

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FRANKLIN

and

WISCONSIN PROFESSIONAL POLICE ASSOCIATION

Case 57
No. 63754
MA-12703

(Additional Personal Day Grievance)

Appearances:

Jeffrey D. Berlin, WPPA Attorney, 1838 N. Green Bay Road, Grafton, WI 53024, appearing on behalf of the Wisconsin Professional Police Association at hearing and **Mark R. Hollinger**, Law Office of Mark R. Hollinger, LLC, 2766 North 75th Street, Milwaukee, WI 53210, appearing on behalf of the Wisconsin Professional Police Association on the briefs.

Joel S. Aziere, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Ave., Suite 1400, Milwaukee, WI 53202-6613, appearing on behalf of the City of Franklin.

ARBITRATION AWARD

The City of Franklin, hereinafter City or Employer, and the Wisconsin Professional Police Association, hereinafter Association or Union, are parties to a collective bargaining agreement covering the period January 1, 2002 through December 31, 2004 that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on December 7, 2004, in Franklin, Wisconsin. A transcript of the hearing was filed on December 15, 2004. The record was closed on July 26, 2005, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUES

There are no procedural issues in this matter. The parties were unable to stipulate to a substantive issue or issues for resolution. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument, as well as the parties' suggested issues. The Union frames the issue as:

Did the employer violate Section 9.03 of the 2002-2004 collective bargaining agreement in refusing a fourth personal day for the years 2002 and 2003?

The Employer frames the issues as:

Whether the City violated Section 9.03 of the 2002-2004 collective bargaining agreement when it refused to grant more than four personal days in 2004 to police officers of the Franklin Police Officers Association and, if so, what is the appropriate remedy?

Having reviewed the evidence and arguments in this matter, the undersigned has determined that the Union and the Employer have substantively asked the same questions, however for ease of analysis, the undersigned frames the issues as:

1. What is the effective date of the modification to Section 9.03?
2. Are employees entitled to an additional personal leave day for 2002 and 2003 during 2004 (or thereafter)?

RELEVANT CONTRACT PROVISIONS and DOCUMENTS

ARTICLE V – GRIEVANCE PROCEDURE

. . .

Section 5.04 – Step Three: If no settlement is reached in Step Two, then such grievance shall be submitted to arbitration within (10) working days from the time the Police Chief was to have submitted his answer in the manner described below:

. . .

(c) Upon completion of this hearing, the arbitrator shall be requested to render a written decision within thirty (30) calendar days after the conclusion of testimony and argument to both the City and the Association which shall be final and binding upon the parties. In making his decision, the arbitrator shall neither add to, detract from nor modify the language of this Agreement. The arbitrator shall have no authority to grant wage increases or wage decreases. The

arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinions which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the City, nor shall such right be limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the city of such right.

ARTICLE IX – HOLIDAYS

...

Section 9.03: Employees shall be allowed four (4) personal days off per year. However, employees must give at least ten (10) days notice to the Chief of Police before using the first two (2) personal days and thirty (30) days notice before using the third and fourth personal days off.

...

ARTICLE XXVIII – DURATION AND NEGOTIATIONS

Section 28.01: This agreement shall become effective as of January 1, 2002 and shall continue in full force and effect until December 31, 2004. The terms and conditions of this Agreement shall continue to apply until superseded by another Agreement.

...

SETTLEMENT OFFER OF THE CITY OF FRANKLIN TO FRANKLIN POLICE OFFICER'S ASSOCIATION, WPPA LOCAL NO. 280

January 20, 2004

The City and the Association agree that the provisions contained in the 2000-2001 collective bargaining agreement between the City of Franklin and the Franklin Police Officer's Association be continued in a new three (3) year agreement, except as modified by the following:

1. TENTATIVE AGREEMENTS: Attached tentative agreements reached in bargaining (see attached).

2. **ARTICLE VI – WAGES:** Increase all wage rates, with the exception of the starting rate of Patrolman, which shall remain at the July 1, 2001 rate, as follows:

Effective 01/01/02 3.00% wage increase, then \$0.25 per hour

Effective 01/01/03 3.00% wage increase, then \$0.25 per hour

Effective 01/01/04 3.00% wage increase

3. **ARTICLE IX – HOLIDAYS:** In exchange for the Association's withdrawal of the SWAT team grievances, the City agrees to provide one additional personal day, as follows:

Section 9.03: Employees shall be allowed ~~three (3)~~ **four (4)** personal days off per year [sic]. However, employees must give at least ten (10) days notice to the Chief of Police before using the first two (2) personal days and thirty (30) days notice before using the third **and fourth** personal days off.

