

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF WEST SALEM

and

**THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT
EMPLOYEE RELATIONS DIVISION, WEST SALEM POLICE ASSOCIATION**

Case 17
No. 65571
MA-13254

(Holiday Pay Grievance)

Appearances:

Attorney Jerome Klos, Klos, Flynn & Papenfuss – Chartered, 800 Lynne Tower Building, 318 Main Street, P.O. Box 487, La Crosse, WI 54602-0487, appeared on behalf of the Village of West Salem.

Attorney Mark R. Hollinger, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, WI 63713 appeared on behalf of The Wisconsin Professional Police Association/Law Enforcement Employee Relations Division and the West Salem Police Association.

ARBITRATION AWARD

The Village and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association (hereinafter the Association or the Union) requested and the Village agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Christopher Carley, hereinafter Carley or Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on June 14, 2006 in the Village of West Salem. No transcript was taken. A briefing schedule was set and the record was closed on October 17, 2006.

ISSUES

The parties did not stipulate to a statement of the issues. The Village proposed the issues be stated as:

When an employee resigns effective December 30th and the employer settles up for comp. time and vacation time by making payments from January 1 to January 18th, when the employee isn't working during that period, does that for some reason trigger an entitlement to personal or any additional vacation time under the contract?

If so, what is the remedy?

The Association proposed the issues be stated as:

Did the Village of West Salem wrongfully deny the grievant, Officer Christopher Carley, pay for two (2) "personal choice" holidays from 2006?

If so, what is the proper remedy?

The undersigned finds that the Association's statement of the issues is best supported by the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE X VACATIONS

10.01 All employees after one (1) continuous year of employment shall be entitled to vacation leave with pay and said vacation shall be taken during each calendar year and shall be based upon continuous service accruing from their anniversary date of employment occurring during any such calendar year based upon the following schedule:

1 year of service:	1 week of vacation leave, of which 6 work days are paid;
2 years of service:	2 weeks of vacation leave, of which 12 work days are paid;
7 years of service:	3 weeks of vacation leave, of which 18 work days are paid;
16 years of service:	4 weeks of vacation leave, of which 24 work days are paid.

10.02 On each anniversary date of his employment, the employee will qualify for vacation leave during the calendar year in accordance with the above scheduled based on continuous service which will have already accrued in that anniversary year. Prorated vacation pay shall be paid to any employee in the event of termination of employment of the vacation leave that has not been taken prior thereto or of subsequent accumulation.

...

ARTICLE XII HOLIDAYS

12.01 Employees shall be entitled to the following holidays at the employee's regular rate of pay: New Year's Day, Memorial Day, Independence Day, Thanksgiving Day, Labor Day, Christmas Day, two holidays of employee's personal choice, and Easter Day. Holiday pay is eight (8) hours of pay at the employee's regular rate for each holiday whether worked or not.

These days can at the employee's discretion be scheduled as personal days off with the Chief's approval or if the days are not used as personal days (no matter what the reason) by December 1st, the Employer shall pay out the unused holidays at the regular rate of pay in the next payroll. For the purposes of this article the employee shall use December of one year to the next December for using the Holidays.

In the event of termination, employees who have taken more days than allowable pursuant to the following shall have said pay deducted from terminal pay or wages due.

For purposes of this Section, the person shall be deemed to have worked on a holiday for such hours worked on that holiday between 12:00 midnight to 12:00 midnights.

...

ARTICLE XIV INSURANCE

14.01 The Employer shall provide hospital - medical insurance to all full time employees with the employee paying \$50.00 per month of the premium for family plan coverage or \$20.00 per month of the premium for single plan coverage, and the Employer paying the balance of the monthly premium. The Village retains the right to substitute other medical - hospital insurance plans or carriers from time to time.

...

