BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF BEAVER DAM (POLICE DEPARTMENT)

and

LABOR ASSOCIATION OF WISCONSIN, INC.,
BEAVER DAM POLICE ASSOCIATION, LOCAL 206

Case 94
No. 64907
MA-13049

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., N116 16033 Main Street, Germantown, Wisconsin 53022, on behalf of the Grievant and the Association.

Mr. Brad Fulton, DeWitt, Ross & Stevens, S.C., 2 East Mifflin Street, Madison, Wisconsin 53703, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 2002-04 labor agreement between the captioned parties, the parties jointly selected Arbitrator Sharon A. Gallagher through the Wisconsin Employment Relations Commission, to hear and resolve a dispute between them concerning whether Grievant Mark Breselow was credited with the appropriate amount of vacation time when the City issued his separation data calculation on April 27, 2005. Hearing was held at Beaver Dam, Wisconsin on September 27, 2005. No stenographic transcript of the proceedings was made.

On November 3, 2005 the Arbitrator sent the parties a letter suggesting a settlement proposal. On November 7, 2005, the parties indicated they were not interested in settlement. The parties agreed to submit their post-hearing briefs directly to each other, copy to the Arbitrator, post-marked November 7, 2005. The Association waived the right to file a reply brief. The City filed its reply brief by November 23, 2005, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues to be determined herein. However, the parties agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument in the case as well as their suggested issues. The City suggested the following issues:

1) Did the City violate the terms of the labor agreement when it paid Officer Breselow's vacation upon his retirement from the Beaver Dam Police Department?

2) If so, what is the appropriate remedy?

The Association proposed the following issues for determination herein:

3) Did the Employer violate the clear and unambiguous terms of the agreement when it failed to include 25 vacation days in the payout Officer Mark Breselow received upon his retirement from the Beaver Dam Police Department?

4) If so, what is the appropriate remedy?

Based upon the relevant evidence and argument and the fact that the Association's issues contained argument within the Arbitrator's authority, the Arbitrator finds the City's issues reasonably state the issues in the case and they shall be decided herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE III – GRIEVANCE PROCEDURE

Section 3.01: The grievance procedure provided for in this Article shall apply only to grievances involving the interpretation or application of a specific provision of this Agreement. Grievances required to be in writing shall set forth the basis of the grievant's claim. Suspensions, demotions and discharges shall be handled in a manner consistent with § 62.13(5) Wis. Stats.

Section 3.02: Both the employees and the City recognize that grievances and complaints shall be settled promptly and at the earliest possible stage and, therefore, agree that the grievance processes must be initiated within forty-five (45) calendar days of the incident or the grievance shall be invalid.

Step 1: The aggrieved employee and/or his representative shall present the grievance in writing to the Police Chief. The Police Chief shall attempt to make a mutually satisfactory adjustment and shall submit a written response to the aggrieved employee and/or his representative with ten (10) workdays from his receipt of the grievance.

Step 2:

a. For grievances which allege a violation of the express provisions of this Agreement and do not involve suspension, demotion or discharge of any employee covered by this Agreement, the grievance shall be considered settled at Step 1 unless, within ten (10) workdays from the date of the Police Chief's response, the aggrieved employee and/or his representative shall request, in writing, to the Chairman of the Police and Fire Commission that the dispute be submitted to the police and Fire Commission. The Police and Fire Commission shall confer with the aggrieved employee and/or his representative before making its decision and shall submit its written decision to the aggrieved employee and/or his representative within twenty (20) workdays from its receipt of the grievance.

. . .

Step 3: The grievance shall be considered settled in Step 2(a), above unless, within ten (10) workdays form the date of the final decision or last date due, the bargaining unit shall notify the Mayor, in writing, that the matter is to be submitted to arbitration and shall request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to the parties.

Section 3.03: Each party shall alternately strike two (2) names from the list submitted by the Wisconsin Employment Relations Commission. A flip of the coin shall determine who strikes first. The name remaining shall be the arbitrator.

. . .

Section 3.04: Each party shall share equally in the cost of the arbitrator.

Each party, however, shall bear its own costs for witnesses and all other out-of-pocket expenses, including possible attorneys' fees.

Section 3.05: Upon completion of this review and hearing, the arbitrator shall render a written decision as soon as possible to both parties, which shall be final and biding (sic) upon both 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.

. . .

ARTICLE XIII – VACATIONS

Section 13.01: Each employee shall be granted vacation with pay according to the following schedule:

After 1 year of continuous employment	-	10 working days
After 6 years of continuous employment	-	11 working days
After 8 years of continuous employment	-	12 working days
After 9 years of continuous employment	-	13 working days
After 10 years of continuous employment	-	14 working days
After 11 years of continuous employment	-	15 working days
After 12 years of continuous employment	-	16 working days
After 13 years of continuous employment	-	17 working days
After 14 years of continuous employment	-	18 working days
After 15 years of continuous employment	-	19 working days
After 16 years of continuous employment	-	20 working days
After 17 years of continuous employment	-	21 working days
After 18 years of continuous employment	-	22 working days
After 19 years of continuous employment	-	23 working days
After 20 years of continuous employment	-	24 working days
After 21 years of continuous employment	-	25 working days

Section 13.02: Vacations shall be computed on the anniversary date of initial employment.

Section 13.03: Employees who separate from City employment will be paid, as their regular salary pay, earned and unused vacation accumulated to their credit.

Section 13.04: All vacation schedules, including the number of employees allowed off at the same time, shall be approved by the Police Chief.

. . .

Section 13.06: Vacations must be taken in the year in which they accrue or they shall be considered lost, unless for the convenience of the Department it is determined that the vacation time should be carried over to the following calendar year.

. . .

Section 13.08: The vacation schedule shall be posted no later than January 15th of each year, taking into account seniority on a shift basis:

a) First pick by a lieutenant or sergeant.

b) Second pick by a member of the bargaining unit assigned to that shift based on shift seniority.

c) All further picks on that shift by departmental seniority, regardless of rank or position in or outside the Bargaining Unit.

The vacation schedule shall be posted for a period of thirty-six (36) calendar days and individual employees, on a seniority basis, shall retain the schedule for a period not to exceed four (4) calendar days for the purpose of selecting his vacation. After each employee has made a vacation selection, the Chief of Police or his designee shall approve the selection prior to the next employee making a selection. If an employee does not make his vacation selection within his four (4) day period, the selection of vacation on a seniority basis shall be lost to that employee. If the employee selects to only pick a portion of his vacation accrual, any carry-over choices shall be made after all employees have had the opportunity to select vacation on a seniority basis.

Section 13.09: Vacations may be taken in increments of one (1) hour or more, at the employee's option.

FACTS

The Grievant, Mark Breselow, began working for the Beaver Dam Police Department (BDPD) on December 1, 1977 until his retirement (over twenty-seven years later) from the BDPD on May 6, 2005. On April 27, 2005, the City notified Breselow that he had used his 2003-04 vacation allotment of 25 days in 2004 (Jt. Exh. 10).

Breselow objected to this calculation indicating that he believed "(t)here should be an additional 212.5 hours for a total of 235.5 hours of vacation time due." Breselow filed the instant grievance on May 9, 2005, asserting that he was due 212.5 hours of vacation as of December 1, 2005 because he had not been allowed to take any vacation time off after his first year of employment. In this regard, Breselow stated herein that he asked Sergeant Ron Hoffman whether he could take his vacation after his first year anniversary on December 1, 1978. Hoffman told Breselow he could not take his 10 days of vacation in December, 1978 because vacations had already been selected and approved through the end of the year. Breselow stated that he never requested to carryover his 1977-78 vacation and he did not file a grievance regarding Hoffman's refusal to allow him to use his 1997-98 vacation. Breselow stated that he never received a vacation balance confirmation for 1977-78 and he never got any vacation credited to him for 1977-78.

It is undisputed that new employees are subject to a one-year probationary period and that probationary employees have never been allowed to take vacation during their probation before their anniversary date. After the probationary period expires, the officer may take vacation in the year in which his first anniversary date falls. It is also undisputed that the City kept no vacation records for the years 1977 through 1983 and the City offered no evidence herein to dispute Breselow's testimony regarding what Breselow was told concerning his vacation usage in December, 1978 by Sergeant Hoffman. The City's Personnel Policy states that employees cannot carryover vacation past the first quarter except in extreme circumstances. (The City's Policy was not submitted herein).

The City offered the following data regarding Breselow's history of vacation eligibility and use during his City employment:

ANNIVERSARY DATE	YEARS OF SERVICE	ELIGIBLE VACATION DAYS	DAYS USED
1-Dec-78	1	10	*Unknown
1-Dec-79	2	10	*Unknown
1-Dec-80	3	10	*Unknown
1-Dec-81	4	10	*Unknown
1-Dec-82	5	10	*Unknown
1-Dec-83	6	10	*Unknown
1-Dec-84	7	10	9
1-Dec-85	8	12 + carryover	13
1-Dec-86	9	13	13
1-Dec-87	10	14	14
1-Dec-88	11	15	15
1-Dec-89	12	16	16
1-Dec-90	13	17	17
1-Dec-91	14	18	18
1-Dec-92	15	19	19
1-Dec-93	16	20	20days 2-1/ hrs

1-Dec-94		17	21	21
1-Dec-95		18	22	22
1-Dec-96		19	23	23
1-Dec-97		20	23	23days 15 mins
1-Dec-98		21	23	23
1-Dec-99		22	23	23
1-Dec-00		23	23	23
1-Dec-01		24	23	23
1-Dec-02		25	25	25
1-Dec-03		26	26	25
1-Dec-04		27	25	25
1-Dec-05	**(contract unsettled – retired on 05/06/05 prior to reaching '05 anniversary date – entitled to pro-rated vac)**	**10 days 6 hours 2 days**		**8 days used - 2 days 6 hours paid out**

NOTE - * records were kept (sic) in the Beaver Dam Police Department during years indicated and are no longer available

The Association did not dispute this data. Association President Johnson stated herein that the Association has never objected to the City's insistence that employees use their vacation on a calendar year basis.

After the grievance was filed the Association and the City exchanged position letters. The Association's January 12, 2005 letter read in relevant part as follows:

. . .

> I have been asked to give my opinion and interpretation of the collective bargaining agreement in respect to vacation allotment. It is my opinion that employees earn vacation in one calendar year from anniversary date to anniversary date to be taken in the following subsequent 12-month period. In cases where an employee terminates their employment with the City, the employee would have whatever vacation had been accrued in the previous twelve months between anniversary dates, minus any vacation time that was taken plus accrued vacation for the months the employee worked from his last anniversary date to the date of termination. This opinion is supported by the language in the contract.
>
> In Article XIII, Section 13.01, employees are not allowed to take vacation during the first year of employment, provided, however, after one year of continuous employment, they are entitled to 10 working days. The vacation schedule then graduates up based on the years of employment.
>
> Section 13.02 clarifies that vacations are accumulated and calculated based on the anniversary date of initial employment.
>
> Section 13.03 addresses employees who separate from the City and indicates they are entitled to all earned and unused vacation accumulated to their credit.

Section 13.06 addresses vacation that is earned and accrued which must be taken in the year that it is accrued. Vacation time which is earned in one year becomes accrued upon the anniversary date. There is a distinction that is made between vacation time that is earned in one year which becomes accrued upon the anniversary date and the accrued vacation which is referenced in Section 13.06, which must be taken before the next anniversary date or it is lost.

With employees earning vacation in the first year of employment and not being able to take these days, the concept of earning in one year and taking it in the following twelve month period between anniversary dates is a common practice and the intent of the language set forth in Article XIII.

Accordingly, based on my opinion, it should be applied to Officer Mark Breselow as follows.

It is my understanding that Officer Breselow's hire date was December 1, 1977. Accordingly, on December 1, 2005, he has worked for the City of Beaver Dam for 28 years. Based on the vacation schedule set forth in Section 13.01, Officer Breselow is entitled to 25 vacation days as of December 1, 2004 and starts to earn vacation at the rate of 1/12th of his allotment per month of employment. 25 days of vacation divided by 12 months equals 2.083 days of vacation per month after his anniversary date. Accordingly, for each month that Officer Breselow works after December 1, 2004, he is entitled to the 25 days he has earned between December 1, 2003 and 2004, he is entitled to the 25 days he has earned between December 1, 2003 and December 1, 2004 plus 2.083 vacation days for each month following December 1, 2004 until the date he retires.

. . .

The City responded to the Association's January 12th letter on January 26, 2005, as follows:

. . .

I have been asked to provide a response to your January 12, 2005 letter to the City of Beaver Dam setting forth your opinion and interpretation of the collective bargaining agreement with respect to vacation allotment. The City disagrees with your interpretation, and the past practice throughout the course of the City's relationship with the Union supports the City's interpretation.

The practice of the City and the Union has always been that employees earn vacation in the first year of employment, but that they are not able to use those

vacation days until after they have worked one full year. The employee then has from his first anniversary of employment through the end of that calendar year to use those vacation days. However, consistent with Section 13.06, in subsequent years employees have to use the vacation days that they accrue in the calendar year, of the anniversary date.

While this program may work to the detriment of an individual such as Officer Breselow – who had to use his 10 days of vacation accrued in his first year from his one year anniversary date of December 1, 1978 through the end of calendar year 1978 – it works to the advantage of others and has been consistently applied over the years. A review of Officer Breselow's vacation allotment over the past decade confirms not only the City's interpretation, but the well-established past practice of the parties. Specifically, from 1994 through the 2001 agreements, the vacation schedule was as follows:

After 1 year of continuous employment.....	10 working days
After 7 years of continuous employment.....	11 working days
After 8 years of continuous employment.....	12 working days
After 9 years of continuous employment.....	13 working days
After 10 years of continuous employment.....	14 working days
After 11 years of continuous employment.....	15 working days
After 12 years of continuous employment.....	16 working days
After 13 years of continuous employment.....	17 working days
After 14 years of continuous employment.....	18 working days
After 15 years of continuous employment.....	19 working days
After 16 years of continuous employment.....	20 working days
After 17 years of continuous employment.....	21 working days
After 18 years of continuous employment.....	22 working days
After 19 years of continuous employment.....	23 working days[1]

On December 1, 1993, Officer Breselow celebrated his 16 year anniversary with the Department. Under the interpretation of the agreement set forth in your letter, Officer Breselow only would have been entitled to 20 vacation days in 1994. However, consistent with the City's interpretation and past practice, Officer Breselow received 21 vacation days in 1994 because his 17 year anniversary date took place in 1994. Indeed, the vacation days allotted to Officer Breselow since 1994 are as follows:

[1] Actually, the vacation schedule did not include a step for the 19th year until 1995. However, that is irrelevant for the purposes of our illustration.

Year	Vacation days
1994	21
1995	22
1996	23
1997	23
1998	23
1999	23
2000	23
2001	23
2002	25[2]
2003	25
2004	25

Copies of Officer Breselow's "Employee Attendance Records" from 1994 through the present are enclosed.

Accordingly, Officer Breselow is entitled to 2.083 vacation days for each month following December 1, 2004 until the date he retires.

. . .

The Association responded to Fulton's letter on January 28, 205, as follows:

. . .

I have reviewed your correspondence dated January 26, 2005 regarding the vacation allotment policy and the procedure as it applies to Officer Mark Breselow. It appears that we do not agree on the City's interpretation of what Officer Breselow is entitled to. It is my understanding that Officer Breselow did not get any vacation during the first year that he was employed, i.e., 12-1-1977 through 12-1-1978. Under your analogy, he would have had available to him 10 vacation days as of 12-1-1978 to be used up until 12-1-1978, (sic) and as of 1-1-1979, he would have received an additional 10 days. This is not the case, nor do your handouts of his work schedule provide any proof that this occurred. In fact, Officer Breselow advised me that he took no vacation days until his one year was up on 12-1-1978 and then he was afforded 10 vacation days to be used from 12-1-1978 and then he was afforded 10 vacation days to be used from 12-1-1978 through 1979.

[2] The 2002-2004 Agreement increased the maximum number of vacation days to 25.

> If you have any records to the contrary, I would certainly like to see them. Otherwise, my position as stated in my letter of January 12, 2005 that the vacation is earned in one year to be taken in the following year is the position of the Association and that Officer Breselow, as of December 1, 2004, was entitled to 25 vacation days plus 2.83 vacation days for each month following December 1, 2004. It appears the accrual rate is an agreement.
>
> Please check your records to see if Officer Breselow was afforded vacation days in 1978 and 1979 consistent with your policy. If not, I respectfully request that you revisit our position so we can come to a voluntary agreement as to how this is going to be handled for purposes of a payout for Officer Breselow when he retires. I do not believe that the method of vacation allotment that is currently in place is at issue. I am told by the officers that the way vacation is administered is acceptable. It appears that the only question is what you are entitled to when you terminate your employment.
>
> . . .

Finally, the City responded to the Association's January 28th letter on March 22, 2005, as follows:

> The City's position, as set forth my (sic) January 26, 2005 letter, is clear: "Officer Breselow is entitled to 2.083 vacation days for each month following December 1, 2004 until he retires." The City's position is supported not only by the collective bargaining agreement, but by the documents I previously provided to Pat Corragio and the well-established past practice of the parties.
>
> Your complaint focuses on the fact that Officer Breselow apparently did not take the ten days of vacation he was entitled to during the month of December, 1978. If Officer Breselow is somehow claiming that he was not allowed to use vacation time during that period, he presumably had remedies available to him under the collective bargaining agreement in existence at the time, but his time for filing any such grievance is certainly long past.
>
> Please keep in mind that should the union grieve this issue upon Officer Breselow's retirement and obtain a ruling that its interpretation of the agreement is correct, all of your bargaining unit members will then have taken vacation days from time to time over the last many years to which they were not entitled. Should that be the case, the City will seek to recover payments for those vacation days from all employees.
>
> Officer Breselow was entitled to ten vacation days in the month of December, 1978. His decision not to use those days was his, and his alone. More

importantly, his apparent failure to use the vacation days in 1978 in no way undermines the decades of past practice established by the parties.

The City submitted Employer Exhibit 5 which contained the "Employee Separation Data" for eight former employees of the Police Department who retired from 2000 through 2004. Three of these employees were non-represented (Raether, Kaiser and Schumacher) while the remaining five employees were members of the bargaining unit when they retried (Meyer, Sauer, Cigelske, Marshall and Krobert). These documents showed that if represented and non-represented Police Department employees retired prior to their anniversary dates of employment, they were all granted prorated vacation from the date of their last anniversary to the date of their last day of work at the City. The documents regarding Meyer also showed that he was credited with a full year's vacation because he was employed for the entire year prior to his retirement, and he worked through his anniversary date in the year of his retirement but not beyond that.

POSITIONS OF THE PARTIES

Association:

The Association argued that the pertinent language of the labor agreement is clear and unambiguous. As such, the Arbitrator must give full effect to the plain meaning of the language used. In the Association's view, the contract clearly states that vacation is earned in one year and is to be taken after the year it is earned; that the consistent use of the word "after" in Section 13.01 shows that an employee earns vacation during the first year of employment and then from anniversary date to anniversary date and that employees must then use the vacation earned across the following 12 months (Assoc. Brief, p.7).

In the Association's view, this analysis is supported by the language of Sections 13.03 and 13.06. Therefore, when an employee starts working for the City he/she begins to earn vacation beginning on their date of hire and on their first anniversary date, the vacation the employee has earned is accrued to their benefit and must be taken in the ensuing 12 months under Section 13.06. The Association cited the legal definitions of the terms "accrue" and "earn" from Black's Law Dictionary in further support of this analysis.

The Association urged that the City's arguments in this case are flawed and "ludicrous." In this regard, the Association noted that the City appeared to be arguing that employees only earn vacation in the first year of employment and that thereafter employees only accrue vacation which they must use in the year of accrual. The Association argued that this grievance is not about when an employee may take vacation; it is about when employees earn and accrue vacations. The fact that the City has allowed employees to use vacation before it is accrued is a management decision which only becomes important when the employee

leaves employment. Here, Breselow used only 10 days of vacation from 1978 to 1983 and he was allowed to pick his vacation starting in January of each year even though his anniversary date was not until December 1st of each year.

The Association contended that the application of the City's approach in this case would mean that every officer would lose accrued vacation during their employment with the City because when officers leave employment they are given no credit for the vacation earned in the year prior to their termination of employment. Here, Breselow will forfeit 25 days of vacation if the City's application of Article XIII is approved by the Arbitrator. This would constitute a harsh and absurd result that the Arbitrator should eschew.

The Association urged that evidence of past practice is not relevant as the language of the contract is clear and unambiguous. Even if the Arbitrator finds past practice evidence relevant, the City failed to prove any practice existed. In this regard, the Association noted that the City could not prove that the Association was ever made aware of the City's method of calculating officers' vacation benefits at retirement before Breselow brought the issue to the Association's attention. Therefore, the City failed to prove that the Association mutually agreed to the practice. The Association also noted that the City failed to put in any evidence showing its alleged practice was used in 1978 through 1983.

Furthermore, the Association pointed to the differences between the instant contract regarding vacation and the City's Firefighter, Telecommunicator, and AFSCME bargaining unit labor agreements, which showed that all City employees were not treated alike as Mr. Dummer claimed herein (Assoc. Exhs. 3-5). The Association found it significant that the City failed to put in any evidence showing other union employees' vacation cash outs at retirement to support Dummer's testimony on this point.

Also, the Association asserted that the manner in which the City has treated its non-represented employees' vacation cash outs at retirement is not relevant to this case, as the City can treat its unrepresented employees any way it wishes. The Association renewed its objection to City Exhibit 5 on this basis. The Association urged the Arbitrator to sustain the grievance and make Breselow whole.

City:

The City argued that the language of the labor agreement regarding vacations is clear and unambiguous; that over many years, the City has administered its vacation policies/practices in a clear and consistent manner; and that the Association has been fully aware of the City's policies and practices and it has never objected thereto or attempted to bargain regarding the City's administration of its vacation policies/practices. Thus, in the City's view, under the clear terms of Article XIII, employees accumulate vacation days that must be used in the calendar year they are accrued or the days are lost; that the term "year" in Section 13.06 must mean calendar year; and that every year after the employee's initial year of

employment, employees are allowed to pick and use vacation prior to actual accrual on their anniversary dates, across the entire calendar year.

The City noted that Breselow never objected to the City's treatment of his vacation entitlement across the 27 years of his employment; that Breselow (like every other officer) received an "Employee Attendance Record" every January which showed his vacation and sick leave entitlement for that calendar year, based upon the number of days he would accrue that year as of his December 1st anniversary date. The fact that Breselow lost the opportunity to use the 10 days of vacation he earned after working one year for the City (from December 1, 1977 through December 1, 1978) was unfortunate but irrelevant to this case in the City's view. The documents of record including the past labor agreements, "Employee Attendance Records," the vacation cash out documents for other Police Department employees and the testimony of Mr. Dummer, showed that the City has been consistent in its approach regarding vacation cash outs in this bargaining unit and that it properly calculated Breselow's vacation benefit upon his retirement.

However, the City noted that the testimony regarding what occurred concerning Breselow's 1978 vacation actually supported its arguments herein. In this regard, the City observed that Breselow demonstrated that he was well aware that he was entitled to 10 working days of vacation after he had completed his first year of employment with the City when he asked Sergeant Hoffman to use his vacation after December 1, 1978. The fact that Breselow did not request to carry over his vacation and that he did not file a grievance when Hoffman refused to allow him to use any vacation before the end of calendar year 1978, showed that Breselow knowingly waived his right to insist upon payment therefor. The fact that Breselow requested to carry over one day of vacation in 1984, also showed that he understood the City's vacation practices. In these circumstances, the City urged the Arbitrator to deny and dismiss the grievance in its entirety.

Reply Brief:

The Association declined to file a reply brief. The City filed its reply brief by e-mail.

City:

The City asserted that evidence of past practice is relevant and instructive here as both the City and the Association have argued that the pertinent contract language is clear and unambiguous. In this regard, the City noted that the City has argued that "year" as used in Section 13.06 must mean calendar year , while the Association has argued that "year" must mean the 12 month period following and employee's anniversary date. However, the City noted that Breselow, Association President Johnson and City witness Dummer all confirmed the City's past practice (over more than 25 years) of requiring employees to use or lose their vacation during the calendar year it is earned. In addition, the City's method of calculating and crediting vacation was annually reconfirmed to each employee when they received their

individual "Employee Attendance Records", making the Association's argument that it was unaware of the City's past practices regarding vacation unbelievable.

The City urged that this case was brought in a blatant attempt to recover vacation time Breselow lost because he failed to use /request to carry it over. Breselow long ago waived his right to the 10 days vacation he earned as of December 2, 1978 and the Arbitrator cannot intervene concerning the matter. Also, if the Association's analysis is approved, Breselow would receive more vacation than he was entitled to, so that even if the Arbitrator rules in favor of the Association, she should reduce Breselow's make-whole remedy accordingly.

DISCUSSION

Both the City and the Association have argued that the relevant language of the labor agreement is clear and unambiguous. Yet the parties have vastly different interpretations of the language and its affect. This necessarily means that the relevant language is far from clear and unambiguous, making evidence of bargaining history and past practice relevant and admissible to assist the Arbitrator in determining the parties' meaning and intent in drafting the language of Article XIII as they did. Here, neither party offered evidence of bargaining history and only the City offered evidence of past practice.

A close analysis of Article XIII is necessary as a starting point in this case. It is significant that there is no reference in the labor agreement to proration of vacation benefits or to what vacation benefits are due upon retirement/separation of employment. Had the parties made express provision for vacation cash outs, this case would likely never have been brought.

Section 13.02 states that "vacations shall be computed on the anniversary date of initial employment". This Section identifies the date upon which the prior section begins to count the "year of continuous employment," as being "on" the anniversary date. There is no reference to any other method of identifying the start of each year or to any other date for counting the year (or years) of continuous employment employees must serve before they "shall be granted vacation with pay" under Section 13.01. Section 13.01 mandates that employees be granted vacation with pay for stated numbers of working days only "after" they have been continuously employed by the City for specific numbers of years. In this context, the use of the word "on" in Section 13.02 and the use of the word "after" in Section 13.01 require a conclusion that in order to accrue and be credited with a full year's worth of vacation, an officer must be employed on his/her anniversary date.

In addition, Section 13.06 states that vacations must be taken in the "year in which they accrue or they shall be considered lost…." In my view, this portion of Section 13.06 reconfirms other sections of the contract, such as 13.01 and 13.02, that indicate that accrual occurs on the anniversary date of employment and therefore, the employee must use his/her vacation in the year that anniversary falls or stand to lose it. The Association has argued that

the contract gives employees 12 months after their anniversary dates to use their vacation. Neither the record documents nor any Section of Article XIII support the Association's assertion on this point and it has been rejected.

It is Section 13.03 that is really the difficulty here, as it refers, for the first time, to "earned and unused" vacation. Section 13.03, states that employees who separate from City employment will be "paid...earned and unused vacation accumulated to their credit." In an effort to distinguish the concept of earned vacation from accrued vacation, the Association cited definitions of the words "earn" and "accrue" from a prominent law dictionary. It is significant that the word "accrue" does not appear in Article XIII. Whether one uses an ordinary dictionary or a law dictionary, the term "accrue" indicates that one has gained an enforceable right by the passage of time, and the word "earn" means that one is paid or receives something of value in exchange for his/her past labor or service.

And so we have come full circle, as the above inquiry necessarily brings us back to Section 13.01 which contains the definition of how/when employees are granted vacation. Section 13.01 clearly and unambiguously requires that employees serve a full year (or full years) of continuous employment with the City before they are credited with (or have earned) and are entitled to rely on receiving the listed amounts of vacation per year. And Section 13.02 makes completely clear that the only means of counting years for purposes of vacation entitlement is on each officer's anniversary date.

Given the above analysis, there is simply no logical way to apply all of the terms of the labor agreement (as is required by arbitral rules of construction) and to grant employees who retire/separate from their employment before their anniversary dates of employment a full share of vacation for their last year of employment, as Breselow has requested herein. Rather, even though proration is not mentioned at any time in Article XIII, the overall language of the Article could be reasonably interpreted to mean that vacation of officers who retire/separate prior to their anniversary dates of employment be prorated based upon the number of days they are employed from their last anniversary date to the date of their retirement/separation, as they have not served the full year's continuous employment required by Section 13.01 and they therefore have not earned a full year's vacation, computed under Section 13.02. This is what the City did in the past and in Breselow's case. In the alternative, the City could have interpreted the contract to mean that officers who fail to work through their anniversary dates prior to retirement/separation would not be entitled to any vacation as none would be "earned and unused" before the officer's anniversary date. The City chose not to take this path preferring to give officer's vacation benefit during the period of their service before their anniversary dates during the year before retirement/separation.

The parties have argued strongly regarding past practice. Based upon the facts of record, it is clear that Association officers and members have been fully aware for many years of the City's practice of crediting officers' vacation for each year no matter when their anniversary date falls. However, no evidence was presented to show that this situation has

ever occurred before Officer Breselow brought it to the attention of the parties and the City failed to prove that in the past, they ever spoke to the Association about their method of calculating vacation benefits for employees who would separate/retire. The City also failed to show that they sent copies of any retiring/separating employees' benefit calculations to the Association in the past. Thus, a mutually agreeable past practice was not proved herein.

Although not sufficient to prove past practice regarding its method of calculating vacation benefits at retirement/separation, City Exhibit 5 is relevant and admissible to demonstrate how the City has consistently interpreted Article XIII when unit employees have retired/separated. In this regard, I note that Officers Krobert, Marshall, Cigeske and Sauer all received prorated vacation from their last anniversary date to their chosen date of retirement, and no more. Also, Officer Meyer received his entire year's vacation for 2000-01 (23 days) because he worked through his anniversary date of February 1st but not beyond it.

The Association has argued that City Exhibit 5 is tainted because it contains non-represented employees' as well as unit employees' benefit calculations. Although this Arbitrator would normally agree with the Association that non-represented employee data is not relevant under this contract, the fact that the City calculated Supervisors Raether, Schumacher and Kaiser's benefits in exactly the same fashion that the City calculated unit employees' benefits strengthens the City's argument that it has been consistent in its approach. In addition, it is significant that the Association offered no contradictory evidence on this point.

The Association offered several labor agreements from other City bargaining units (Assoc. Exhs. 3-5) in an effort to show that the City has been inconsistent in administering vacation benefits and to impeach the testimony of Mr. Dummer, that he has treated all City employees the same regarding vacation benefit calculation at the time of retirement/separation. In my view, the Association failed to meet its burden of proof on both of these counts. The Firefighter and AFSCME labor agreements are not relevant or probative of the issues before me as no one from this bargaining unit was involved in negotiating those agreements or subject to their terms. In these circumstances, we have no idea why the language was written as it was in those agreements. In addition, the Telecommunicator contract contains language identical to Section 13.01, 13.02 and 13.03 and it otherwise supports the above analysis of the effective labor agreement.

Regarding Mr. Dummer's testimony that he has treated all City employees the same for purposes of vacation calculation at retirement/separation, the documentary evidence generally supports Dummer's statement as it relates specifically to the issue of proration presented in this case. In short, the Association failed to prove that the City has been inconsistent in calculating vacation benefits for retiring/separating employees.

The fact that the City has allowed all non-probationary employees of the Police Department to select and use their vacation (pursuant to Section 13.08), according to their

seniority, has simply meant that officers like Breselow who were hired and began their City employment late in a calendar year have been allowed to use their vacation across the calendar year (after their first anniversary date) in which they would later earn and accrue it. Were this accommodation not made, Breselow would have had to use all of his vacation between December 2nd and 31st each year unless he requested to carry it over into the following calendar year under the language of Section 13.06. Such an approach would have been unworkable and it would have denied Breselow his seniority rights to pick vacation.

It is also very important that Breselow was personally aware of the City's interpretation of his vacation rights as early as 1978, when Breselow requested to take the 10 days of vacation he had earned from December 1, 1977 through December 1, 1978, and Sergeant Hoffman denied his request because no days were open from December 2nd to the end of calendar year 1978 that Breselow could select. It is also significant that Breselow then failed to file a grievance or to request to carryover vacation when Hoffman denied his request. At this point, Breselow knew or should have known that by his actions in 1978, he was waiving his right to insist upon recovering his lost vacation from 1977-78. Indeed, Breselow admitted herein that he never received any extra vacation allotment during his career. Yet, he failed to file a grievance at the point he discovered his loss. Furthermore, Breselow's "Employee Attendance Records" for every year from 1983 to 2005, [3] demonstrated that he understood the City's vacation policies, as Breselow picked and used some of his vacation in every calendar year from 1983 through 2005, prior to his anniversary date.[4]

The Association has argued that all unit employees will lose vacation if vacation is prorated prior to retirement/separation. I disagree. Section 13.01 grants paid vacation only after the employee has served the specified year(s) of continuous employment on his/her anniversary date. Therefore, employees will lose no vacation up front because technically they do not earn vacation for their use until after their first full year of City employment has passed. In the year of their retirement/separation, the City has consistently credited employees with prorated vacation from their last anniversary date to their chosen date of retirement/separation, even though Section 13.01 requires a full year of continuous employment in order to be granted paid vacation. The City's consistent policy of prorating vacation actually grants employees more vacation than the strict language of Article XIII expressly requires the City to pay.

In all of the circumstances of this case, Breselow received all of the vacation he had earned and which remained unused as of his retirement date and I therefore issue the following

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[3] The City did not keep formal vacation records until 1984 in the Police Department.

[4] Association President Johnson's "Employee Attendance Records" also showed that Johnson used some of his vacation (credited to him in January of each year) in January of each of the following years: 1995, 1996, 1998, 2000 and 2003, although Johnson's anniversary date was not until February 1st.

AWARD

The City did not violate the terms of the labor agreement when it paid Officer Breselow's vacation upon his retirement from the Beaver Dam Police Department. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 17th day of January, 2006.

Sharon A. Gallagher /s/
Sharon Gallagher, Arbitrator

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