4. **ARTICLE XV – HOSPITAL AND SURGICAL INSURANCE, SECTION 15.01:** Revise the first sentence as follows:

Section 15.01: ~~The City shall pay the full premium of hospital and surgical insurance benefits for members and their dependents as provided in the current hospital and surgical plan as provided by the City through its designated insurance carrier.~~ Effective January 1, 2003, employees shall contribute, via payroll deduction, an amount of \$20.00 for the single plan or \$50.00 for the family plan. Effective January 1, 2004, employees shall contribute, via payroll deduction, an amount of \$23.00 per month for the single plan and \$57.50 for the family plan. The City shall pay the remainder of the premium cost.

5. **ARTICLE XV – HOSPITAL AND SURGICAL INSURANCE, SECTION 15.01[sic]:** Revise the language to read as follows:

Section 15.03: For employees who retire on a regular pension (disability pensions, excluded) on or after January 1, ~~1996~~ **2002**, the City shall pay seventy-five percent (75%) of the cost as of January 1, ~~2000~~ **2002**, towards the single plan premium or the family plan premium of the health plan the employee was in prior to retirement, and such payment shall remain frozen at the level throughout the period of such payment, under the following conditions (if an employee/retiree switches from a family to a single plan or vice versa, the City will continue to pay up to the same amount it had been previously paying) as of January 1, ~~2000~~ **2002**.

- (a) The employee/retiree must have at least fifteen (15) years of continuous service with the City of Franklin.
 - (b) The employee/retiree must be at least the statutory normal retirement age.
 - (c) Participation in the City's health insurance program ceases at the earliest of the following:
 - (i) The employee/retiree's attainment of age sixty-five (65), and the employee/retiree is eligible for Medicare.
 - (ii) The employee/retiree's death.
6. **ARTICLE XXVII – DURATION AND NEGOTIATIONS:** Revise all dates to reflect a three (3) year agreement, effective January 1, 2002 through December 31, 2004.
7. **APPENDIX “A”:** Effective the first day of the month following ratification by both parties, revise the health insurance coverage by incorporating the following changes:
- (a) Increase the prescription drug cost to \$5.00 for generic and \$15.00 for brand name. It shall be mandatory for an employee to use a generic for prescription drugs if a generic brand is available.
 - (b) Increase the benefit of routine exams from \$80.00 to \$200.00.
 - (c) The employee shall be responsible for a \$50.00 fee for emergency room and urgent care visits, which will be waived if the employee is admitted to the hospital.

BACKGROUND and FACTS

The Union and the Employer have been parties to a series of collective bargaining agreements. Negotiations for the current agreement, January 1, 2002 through December 31, 2004, were difficult. Negotiations began in October 2001. At the end of 2002, the parties requested the assistance of the Wisconsin Employment Relations Commission. Karen Mawhinney was appointed as Mediator/Investigator and met with the parties on January 13, 2003. At that time, mediation was unsuccessful. On July 10, 2003, the Investigator issued a

Notice to the parties indicating that she had closed the investigation, declared impasse, certified the final offers between the parties and recommended that the Commission issue an Order requiring arbitration of the dispute. Additional personal days, the subject of this grievance, were not part of the tentative agreements or final offers of either party.