BACKGROUND AND FACTS

Grievant was employed by the Village in the Police Department as a School Liaison Officer when he resigned his position. He began work part time in January of 2001, and went full time in May of 2001. On December 1, 2005, he notified the Village of his resignation by giving the Police and Fire Commission and the Police Chief a verbatim copy of the following letter:

December 1, 2005

Ladies and Gentlemen:

This is my formal notification to you as school administrators that on December 22nd, 2005 will be my last day as the West Salem Police/School Liaison Officer for the school district. I will be officially resigning my position as police officer for the village of West Salem on December 30, 2005 so I can take a position as police officer for the Town of Campbell on January 1, 2006.

I would like to take this time to thank all of you for the chance you took on allowing me to be your police liaison officer. Your support has been overwhelming and will not be forgotten. I am honored to say I had the privilege to work with the wonderful staffs that each of your respective school has. This was very hard decision to make, to leave this position but I know in my head it's the right decision for my family and me.

I will be staying on as an assistant high school track coach at least for one more year and hope to see you in that capacity.

Thank you once again and good luck in all your futures endeavors.

Respectfully,

Christopher H. Carley
School Liaison Officer
West Salem Police Department.

Grievant discussed his resignation with the Chief of Police the following day, including payment for accrued, unused vacation time, possible income tax withholding implications, and other things. The Chief told Grievant that vacation time would not be paid out in a lump sum in December of 2005, but that he could take paid vacation time in January. The Chief understood that if vacation were paid for time in January then Grievant's health insurance

benefits would continue for January. At the Chief's suggestion Grievant wrote and provided to the Chief a second letter making his resignation effective the second week of January and taking his two weeks paid vacation during those two weeks. Grievant wrote, verbatim, as follows:

December 1, 2005

Chief Dennis Abbot:

This is my formal written notice, as of December 30, 2005: I will be relinquishing my position as Police Officer with the West Salem Police Department. I have been offered a full time police officer position with the Town of Campbell. On January 2, 2006 will be the beginning of my official two weeks notice to the department in turn I would like to use my two weeks vacation during this time until January 17, 2006 which will be my official finishing date for the department.

I would like to take this opportunity to express my thanks for allowing me to be part of the Village of West Salem for past 5 years. This was a hard decision for me to make but I feel this is the right decision for my future.

If you have any questions please feel free to contact me.

Respectfully,

Christopher H. Carley
School Liaison Officer
West Salem Police Department.

Grievant did not work in the Village Police Department after December 30th, 2005. He was paid by the Village for the time period starting January 1, 2006, through January 18, 2006, with the January 1st date paid to Grievant as a holiday. He had two "Kelly Days" because he had previously been working a 5 and 2 rotation, and was paid for those. He was paid 12 days as vacation pay. Grievant was covered by the Village for health insurance benefits through the month of January, 2006. It was Grievant's understanding that he was still employed by the Village through January 17th or 18th, and if called in by the Chief for an emergency during the two weeks in January he would be obligated to go in to work. When doing payroll, the Village considers people on vacation to be employees.

Normally, bargaining unit Officers were paid a lump sum in December for holidays not taken within the previous year, figured from January 1 through December 31. The Chief has not required named holidays to be taken on the particular holiday, but has allowed named

holidays to be scheduled, with his approval, at the convenience of the officer. However, employees normally give advanced notice of taking vacation or a holiday, so by December 1st they and the Village know if they will be taking Christmas as a holiday, for example. Any unused holidays are thus paid for by the Village in December. Grievant had not taken any personal choice holiday days off work during the 2005 year. When resigning, he asked to be paid for two personal choice days and was told by the Chief that he would not be paid for those because he was to be on vacation for the two weeks in January. The Chief told Grievant that he went from January to January for personal holidays based on past practice, and Grievant was not employed in January. It has always been Grievant's understanding that the personal days were figured from December to December.

Grievant did get his holidays paid out in December, but that did not include personal choice holidays for any time after December 31, 2005.

Grievant's final paycheck from the Village did not include any personal choice days for any time after either December 31, 2005 or January 1, 2006. The Chief did not consider any personal choice days to be available to Grievant. In several prior terminations the Chief had prorated personal choice holiday pay in making final payments to former officers, but was uncertain if the Union was aware of that. Neither Grievant, who had been the president of the Union, nor Officer Robert Schuppel, who preceded him as Union president and held other Union offices, was aware of any prorating of personal choice holidays paid to retiring officers.

Other matters appear as in the discussion.

POSITIONS OF THE PARTIES

The Association

In summary, the Association argues that Officer Carley was employed by the Village until January 17, 2006 and as such he was entitled to all holidays that accrued up to that point: New Year's Day 2006 and two (2) "personal choice" floating holidays. The Village paid him for New Year's Day but not for the "personal choice" holidays. The subtext of the issue is whether Carley was still an employee until January 17th, or was his employment terminated as of December 30. Section 12.01 provides that holiday entitlement runs from December 1 of one year to December 1 of the next. If the "use" period for holidays runs from December 1 of one year to December 1 of the next, but the "entitlement" period is the calendar year, Carley is still entitled to the two personal choice holidays because he was employed until January 17, 2006.

The Association contends that all employees on vacation and holiday are still considered employees and Carley was still employed until January 17th. He was entitled to two personal choice holidays as of January 1, 2006 because such holidays have no fixed date,

unlike named holidays. Personal choice holidays accrue as of the first day of the entitlement period, which is January 1 to December 31. Named holidays, although they can be used subject to the Chief's approval, become an entitlement as of the date of the respective named holiday. Since personal choice holidays have no specific holiday, each must accrue as of January 1. Regardless of whether the Chief compelled or suggested a second resignation letter, the second letter was the one accepted by the Village. It stated Carley relinquishes his position as a police officer as of December 30, and also states he would be taking vacation starting on January 2, 2006 through January 17, 2006, "which will be my official finishing date for the department". Carley did take vacation through January 18 and was paid for that on the regularly scheduled payday following his "official finishing date" of January 17th.

The Association further argues the Village paid Carley for New Years day, supporting the argument he was still employed after December 31st. The Village's proration claim is a tacit admission that Carley was still employed. Had an emergency or criminal behavior occurred before January 17th, the Chief would expect Carley to act as a police officer. To nullify the entitlement because the agreement is silent with respect to payout of these holidays should be rejected, and prevent a forfeiture. There is no binding past practice that there is no entitlement. The Village chart of days employed verses holidays taken off does not establish that personal choice holidays are not an entitlement or that past practice exists.

The Village

In summary, the Village argues that paragraph two of section 12.01 in effect allows the employee, with the Chief's approval, to choose to use any one or all nine (9) such holidays of employee's choice to enable employees to block as a series of holidays off work or block a series of holidays for holiday paychecks. For those who prefer to work holidays and accumulate a total holiday paycheck, it allows the employee to so give notice by December 1st and thus get such paycheck before Christmas. The contract clearly creates and accrues the holidays on a calendar basis but allows the employee to utilize them on a fiscal December 1st basis. December does not accrue any additional holiday status for the next year as it has previously been compensated by the employee's use and prepayment prior to December 31st.

The Village argues that at date of resignation the Grievant could have taken his vacation accrued time in December in a lump sum, as he originally proposed to the Chief. The Chief advised taking the vacation time in January to provide health insurance continuation for January, a January paycheck, and credit for a New Year's Day holiday by proration. Grievant agreed and expressed his approval to the Village Administrator.

The Village contends that paragraph 3 was created to prevent overpayment by use of one or all nine holidays prior to their creation (allowable) during the calendar year. This provision does not treat personal choice holidays differently from named holidays. The Village

paid for New Years Day but could have taken the position it was not earned on a prorated past practice on only 17 days service. The two personal choice days constitute taking more days than allowable. To find for the Grievant the arbitrator must conclude that the contract provides that an employee on the books for January 1, 2, and 3 and off thereafter is entitled to three paid holidays without application of provision of payback for more days than allowable.

The Village also argues that the Chief's version of the facts is corroborated in the testimony and Grievant merely claimed lack of memory. To counter the Union's best argument, it would be even more ludicrous to conclude that an employee who had 3 accrued vacation days (although herein more vacation days were involved) would as of January 3rd be entitled not only to 3 days vacation pay but 3 days holiday pay.

The Village maintains the record establishes a past practice that a terminated employee who utilizes a combination of personal days or pre-used fixed named holidays and personal days, which exceeded the rate of the 9 holidays over 12 months ratio, the pro rata excess was to be repaid. In this instance only one holiday (not three) has been earned and should be paid. The Union concession to this practice is implicit from its failure to file a grievance at any time of its past implementation. As of January 17th Carley had accrued one of nine holidays and was paid therefor. He would not earn either a further personal choice holiday or a fixed holiday converted to a personal choice day until he satisfied the 9/12 pro rata ratio and would be subject to repayment.

DISCUSSION

Grievant contends that he is entitled to two days of personal choice holiday pay for 2006 which was not paid by the Village. The collective bargaining agreement between the parties provides for a number of benefits to covered employees, including vacations, holidays, health insurance, and other things. Whether Grievant is entitled to the personal choice holidays, or payment for their non-use, depends on when those benefits accrue, whether he was an employee under the collective bargaining agreement at such time, and whether a past practice exists that in effect prorates the personal choice days out of any entitlement given the dates of employment in this case.

The case starts out with some complication as to the nature of the resignation notice given by Grievant to the Village. Regardless of how Grievant may have phrased his letters, the issue is centered around his status on and after January 1, 2006. Grievant provided two letters to resign his position, the first apparently being a copy of a letter given to the School District. The first letter provided, in essence:

This is my formal notification to you as school administrators that on December 22nd, 2005 will be my last day as the West Salem Police/School Liaison Officer for the school district. I will be officially resigning my position as police officer for the Village of West Salem on December 30, 2005 so I can take a position as police officer for the Town of Campbell on January 1, 2006.

He then discussed his resignation with the Village Chief of Police Abbott. The discussion included payment of unused vacation days, unused holidays, health insurance, tax withholdings, and timing of payroll. There is some dispute between Grievant and the Chief as to the discussion of tax withholdings. However, it is more likely than not that such a topic would have been mentioned, at least briefly under the circumstances. More to the point, in view of the other matters that the parties agree they did discuss, the tax withholding matter is not dispositive either way. The Grievant and the Chief also had different understandings as to how holidays accrued. The Chief understood that holidays are accrued from January 1st to January 1st, with Grievant understanding they were accrued from December 1st to December 1st. The Chief did not authorize payment for any personal choice holidays after December 31, 2005, but did authorize 2006 New Year's Day holiday pay, two Kelly Days, and two weeks vacation pay if taken in January. It was the Chief's suggestion, not direction, that Grievant rewrite his resignation letter to the Village so as to take his vacation pay for time in January 2006, to get the New Year's Day paid holiday, and to be able to remain covered by Village health insurance provisions in the month of January. All of these matters were helpful to Grievant in making his transition to a Town of Campbell Police Officer. Grievant provided a revised letter to the Chief which stated, in essence:

This is my formal notice, as of December 30, 2005: I will be relinquishing my position as Police Officer with the West Salem Police Department. I have been offered a full time police officer position with the Town of Campbell. On January 2, 2006 will be the beginning of my official two weeks notice to the department in turn I would like to use my two weeks vacation during this time until January 17, 2006 which will be my official finishing date for the department.

The issue that has developed is what ramification does Grievant's resignation have, if any, as to personal choice holiday provisions under the collective bargaining agreement.

An initial consideration is what letter of resignation is the effective one. Here, it has to be the second letter, given to the Chief after the discussion of benefits. While there was some testimony that the Police and Fire Commission accepted the first letter, no one from the Police and Fire Commission testified at the hearing. The first letter is written as if it were a communication to the school district administrators, rather than the Village. The second letter clearly points out a two week notice, beginning January 2, 2006, to use two weeks vacation until January 17, 2006, which would be his official finishing date for the department. It sets out this status as of December 30, 2005. Importantly, it is the second letter which both the Grievant and the Village actually acted on and is consistent with the Village having paid him vacation pay, New Year's Day holiday pay, Kelley Days and provided health insurance coverage. Thus, it is the second letter which is the effective notice.

Article XIII, Holidays, provides for seven named holidays and two personal choice holidays. These are obviously throughout the year. With the Chief's approval, any or all can actually be scheduled at the employee's discretion. However, under the agreement the employees shall use December of one year to the next December to use the holidays. If days are not used by December 1st then the employer shall pay them out as unused holidays in the next payroll check. This is of some benefit to the employees as it provided the potential for larger paychecks during the holiday season. Thus, both Grievant and the Chief had a basis in the agreement as to how they viewed holiday pay. As the Village argues, it is the January to January period which sets the entitlement to holidays, while, as Grievant understood, those holidays have to be used or paid out on a December to December basis. Grievant testified that he did receive his unused holiday pay in December. That could only be for the holidays that became a contractual entitlement for the 2005 year – January 1, 2005 to December 31, 2005. Accordingly, if Grievant has a claim to holiday pay, personal choice days or otherwise, it would have to be for holidays figured from and after January 1, 2006.

The benefits and obligations of the collective bargaining agreement are between the Village and, as members of the bargaining unit, the employees. Benefits, if available, go only to employees. Thus, the question becomes, was grievant an employee on or after January 1, 2006 in order to make a claim to the 2006 holiday benefit. He was. There is no dispute that he was on the payroll until January 18, 2006 and paid with a payroll check. He was granted New Year's Day holiday pay which only becomes available to employees on or after January 1st. He was paid Kelly Days. Importantly, he was maintained as an insured under the Village health insurance benefits provisions of the agreement. Under Article XIV, section 14.01,

The Employer shall provide hospital – medical insurance to all full time employees. . . .

It is an employee who the Village shall provide the insurance to. Equally important, Grievant was paid vacation days in January for being on vacation in January. The Village considers those on vacation to be employees. Grievant maintained this status with the Village, that of an employee, through at least January 18, 2006 according to the payroll records.¹ Contrary to the argument of the Village that Grievant was off the books on January 4th, he was clearly on the books until at least January 18th.

¹ There are no factual circumstances in the record about Grievant's employment with the Town of Campbell which would nullify or exclude this. If called out on an emergency or responding to criminal activity in his presence, the matter of which employer he would have had at the time, if not both or joint, is not a matter that needs to be decided here.

As an employee in 2006, the question next becomes what Grievant is entitled to by way of holidays, if any. As noted above, holidays must be used from December to December, but become a contract right from January to January. Whatever holiday rights Grievant obtained in January must be used or paid for by the following December.

Section 12.01 states in part:

These days can at the employee's discretion be scheduled as personal days off with the Chief's approval or if the days are not used as personal days (no matter what the reason) by December 1st, the Employer shall pay out the unused holidays at the regular rate of pay in the next payroll check. For the purpose of this article the employee shall use December of one year to the next December for using the Holidays.

In the event of termination, employees who have taken more days than allowable pursuant to the following shall have said pay deducted from terminal pay or wages due.

Here, there is no claim that Grievant took more days than allowable. The issue is the opposite - was he entitled to more than he was paid for. The agreement allows employees to schedule these days as personal days off at their discretion with the Chief's permission, which he regularly granted. The Chief's form for time off does not even list the specific holidays. This is permissive on the part of the employee and discretionary on the part of the Chief. However, the benefit names seven holidays and two personal choice holidays. The two personal choice holidays are not tied to or identified by any particular day. They can be selected anytime as a holiday. If they are not used by December 1st the agreement requires they be paid out. There is no time limit in the agreement as to when they must be used if they are to be used. An employee such as Grievant can claim the personal choice holidays for anytime they choose. That can be from the beginning of the calendar year, which is what Grievant is claiming. Section 12.01 provides that holiday pay is eight (8) hours of pay at the employee's regular rate for each holiday whether worked or not. If the days are not used as personal days (no matter what the reason) by December 1st, the employer shall pay out the unused holidays at the regular rate of pay in the next payroll check. These days were not used by Grievant as personal days off by December 1st of 2006 or at anytime while still employed by the Village. The reason is because he used vacation, New Year's Day holiday and Kelly Days prior to his termination of employment on or about January 18th. The Chief did not authorize the additional personal choice holidays. Those are the actual reasons the personal choice holidays were not used. But the contract does not require a reason before the Village is required to pay out unused holidays. If unused, the Village must pay, just as the agreement says: (no matter what the reason).

Grievant was on vacation during much of the time in January, 2006. These days are available to also claim as personal choice holidays. There is nothing in the agreement which prevents this. Generally, when holidays happen to occur during an employee's vacation period, arbitrators are in agreement that holiday pay must be allowed. *See, How Arbitration Works*, Elkouri & Elkouri, (6th Ed. 2003) pp.1074 to 1077. That reasoning applies here. Grievant was still an employee and entitled to the benefits of an employee under the collective bargaining agreement.

The Village argues that holidays and holiday pay are prorated for resigning Officers on a 9/12th basis. It has done this on several occasions for Officers leaving the department. For several reasons the Village argument must fail.

It is first noted that Article XII does not contain a proration provision for holidays, only language which provides for repayment by employees who have taken more days than allowable. That is not the situation here. By contrast, vacation benefits are specifically prorated under Article 10.02 for terminated employees. The parties specifically negotiated that provision for vacations. Such a provision is not in Article XII. In interpreting and applying agreements, they must be read as a whole with effect given to all clauses and words. *See, How Arbitration Works*, Elkouri & Elkouri, (6th Ed. 2003) pp. 462, 463, 464. It is a recognized arbitral principal that inclusion of a phrase or term in one part of an agreement but not in another is an indication of intent that the phrase or term applies only to the part in which it is included, and not the other. The parties could have negotiated a proration phrase in Article XII as they did in Article X, but they did not. The Arbitrator has no power to add this term, or any term, to the agreement. There is no provision in the agreement that would prorate the two personal choice holidays that accrue to Grievant on and after January 1st.

The Village argues that it has been the past practice to prorate all nine holidays for Officers who terminate their employment. As noted, the Chief has done this on several occasions for Officers leaving the department. However, the Chief testified that he was uncertain if the Union was aware of this. Both Grievant, who had been the Association president, and the former president, were unaware that this proration had occurred. This makes sense in that the Officer is leaving the department and no longer covered by the agreement. The Association, through its officers and membership, would have no reason to know how the Chief handled those final paychecks. There is no evidence that this was ever brought to the attention of the Association before this grievance. In order for a party to establish a binding past practice it must be established that such practice is well established. It is recognized that a past practice, to be binding on both parties, must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. *See, How Arbitration Works*, Elkouri & Elkouri, (6th Ed. 2003) pp. 607, 608. A binding past practice becomes, in essence, an agreement or mutual understanding. In this case a binding practice cannot be established

on this record. The Association did not know that the Village had prorated the holiday pay of former Officers leaving the department. Because the Association did not know this, it could not have been clearly enunciated or acted upon by both the Village and the Association. Neither was it readily ascertainable. It most certainly was not accepted by both parties as an established practice. The Association could not have agreed to something it does not know is happening. No binding past practice has been established by the Village by which personal choice holidays are prorated on a 9/12 basis for Officers leaving the department. There is no established past practice available here to answer any ambiguities or gaps in language. The parties have argued different interpretations of Article XII. The agreement is clear. If the days are not used as personal days (no matter what the reason) by December 1st the employer shall pay out the unused holidays. It is owed whether worked or not.

The Grievant was entitled to pay for two personal choice holidays under the agreement. The Village wrongfully denied him pay for two personal choice holidays from 2006. Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The Grievance is sustained. The Village shall pay the Grievant two (2) days holiday pay.

Dated at Madison, Wisconsin, this 11th day of January, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator