereby bind itself to continue to do so where, as here, staffing and overtime cost concerns prompt it to more strictly conform its practice to the limits permitted by the Agreement. If the evidence concerning practice prior to March 13, 2001, conclusively shows anything, it is that the County has always taken into consideration the number of persons who would be written off the schedule for any reason, including but not limited to training, vacation, holiday time and sick leave.

Bargaining history also supports the County's interpretation. The Union proposed and settled without obtaining a change from one to two days in the second sentence of Art. 15.F.2. during the bargaining leading up to the 1996-97 agreement. In that same bargain, the Union proposed and again settled without achieving a proposal to change the third sentence of Art. 15.F.2 to read: "[t]his includes all reasons for absence for training, vacation and holiday time." In rejecting that proposal, the County's negotiators told the Union at the table that it viewed the Union's proposal as seeking to add a restriction on the types of reasons that the County could take into account in approving or denying time off. As Petersen testified, he did not tell the Union at the bargaining table in 1995 that no bargaining unit employee had ever had a vacation request denied, but rather he told them that no bargaining unit employee had ever had an approved vacation later denied because of someone else's subsequent absence from work. The Union cannot be permitted to obtain through grievance arbitration the above changes that it was unable to achieve through bargaining.

The County's proposed interpretation of the Agreement would not prevent the employees from enjoying a full measure of the vacation benefits accorded them by the Agreement. Employees can trade days off with other employees on their shift, and they can request trades to enable them to work on a different shift from which it might be possible to request and be granted vacation time off. Employees can also request to carry over vacation beyond the end of the year to avoid losing it; no such request has ever been turned down where it resulted from the employee's inability to schedule the vacation time off during the year.

The County's proposed interpretation is also supported by logic and legitimate business purposes. The purpose of limiting the number of individuals off of the schedule at any given time is to maintain a sufficient number of staff to safely and efficiently operate the Jail. Staffing is no less adversely affected from an absence due to a vacation than it is from an absence due to illness. It should make no difference (as the clear language of the Agreement suggests) whether the absence is due to training, vacation, resignation, sick leave, or any other absence.

In essence, this is a bargaining table issue. The grievance should be denied either as an untimely challenge to the March 31, 2001 policy and/or on its merits, and the Union should be required to obtain the changes it seeks through the collective bargaining process rather than

grievance arbitration.

DISCUSSION

The language of Art. 15.F.2. strongly supports the County's proposed interpretation of that provision. The phrase "at least one" is far more consistent with the County's March 13, 2001 directive that "only 1 union person . . . will be allowed to be written out of the schedule [per shift] per day" than the Union's insistence that 2 union persons be allowed to be written out of the schedule unless one management person has been so written out. The phrase "[t]his includes all reasons for absence" is far more consistent with the County's consideration of all reasons than the Union's insistence that the only reasons for absence it includes are training, vacation and holiday time and not sick leave, funeral leave, Family and Medical Leave Act leave, or any other reasons.

On the other hand, the County's proposed interpretation would give no effect to the phrase "from training to vacation/holiday time." The sentence in which that phrase appears would have the same meaning with and without the inclusion of that phrase.

However, while interpretations rendering language meaningless are ordinarily to be avoided if possible, the Arbitrator finds it more persuasive in this case that the parties intended that phrase to merely emphasize the breadth of the phrase preceding it, rather than to impose limitations on its breadth. In other words, the Arbitrator is persuaded that the parties intended the sentence to mean the same as it would have meant if they had written it "[t]his includes all reasons for absence from soup to nuts" or "[t]his includes all reasons for absence including, but not limited to prior scheduled vacation, holiday time, and training." The Arbitrator finds that rationale especially persuasive where, as here, the parties chose not to use the "from . . . to . . . " when they later created a provision for the added position of Telecommunicators for whom the reasons were clearly being limited to "vacation and holidays" in the second paragraph of F.2. For the foregoing reasons, and based on the language of the agreement alone, the Arbitrator finds the County's proposed interpretation of Art. 15.F.2. is persuasive and rejects the Union's as not supported by the language of the Agreement.

The evidence presented by the parties that goes beyond the four corners of the Agreement does not undercut that conclusion. The significance of the County's evidence of practice since the March 13, 2001 directive is persuasively undercut by the fact that the directive itself and follow-up statements by supervisory personnel gave the Union reason to believe that the change outlined in the first paragraph of the directive was temporary and would "be relaxed . . . as soon as possible." The Union would have the County's evidence of 1995 bargaining history disregarded because the Union's proposal was expressly designated as a "clarification" of the third sentence of the first paragraph of Art. 15 F.2. The Union's contention in that regard and the related factual dispute about what was said at the bargaining table at that time need not be addressed, however, since that evidence would either lend further support to the County's position or provide no guidance as to the proper interpretation of Art. 15.F.2.

The Union's reliance on evidence of past practice before the March 13, 2001 directive is not persuasive. The phrase "at least one . . ." in 15.2.F. expressly recognizes that more than one union person from the Jail Division could be allowed not to be written into the work schedule per shift per day. Therefore, by having allowed more than one on numerous occasions, the County did not create a practice that precluded it from exercising its rights to conform more strictly to the minimum of one specified in 15.2.F. Furthermore, the Union has not persuasively shown that the County did not consider reasons other than training, vacation and holiday time prior to March 13, 2001. The Grievant's testimony to that effect was squarely contradicted by that of Jail Sergeant Herrmann and two other higher ranking supervisors with responsibility for jail operations. The Union's voluminous documentary evidence is inconclusive in that regard because it does not indicate whether the sick leave taken was known of in advance of approval of the vacation requests involved. Any Union reliance on the amenities and practices clause of Art. 3 is misplaced because that general language protects amenities and practices that are not specifically addressed in contract language. In this case, Art. 15.2.F specifically addresses the subject matter of this dispute.

The Union has persuasively shown that the changes implemented by issuance of the March 13, 2001 directive have made it more difficult for Jail Division bargaining unit employees to schedule vacation and holiday time off after the rotational selection of vacation blocks has been completed in January of the year. However, the County persuasively counters that the increased difficulties can be traced, at least in part, to expanded time off entitlements enacted by law (e.g., Family and Medical Leave Act), or arising as the length of service and associated vacation entitlements of the bargaining unit have increased. The record does not persuasively establish that the County's proposed interpretation would have made it difficult for Jail Division bargaining unit employees to schedule vacation and holiday time off at the time the disputed language of Art. 15.F.2. was initially agreed upon in a 1989 side agreement and thereafter incorporated in a slightly modified form in the parties' collective bargaining agreements. The Arbitrator is not persuaded that interim expansions of bargaining unit time off entitlements warrant the conclusion that the parties somehow intended to change the meaning the disputed language in order to accommodate those expanded time off entitlements. The procedures provided for in the Agreement for requesting extensions of unused vacation to the following year and for effecting a trade to a different shift provide some measures of protection against losses of vacation days. To the extent that the Union seeks additional assurances, their resort needs to be to the bargaining table rather than grievance arbitration.

The Union's reliance on a comparison of the language of Art. 15.F.2 with the language of the WPPA's deputies unit contract on the same subject is also not persuasive. The record does not establish how that language came to become a part of the WPPA agreement or whether the WPPA and the County considered that language to be substantively different than the language contained in Art. 15.F.2.

There remains the Union's contention that Department management must not be

permitted to renege on its promise in its March 13, 2001 operational directive to relax the restrictions listed in that directive "[a]s soon as possible . . . depend[ing] on the filling of the open positions and the return to work of those individuals now off." The restrictions at issue in this case have been found above to be specifically and expressly authorized by the language of the Agreement. Therefore, as provided in Art. 30, the unilateral March 13, 2001 management directive — which is not a part of the Agreement — cannot and does not modify the pertinent Agreement language.

For all of the foregoing reasons, the Arbitrator finds it appropriate to deny the grievance in all respects.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES noted above that

1. The County did not violate the Agreement by its denial of Laurie Magyar's February 26, 2002, requests to take vacation time off on April 26, 27 and 28, 2002.

2. The subject grievance is denied in all respects, and no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin, this 7th day of August, 2003.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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