Although impasse had been declared, the parties did not proceed to interest arbitration. Sometime in October, Bob Pechanach, Business agent for the Union, contacted Nancy Pirkey, negotiator for the City, and asked if the City would be willing to offer the dispatchers' settlement to the police in order to settle the contract dispute. Ms. Pirkey discussed this with her client and obtained authority to make an offer to the Union on wages and health insurance. In a letter dated November 3, 2003 to Mr. Pechanach, Ms. Pirkey stated:

If the Association is interested in any of the other terms of the dispatchers settlement, then we need to include the pending grievances as part of any settlement offer. In other words, the City would only be willing to consider matching the terms of the dispatchers settlement if the Association is willing to drop the pending grievances over the SWAT team issue. We made a similar offer to the DPW bargaining unit over a grievance they have pending, and they are currently reviewing that offer.

Although not stated, this refers to the agreement the dispatchers had reached to include a provision to "increase [in] the number of Personal Days from 3 days to 4 days" in their 2003-2005 collective bargaining agreement. By letter dated November 1, 2003, the Union made a counterproposal that included "The addition of one (1) personal day". The City rejected the Union proposal by letter dated November 21, 2003 and offered another proposal to "[a]dd one additional personal day in Section 9.03, in exchange for the Association's dropping its grievances on the SWAT team." The Union rejected this offer by letter dated November 25, 2003, asking the City to make modifications to health insurance and retiree health insurance provisions.

In December 2003, additional telephone conversations between Ms. Pirkey and Mr. Pechanach ensued about health insurance coverage, as well as the language of a Grievance Settlement Agreement regarding the SWAT team grievance. By letter dated January 27, 2004, Ms. Pirkey sent Mr. Pechanach the "City's settlement offer in one last attempt to settle the police contract". Attached to this letter were three documents: 1) Settlement Offer of the City of Franklin to Franklin Police Officer's Association, WPPA Local No. 280 dated January 20, 2004; 2) Tentative Agreements Between the City of Franklin and Franklin Police Officer's Association, WPPA Local No. 280; and 3) Grievance Settlement Agreement.

In pertinent part, the Settlement Offer, at 3, reads:

ARTICLE IX – HOLIDAYS: In exchange for the Association’s withdrawal of the SWAT team grievances, the City agrees to provide one additional personal day, as follows:

Section 9.03: Employees shall be allowed ~~three (3)~~ **four (4)** personal days off per year [sic]. However, employees must give at least ten (10) days notice to the Chief of Police before using the first two (2) personal days and thirty (30) days notice before using the third **and fourth** personal days off.

Although various aspects of the Settlement Offer had effective dates, at no time was there any discussion between the parties as to the effective date of the proposed change in Section 9.03 of the Agreement. Business Agent Pechanach testified that he “assumed knowing what was included in the dispatchers tentative agreement that the personal day would be effective for each year of the agreement as I thought it was for the dispatchers.” The dispatchers’ contract covers the period 2003 through 2005 and was executed in September 2003. Ms. Pirkey testified that it was the City’s intent in the Police contract that one day be granted in 2004 and each future year.

The Union accepted the January 20, 2004 Settlement Offer proposed by the City, and by letter dated March 2, 2004, Mr. Pechanach advised Ms. Pirkey that the Franklin Police Officers Association had ratified it. The collective bargaining agreement for the period January 1, 2002 through December 31, 2004 was signed on April 20, 2004. At no time did the parties discuss the implementation of the change in Section 9.03.

Although not stated in the collective bargaining agreement, personal days must be used in the year that they are earned: they cannot be carried forward for another year and employees are not paid at the end of the year for any unused personal days. This “use it or lose it” policy is an established past practice between the City and the police union and is part of the City of Franklin Employee Handbook as well as the Franklin Police Department internal policy 10-97-15, effective December 4, 1997, revised October 31, 2003. Gary Petre, Director of Administration for the City of Franklin, testified that although he was not specifically aware of such a situation, it was possible that a personal day had been carried over due to someone being injured on the job and unable to take a scheduled personal day before the end of the year. Officer Joseph DeMotto testified to a situation of this nature, where Corporal Schenk injured his foot and was allowed to carry over scheduled personal days off and use sick leave for the injury. Officer DeMotto was a member of the Association bargaining team and testified that he was aware that the City’s personal leave policy does not permit the carrying over of personal days.

The Department of Public Works (DPW) employees also received an additional personal day as part of the settlement of their contract which, like the Police contract, resolved an outstanding grievance. The DPW contract covers the period 2003 through 2005 and was signed in January 2004. This agreement contained a retroactive increase in personal days through January 1, 2003 and was paid to the employees in 2004. This payment was part of the mediated settlement of the contract between the parties.

Further facts will be set forth in the Discussion section below.

POSITIONS OF THE PARTIES

It is the position of the Union that the modification of Section 9.03 granting four, rather than three, personal days each year of the contract is clear and unambiguous and applies retroactively to January 1, 2002 even though the agreement was not signed until April 20, 2004. The Union argues that the effective date of the additional day cannot be assumed to be the date the parties signed the new contract because such an assumption contradicts the clear language of the collective bargaining agreement itself, as found in the Duration clause, Section 28.01.

The Union contends that the City's position would render Article IX, Section 9.03 meaningless and ineffective for two years of the contract, 2002 and 2003. This cannot be, absent the clear understanding of the parties. In addition, if there was not a meeting of the minds, it was a unilateral mistake by the City and does not provide justification for reformation of the contract to conform the contract to the City's interpretation.

Finally, the Union points to the Corporal Scheck situation where personal days were carried forward due to an injury, Gary Petre's testimony that it was possible that personal days had been carried over under such circumstances, and the payment of the 2003 additional personal day to members of the DPW unit as past practice to allow Union members to utilize personal days allegedly available for 2002 and 2003 in 2004. The Association contends that the employees should be offered the opportunity to utilize the additional personal days from 2002 and 2003, by taking six personal days in 2004.

It is the position of the Employer that the increase in personal days from three per year to four per year did not go into effect until the collective bargaining agreement was signed on April 20, 2004. The Settlement Proposal of January 20, 2004 was accepted after the prior contract had expired. In order to maintain the dynamic status quo during the contract hiatus, the City had to provide three personal days per year until the new contract was ratified in 2004. Retroactive application of new terms must be specifically spelled out in the proposals, tentative agreements or language of the new contract. That did not happen in this case, and there was no discussion about retroactivity of this provision.

The City clearly tied the increase in personal days to the dropping of the SWAT grievance, and the language of the settlement proposal referenced one additional personal day. The increase in personal days was not retroactive, and in any event there is no entitlement to a fifth or sixth personal day in 2004. The clear policy and practice of the City is that personal days cannot be carried from one year to the next. The Schenk situation is the only case where carry over may have occurred, clearly not establishing a policy of carryover. The dispatchers settled their contract in September 2003, resulting in an additional personal day for 2003 and future years. The DPW unit reached an agreement that the fourth personal day in 2003 was to be paid in 2004, as there was insufficient time in 2003 after settlement had been reached for the employees to utilize the additional personal day. The Police never raised the issue of retroactivity in bargaining.

The plain language of the agreement cannot be modified to provide police officers more than four personal days in 2004. The Union understood that the City was offering one additional day in 2004 and continuing forward. If there was no meeting of the minds, it was a unilateral mistake on the part of the Union that cannot form the basis for reformation of the contractual language. The grievance should be denied and dismissed.

DISCUSSION

The language of Article IX, Section 9.03, is clear and unambiguous:

Section 9.03: Employees shall be allowed four (4) personal days off per year. However, employees must give at least ten (10) days notice to the Chief of Police before using the first two (2) personal days and thirty (30) days notice before using the third and fourth personal days off.

There is no question that each employee is entitled to four (4) personal days off per year from the time that this section, as modified, became part of the collective bargaining agreement, April 20, 2004. At issue is whether the modification of this section, from an entitlement of three (3) personal days off per year to four (4) personal days off per year, became effective with the beginning date of the collective bargaining agreement between the parties, January 1, 2002, and if so, how the additional day off in 2002 and 2003 can be retroactively enjoyed by the employees.

What is the effective date of the modification to Section 9.03?

The parties disagree as to whether the additional day was to be applied retroactively. The Association contends that this modification to the collective bargaining agreement was retroactive to January 2002 inasmuch as the Settlement Offer drafted by the Employer and accepted by the Union includes dates when other provisions are to take effect and, by default,

if there is no implementation date, the modification to Section 9.03 is retroactive to January 2002. The City points to the language of the Settlement Offer that states “In exchange for the Association’s withdrawal of the SWAT team grievances, the City agrees to provide one additional person day” and contends that the one additional personal day becomes effective when the SWAT team grievance is withdrawn, despite the modified language of Section 9.03 that follows and makes clear that there is one additional personal day per year.

The question of the retroactive application of an increase in personal days was addressed by Arbitrator Raleigh Jones in BROWN COUNTY HUMAN SERVICES PROFESSIONAL EMPLOYEES ASSOCIATION, Case 675, No. 61856, MA-12084 (7/15/03). In that case, an additional personal day was offered to the Union as a *quid pro quo* for modification of health insurance that was to take effect on January 1, 2003. The Employer argued that the effective date of the additional personal day should coincide with the insurance modifications, but failed to so state during bargaining. The Union argued that since there had been no discussion about the effective date, the generally accepted rules of contract construction required the interpretation adopted by the arbitrator: that the change was retroactive to the beginning of the contract, January 1, 2002.

The same rules of contract construction are applicable here. The meaning of a particular contract provision is to be ascertained by looking at the contract as whole. Looking at Section 9.03 together with the Duration clause, Section 28.01, that provides that the agreement is effective as of January 1, 2002 and remains in full force and effect until December 31, 2004, it appears that the modification to Section 9.03 is effective January 1, 2002. Inasmuch as other provisions, notably Article VI pertaining to wages, Article XII pertaining to Hospital and Surgical Insurance, and Appendix “A” relating to employee prescription co-pays, all have effective dates for changes, the logical inference is that changes in Section 9.03 are effective as of January 1, 2002. This is also true for the contractual changes included in the Tentative Agreements between the City of Franklin and the Association dated January 30, 2003, other than those that include specific implementation dates.

When a contract’s terms are plain and unambiguous, the arbitrator’s task is to simply apply those terms to the facts even if the results are harsh or contrary to the original expectations of the parties. Here, while it appears that it was the intent of the City that the change in the number of personal days become effective at the time of the resolution of the SWAT team grievance, in 2004, the plain words of the contract requires the undersigned to determine that the change to Section 9.03 became effective as of January 2002. The well established rule is that when a contract term is unambiguous, an arbitrator must look only at the contract itself, not extrinsic evidence, to interpret its meaning. In this matter, the contract term itself is clear but since its effective date is at issue, the parties have put in extensive evidence of bargaining history in order to argue their respective positions.

The principle that a specific mention in a contract of one matter is considered to exclude other matters of the same nature which are not mentioned also comes into play in this matter. Again, the specific references to effective dates in other sections, and not in Section 9.03, must lead to the conclusion that the modification to this provision is effective January 1, 2002.

It is well established that any contract ambiguity is to be construed against the drafting party. Here, there is no question that the language was drafted by the City. The City failed to include language in Section 9.03 to the effect that the modification was effective upon signing of the contract. There is no ambiguity in the contract language. It is silent as to effective date. Accordingly, the effective date of the change is the effective date of the contract: January 1, 2002.

The City has argued that the doctrine of dynamic status quo requires that the change be prospective, not retrospective. It is true that the City was required to continue permitting the use of three personal days per year during the contract hiatus period. This does not, however, mean that it could not negotiate with the Union and reach an agreement that would have retroactive application and permit the use of four personal leave days for each of the four years of the contract. Nor does the doctrine of dynamic status quo require the City's interpretation that absent a discussion of implementation date, the term is effective as of the signing of the new agreement. In fact, the language found in the City's Settlement Offer dated January 20, 2004 specifies that

The City and the Association agree that the provisions contained in the 2000-2001 collective bargaining agreement between the City of Franklin and the Franklin Police Officer's Association be continued in a new three (3) year agreement, except as modified by the following: . . .

and then proceeds to list the modification to Section 9.03. Although the offer to modify the language of Section 9.03 was conditioned on the withdrawal of the SWAT team grievances, the City's proposal does not indicate that the change in the language of Section 9.03 is to be effective upon the withdrawal of the grievances, nor does it specify any other effective date for the proposed change to Section 9.03.

Thus, I conclude that the modification of Section 9.03 was retroactive to January 1, 2002. While I have concluded that the change in Section 9.03 was effective as of January 2002, the parties did not negotiate or reach agreement with respect to the implementation of this change, given that the change came into being as of April 20, 2004. That is, the parties failed to address how employees would be able to utilize the additional personal day for 2002 and 2003.

Are the parties entitled to an additional personal day for 2002 and 2003 (to be taken in 2004?)

As a result of prolonged negotiations, the City and the Association did not reach a final agreement on their 2002-2004 collective bargaining agreement until January 2004. In fact, the document was not signed until April of 2004. A mediator/investigator appointed by the WERC determined that the parties had reached an impasse in bargaining in July 2003. However, they did not submit their final offers to an impartial arbitrator to decide the outstanding issues. Eventually, they reached a voluntary settlement, including issues that were not considered at the time of the declaration of impasse.

In addition to the police bargaining unit at issue here, there are at least two other bargaining units in Franklin. In July 2003, the City reached an agreement with the Dispatchers bargaining unit for the period 2003-2005 that provided for an increase in the number of Personal Days that Dispatchers could use each year from three (3) to four (4). This agreement was signed in September 2003. Thus, Dispatchers were able to use their fourth Personal Day in 2003 and each year thereafter.

Following this agreement, the Police sought to resolve their contract with the City along the same lines as the Dispatchers bargaining unit. They were able to do so, but the tentative agreement was not ratified by the Police Union until March 2004 and the document was not signed until April 2004. An additional Personal Day for each year of the contract was included, but the parties did not discuss how employees would utilize the 2002 and 2003 days.

The DPW bargaining unit also secured an additional Personal Day as part of the settlement of its 2003-2005 bargaining agreement. This agreement was reached in late 2003 and signed in January 2004. As part of the mediation that led to the settlement, the parties agreed that the employees would be paid for the 2003 Personal Day and use the additional day each subsequent year.

The Association did not bargain with the City regarding the implementation of the additional Personal Days. In order to utilize the additional day from 2002 and 2003 in 2004, the employees would have to, essentially, carry them over from 2002 and 2003 so as to utilize them in 2004. This, however, contradicts the well established policy of the City of Franklin that Personal Days cannot be carried from one year to the next. The City of Franklin Employee Handbook¹ states:

¹ The Handbook also provides that “[w]hen the same subject a [sic] matter is addressed in both these policies and a collective bargaining agreement or state or federal law which may apply to you, only the collective bargaining agreement or state or federal law will apply.” Thus, there is no argument that the employees may be entitled to five (5) days of paid personal leave.

Personal Leave Days

Regular full-time employees shall be eligible for either four (4) or five (5) days of paid personal leave per calendar year, depending on position and length of service.

Employees shall give their supervisor at least three (3) days notice before taking a personal leave day, unless the mutual agreement of the supervisor and employee waives such notice.

Personal leave days shall not be accumulated. Any unused leave at the end of the calendar year shall be forfeited.

The Franklin Police Department also has a policy with regard to Personal Leave. Policy 10-97-15 adopted December 4, 1997 and revised October 31, 2003, titled "1998 Vacation/Personal Day Off/Compensatory Time Due Off Selection" provides the following guidance on the use of personal days off:

Compensatory time due off, personal days off, or individual vacation day requests for time off of periods of two (2) days may be granted by the employee's immediate supervisor. The approving supervisor shall check for and take into consideration staffing requirements for any special assignments or directed patrol missions when determining if approval should be authorized. Requests for periods of three (3), or more days must receive final approval of the Operations Commander to be sure requests meet the guidelines of this policy, and do not interfere with agency operational or training plans or requirements set by the Chief. In the absence of the Operations Commander, requests may be approved by one of the Lieutenants of the Chief of Police. Compensatory time due off, personal days off, or individual vacation day requests of the Operations Commander, Lieutenants, and Non-Represented Employees shall be approved by the Chief of Police.

No unscheduled and unapproved personal days off may be carried past November 30 of any year. Personal days off shall not be accumulated from year to year, except as may be permitted by the Chief of Police under special circumstances, with the knowledge and approval of the Common Council. It is the employee's responsibility to schedule use of their personal day(s) early enough in the year to assure staffing needs will allow them off. Not doing so may result in the loss of an employee's personal day(s). (Emphasis added)

This policy is well known by the members of the Police Department, and is followed by the Department and its employees. Union Business Agent Petranach and Officer DeMotto, as well as City Administrator Petre all testified that City policy did not permit carry over of personal days. Although Officer DeMotto testified regarding a situation in which he believes an employee was allowed to carry over personal days when he became injured on previously scheduled personal days off and was, supposedly, permitted to substitute sick leave for the scheduled time, City Administrator Petre was not aware that this had occurred. Mr. Petre indicated that this was possible, but the substance of his testimony was that had this happened, it was an isolated incident. One such instance does not provide a basis for the Union's contention that there is a past practice of permitting carryover of Personal Days.² Based upon the Police Department policy, for the Association to prevail on this grievance, the City Council would have to approve the carry over of one additional day from 2002 and one additional day from 2003 in order for the employees to utilize these days in 2004. There is no evidence that the Council took such action.

Further, the language of Section 9.03 itself clearly limits the number of Personal Days off an employee may take in a given year:

Section 9.03: Employees shall be allowed four (4) personal days off per year. However, employees must give at least ten (10) days notice to the Chief of Police before using the first two (2) personal days and thirty (30) days notice before using the third and fourth personal days off.

This language, although in effect as of January 1, 2002, does not permit an employee to utilize more than four (4) Personal Days in one year. Thus, the additional (fourth) personal day allotted to each employee in 2002 and in 2003 cannot be utilized under the clear and unambiguous language of this section of the contract. As framed by the City, the issue is whether the Employer violated the bargaining agreement by not allowing more than four personal days off to employees in 2004. There being no other section of the contract, memorandum of understanding, or side letter regarding use of these two days, and the fact that the employees cannot accumulate days from one calendar year to the next, the answer to this question must be no.

The issue, as framed by the Union, is whether the Employer violated the contract in refusing a fourth personal day in 2002 and 2003. The answer must also be no, as the requests were not made in 2002 and 2003 and the contract only permits four (4) Personal Days in 2004.

² The Union also appears to argue that payment for the days employees were unable to utilize is also a past practice that should be followed here. The evidence is clear that the DPW unit bargained for this payment in lieu of the day off.

Interestingly, both parties contend that there was a unilateral mistake that resulted in the collective bargaining agreement being drafted in the manner it was. Both point to the other as having made the mistake, and both agree that reformation of the contract is not appropriate under these circumstances. In order to sustain the grievance, the contract would have to be rewritten to provide a means for the employees to utilize the additional day from 2002 and 2003, or a side Letter of Agreement spelling out how these days were to be used must exist. Unlike the DPW unit that specifically bargained the implementation of the modified provision on personal days, the Association did not do so. While there may have been no meeting of the minds as to the effective date of the modified provision, and clearly no mutual understanding of how the 2002 and 2003 additional personal days could be utilized by the employees, under the circumstances presented here, and the clear and limited authority granted to the Undersigned by the language of the grievance arbitration clause, Section 5.04, I decline to add language to the contract so as to permit the employees to utilize more than four personal days in 2004.

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

AWARD

1. The effective date of the modification to Section 9.03 is January 1, 2002.
2. No, employees are not entitled to utilize additional personal leave days from 2002 and 2003 in 2004 or later.

Accordingly, the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 15th day of August, 2005.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator