BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CITY OF MERRILL**

and

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION and MERRILL PROFESSIONAL POLICE ASSOCIATION**

Case 67
No. 65723
MA-13302

(FMLA Benefits Proration Grievance)

**Appearances:**

**Dean R. Dietrich** and **Christopher M. Toner,** Attorneys at Law, Ruder Ware. L.L.S.C., 500 Third Street, Wausau, Wisconsin, 54402-8050, appeared on behalf of the City of Merrill.

**Gordon E. McQuillen,** Attorney at Law, 340 Coyier Lane, Madison, Wisconsin, 53713, appeared on behalf of the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division and the Merrill Professional Police Association.

## ARBITRATION AWARD

The City of Merrill, herein the City, and the Merrill Professional Police Association, herein the Association or Union, are parties to a collective bargaining agreement which was in effect at all relevant times and which provides for the final and binding arbitration of certain disputes. Merrill Professional Police Association is associated with the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division. The Association requested and the City agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve two combined grievances filed on behalf of Association member Jamie Jaeger, herein Jaeger or Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the arbitrator. Hearing was held on the matter on July 11, 2006, without transcription. A briefing schedule was set and the record was closed on December 16, 2006.

## ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

> Did the City of Merrill violate the collective bargaining agreement in effect between the Association and the City in several respects when it prorated sick leave, vacation and holidays for Officer Jamie Jaeger when she was on FMLA leave from October 23, 2004, to January 1, 2005?
>
> If so, what is the appropriate remedy?

The City states the issues as:

> Did the City violate the agreement when it prorated vacation, sick leave, and holiday benefits when Officer Jaeger was on Family Medical Leave for a period of over two months in 2004?
>
> If so, what is the appropriate remedy?

There is no practical difference in the statement of the issues. The statement by the Association is selected due to their being two combined grievances and the fact stipulations on dates as set out below.

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 6 – SALARIES

. . .

CERTIFICATION PAY: In recognition that police officers are required to maintain proficiency or certifications in work related fields, each officer shall receive $600.00 annually. Certification pay shall be paid by January 31st of each year.

. . .

### ARTICLE 8 – VACATION

The Chief of Police shall administer the vacation schedule according to the terms of this agreement. He shall reserve the right to determine the number of personnel to be on vacation at any one time in order to insure maximum protection and safety of the City.

The vacation policy for the Police Department shall be as follows:

| | |
|---|---|
| 49.5 hours | After one year continuous service |
| 99 hours | After two years continuous service |
| 148.5 hours | After seven years of continuous service |
| 198 hours | After twelve years of continuous service |
| 247.5 hours | After eighteen years of continuous service |

Vacations shall be prorated for first year workers and administered thereafter on a calendar year basis. E.g., Employee starts 7/1/98: as of 1/1/99 employee shall be granted 6/12ths of vacation; as of 1/1/00 employee has two weeks vacation.

Vacation selection shall be completed by January 1st and shall be made on the basis of seniority by rotation. Officers will be allowed to select and lock in up to 50% of their vacation days on each turn of the rotation. Officers receiving twelve vacation days shall be required to select a minimum of four days, of which at least four days will be in one block. Officers receiving eighteen or twenty-four vacation days shall be required to select a minimum of nine days, of which at least four days will be in one block. Officers receiving thirty vacation days shall be required to select a minimum of twelve days, which shall consist of at least two four day blocks. Although officers shall be allowed to select single vacation days, subject to the preceding sentence, vacation selections in blocks of at least four days will have precedence over the single day vacation picks. In the event an officer does not schedule his vacation by January 1, he will take it on an "as available" basis after all other vacation has been scheduled.

## ARTICLE 9 – SENIORITY

The Department will have a seniority list to include all sworn members of the Department by length of service.

Seniority shall prevail in the annual selection of permanent shifts. Annual shift selection shall be made by November 1st of each year.

## ARTICLE 10 – LONGEVITY

Longevity payments shall be made to all officers according to the following plan:

After five (5) years of continuous service, $2.25 per month paid service retroactive to the first day of employment.

Longevity payments will not be included in base pay for purposes of computing overtime pay, holiday pay, or vacation pay.

Longevity will be computed and paid once a year, the Friday before Thanksgiving.

Employees hired after 1/1/94 shall not be entitled to any longevity payments under this Agreement.

## ARTICLE 11 – PAID HOLIDAYS

All officers will receive eight and one-half holidays paid at their double time rate of pay (136 total hours of pay). Holiday pay shall be paid once a year on the Friday before Thanksgiving.

## ARTICLE 12 – LEAVES

A. SICK LEAVE: Sick leave shall be administered by the Chief of Police as per City Code for Sick Leave, except that notwithstanding any other provision contrary thereto in said ordinance, sick leave shall accumulate at the rate of one (1) day for each month of service in the calendar year, and may be accumulated to an unlimited number of hours.

B. FUNERAL LEAVE: Funeral leave shall be administered by the Chief of Police as per City code for Death in Family. The City Code on Funeral Leave shall be incorporated into this Agreement language.

C. LEAVE OF ABSENCE WITHOUT PAY: Requests for leave of absence without pay for justifiable reasons shall be made by written application on a form provided by the Personnel Office and be submitted at least two (2) weeks prior to the anticipated leave. Emergency leave requests would be the exception.

1. For a leave not to exceed three (3) consecutive days, the request shall be submitted for approval to the Chief of Police.

2. For a leave in excess of three (3) consecutive days, he shall make his request to the Personnel Director after securing the approval of the Chief of Police.

D. ACCRUED SICK LEAVE CREDIT All officers covered by the agreement who actually retire from the City Service and apply within sixty (60) days of the last day paid for a retirement annuity from the Wisconsin Retirement Fund shall have their sick leave credits from the time of retirement converted to a monetary value (allowable hours of accumulated sick leave times normal hourly rate of pay received immediately prior to retirement), which total shall be available to pay hospital, surgical and catastrophic insurance as the same is being supplied by the employer. If the retiring officer elects not to continue in the City's insurance group for thirty-six (36) months, he/she may receive a lump sum payment from the City for the allowable hours of accumulated sick leave (1300 hours maximum) times the hourly rate prior to retirement. Effective with retirements occurring on or after January 1, 2002, officers who plan on retiring

and taking the accrued sick leave payment in cash shall notify the City prior to October 1st of the preceding year or the officer shall wait one year for the payout. Officers who retire for medical/disability reasons or when the WRS allows for early window periods shall not be subject to this restriction. A retired employee shall be eligible to remain a member of the City's insurance until thirty-six (36) months from the date of retirement. From the date of retirement, the employee shall be responsible for the entire premium amount deducted from the total amount due the employee from the fund available from the converted sick leave.

If an officer retires before their 62nd birthday, but after their 50th birthday, the officer may then remain a member of the City's insurance group until age sixty-five (65). Retired is defined for purposes of this section, as drawing a pension check from the Wisconsin Retirement Fund. The officer shall be responsible for the entire premium as charged to the City for such insurance, the amount being deducted from the total amount due the officer from the funds available from the converted sick leave accumulation.

In the event the retired officer shall precede their spouse in death and there remains at that time an unused balance in said account, such balance may be used to purchase such insurance for the surviving spouse for such a period of time as the deceased officer would have been eligible to remain in the insurance group. At the point in time the deceased officer would have been eligible to continue in the City's insurance group or upon withdrawal by the surviving spouse, the unused balance in said fund shall be paid to the surviving spouse. In the event the officer or spouse becomes age sixty-five (65) and still remains eligible for the City's insurance group and there remains a credit in their account, such credit may be used to purchase the supplemental insurance to Medicare. In any event, the City's obligation hereunder shall cease when the monetary value of said account is depleted, when the officer of the surviving spouse thereof are no longer eligible to remain in the City's insurance group and the unused balance in said fund, if any, has been paid to the officer or surviving spouse, when the officer and the surviving spouse are deceased, or when the retiree takes employment where group insurance is available to him/her. The maximum number of hours an officer will be entitled to so convert is a total of 1300 hours.

E. ACCRUED SICK LEAVE CREDIT: Officers shall receive one personal (kelly) day off when the officer does not use sick leave during a calendar year. Said kelly day will be granted in the year following the year in which it was earned.

F. DONATION OF TIME: Officers will be allowed to donate vacation time, kelly days, and/or comp. time to other officers who have exhausted their sick leave and are in need of additional time off.

## ARTICLE 13 – INSURANCE

A. HOSPITAL – SURGICAL INSURANCE:

. . .

B. LIFE INSRUANCE: The City agrees to pay its share of the costs, and in addition, one hundred percent (100%) of the officer's contribution in the State Life insurance Program based on annual earnings. An officer not wishing to participate in the Life insurance programs must sign a waiver of insurance form available in the Personnel Department office. The City shall double the amount of coverage.

C. WISCONSIN RETIREMENT FUND: The City agrees to pay the officer's share, not to exceed seven percent (7%) of his gross earnings to the Wisconsin Retirement Fund in addition to the City's share.

## ARTICLE 14 – CLOTHING ALLOWANCE

Clothing allowance shall be administered by the Chief of Police. Officers shall be compensated at the rate of $550.00 annually. New officers will receive an additional $100.00 for the first year. It is hereby agreed that the clothing allowance shall be paid to the officers by the first pay period in January.

. . .

## ARTICLE 15 – COMPENSATION FOR TRAINING

The training program shall be administered by the Chief of Police and the Police Department Training Officer.

The City, in the normal course of business, conducts in-house training of its officers. In-house training is defined as instructions given by staff employees of the City of Merrill. The City agrees to conduct in-house training of any specific subject more than one time. That is, the City agrees to offer the training on at least two (2) separate occasions. Any officer who cannot attend the in-house training on his or her regularly scheduled hours shall receive compensation for alternating on-off hours at a rate of time and one-half for hourly pay.

Off duty officers shall receive a minimum of two hours of compensation at time and one half for any training session.

If an officer is assigned to attend training and lodging is necessary, those costs will be the responsibility of the City.

. . .

ARTICLE 29 – EDUCATIONAL BENEFITS

Officers who have obtained at least an Associate Degree in Police Science or a related field shall receive an annual education benefit of $360.00, to be paid by January 31st of each year.

## BACKGROUND AND FACTS

Two grievances were filed by the Association on behalf of Grievant, both of which concerned the City having prorated her vacation, sick leave and holiday benefits while she was on an unpaid leave under the Federal and State Family Medical Leave Acts (FMLA). The grievances were consolidated for purposes of this arbitration. The parties stipulated to the following facts:

1. That the City of Merrill and the Merrill Professional Police Association are parties to a collective bargaining agreement for the 2003-2004 contract years and for the 2005-2007 contract years.

2. That Officer Jamie Jaeger was employed as a police officer starting July 10, 1995.

3. That Officer Jaeger was off leave without pay for child-rearing purposes from October 23, 2004, to January 1, 2005.

4. Officer Jaeger received 124 hours of vacation and 82.5 hours of sick leave which included a proration of vacation benefit and sick leave benefit by the reduction of two months for the months of November and December.

5. That vacation hours were reduced from 148.5 hours to 123.80 hours which was rounded to 124 hours.

6. That sick leave hours were reduced from 99 hours to 82.5 hours.

7. That holiday pay was reduced by 26 hours for holiday pay that was received by Officer Jaeger in November, 2004 for the second half of the calendar year.

Besides the stipulation, the record shows that while on unpaid FMLA leave Officer Jaeger was considered by the City to be an employee on unpaid status. She did not perform any police department or City duties during that time.

Since 1998 the City has prorated Police Officers' holiday pay for new hires and those who have separated from employment due to retirement, resignation or death. This has been regardless of rank.

Officer Jaeger received educational benefits under the 2003-2004 labor contract for 2004. Those payments were not prorated due to her FMLA leave and the City has not sought retroactive reimbursement for those benefits or in such cases in the past. The 2003-2004 contract did not contain the education benefit language, added to the 2005-2007 contact which states: Prorating applies if the officer resigns, but not for officers who retire.

Officer Jaeger received certification pay under the 2003-2004 contract for 2004, and those payments were not prorated due to her FMLA leave. The 2003-2004 contract did not contain the certification benefit language, added to the 2005-2007 contract which states: Prorating applies if the officer resigns, but not for officers who retire.

Officer Jaeger's seniority was not prorated.

Officer Jaeger's clothing allowance was not prorated and the City has not sought reimbursement for this.

In the past the City has prorated sick leave, vacation and holiday benefits to a City employee in the AFSCME bargaining unit and to a non-union employee, each having requested a leave of absence and not working any hours within a month. This had not been done for any police officers before because none had been out on unpaid leave before.

While Officer Jaeger was on FMLA leave the City continued to pay health insurance premiums for her as a contract benefit and pursuant to provisions of law.

Further facts appear as in the discussion.

## POSITIONS OF THE PARTIES

### City

In summary, the City argues that it did not violate the Agreement when it prorated the benefits while grievant was on Family Medical Leave. She did not work 12 months in 2004. There is nothing in law or the agreement that requires the remedy the Association seeks. Nothing in Wisconsin law, including Sec. 103.10(9), Wis. Stats., requires vacation, sick leave or holiday benefits to be continued during medical leave. Nothing in Federal law, including 29 C.F.R. Sec. 825.215(d)(2), provides grievant the remedy she seeks.

The City argues that nothing in the agreement requires the City to provide continued vacation, sick leave, or holiday benefits to an employee who is on medical leave. A plain reading of the agreement shows that there is no express provision in the agreement that provides guidance regarding the payment of benefits while an employee is on medical leave. Article 8 on vacation does not provide accrual on medical leave. As a past practice, the City has prorated vacation, sick leave and holiday pay for the past ten years in the event an employee is on medical leave, and no testimony advanced by the Association contradicts that

practice. The City has never paid full vacation, sick leave or holiday benefits to an employee on medical leave in the past ten years. Two other employees on medical leave had their benefits prorated.

Citing arbitral precedent, the City argues that its interpretation of the agreement is the most reasonable. Nothing in law requires maintenance of the benefits and the City has not agreed to accept the contractual responsibility to pay 12 months of benefits to an employee who only works 10 months. The benefits did not accrue and the City was justified in prorating them.

**Association**

In summary, the Association argues that the agreement applies to all members equally. Pay is based on classifications and years of service; vacation depends on length of service; longevity pay is based on length of service; education benefit is per year. The parties intended that employees who did not qualify for longevity pay or education pay did not receive it. The 2005-2007 agreement demonstrates the parties' ability and willingness to provide for exceptions to the general provisions of the 2003-2004 agreement. The parties agreed to continue differential benefits for longevity, education pay, etc. The parties also added language for proration of certification pay, selection of shifts based on seniority, proration of clothing allowance for probationary employees in their second year, for example. Notably, the parties did not modify the provisions of their successor agreement to permit the proration of vacations, sick leave and holidays for officers who work less than a full calendar year. There is no evidence the City attempted to modify this broad language during negotiations. The parties know how to negotiate prorations. That they did not add proration language to vacation, sick leave and holiday provisions establishes those benefits should not have been prorated.

The Union argues that the City did not prorate other benefits of Grievant due to her leave, such as clothing allowance, seniority or years of credible retirement service.

As to the City prorating employees who leave employment other than by retirement or disability, the Union argues they are no longer City employees. But that is not the case with Greivant, who remained a City employee at all relevant times. By contract, those who retire or become disabled do not have their benefits prorated.

The Union also argues the City's past practice attempt is unavailing. One employee was in the AFSCME union, a different labor organization with a different contract that is not in evidence. The other was a non-represented employee who is not subject to the negotiated agreement or grievance process. Non-represented employees have other restrictions on their benefits not present in the Association agreement. No other employee represented by the Association has fallen under the grievance circumstances. Past practice is of no use. City policy must yield to the collective bargaining agreement, and the City policy does not contain proration language of such benefits while on leave.

**City Reply**

In summary, the City argues that the Association's attempt to distinguish the City's past practice of prorating benefits is unpersuasive. The City never explicitly agreed to pay salary or benefits for time the employee has not worked. To obtain benefits they must be earned. Grievant is requesting to be paid for benefits during a time she did not work. This is not supported by agreement language, past practice or intent of the parties.

Citing arbitral precedent, the City argues the intent of the parties was that employees would not be paid salary or benefits while not actually working. The City has prorated these benefits in the past when an employee has not worked, and the Association did not contest that. The Association attempts to distinguish these cases but its arguments are not compelling.

The City argues that management has reserved it rights unless limited in the agreement. The City has only agreed to pay for time the employee actually works. Paying for time not worked is the exception and not the rule. The Association cannot show a contract provision that provides it the remedy it seeks. No bargaining history shows the parties' intent to continue the benefits while on unpaid leave. It has not distinguished the scenarios where the City prorated the benefits to other employees. It does not provide argument or legal authority as to why distinctions with retirees matter. The City argues that neither retirement nor Family Medical Leave presents a situation that justifies payment of benefits in excess of time worked. The employee has not done any work to receive the benefit.

## DISCUSSION

The issue in the case requires deciding whether the collective bargaining agreement between the parties requires certain benefits of bargaining unit employees accrue while the employee is on unpaid family or medical leave (FMLA), or if those benefits may be prorated by the City. While Grievant was on unpaid FMLA leave her vacation, sick time and holiday pay was prorated by the City. Other benefits were not prorated by the City.

State statutes and Federal regulations secure certain FMLA rights to employees such as Grievant, and also limits responsibility for certain benefit liability of employers such as the City.[1] The City maintains that these provisions relieve it of the responsibility of providing the benefits to one on FMLA and that as a matter of law they need not provide the benefits. The City argues there is nothing in State or Federal law which requires the benefits be accrued. The portion of the State statute cited by the City reads:

> (4) Employment right, benefit or position. (a) Except as provided in par. (b), nothing in this section entitles a returning employee to a right, employment benefit or employment position to which the employee would not have been entitled had he or she not taken family leave or medical leave or to the accrual of any seniority or employment benefit during a period of family leave or medical leave.

Section 103.10(9), Wis. Stats.

[1] See, e.g., *How Arbitration Works*, Elkouri & Elkouri, 6th Ed. pp. 1065, 1083-1085, 1095.

Similarly, the Code of Federal Regulations states that:

> (2)An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.
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> 29 C.F.R. Sec. 825.215(d)(2).

The City is correct that neither the statute nor the regulation mandated accrual of the benefits. However, that is not the issue. The issue is whether the collective bargaining agreement requires accrual, apart from statute or regulation. Section 103.10(9), Wis. Stats. says nothing in this section. That does not eliminate other matters, such as a collective bargaining agreement from requiring accrual. Indeed, the City accrued Grievant's seniority. It could not have done so if its proffered application of the statute were correct. Similarly, the Federal regulation specifically provides that an employee may accrue. The statute and regulation do not prevent accrual. As alluded to in an October 24, 2005 memorandum from the Merrill City Attorney to Police Captain Dabbert on the topic of FMLA guidelines, the employee is not entitled to the payment or accrual of any other fringe benefit unless a collective bargaining agreement would so require. Thus, it is the agreement between the parties which determines if the benefits accrue or can be prorated.

As to the agreement, the Union argues that there is nothing in it that provides for proration of the benefits at issue which otherwise accrue. The City argues that there is nothing in the agreement which prevents proration or requires accrual. The leave of absence without pay provisions in the agreement at Article 12 (C) does not mention accrual or proration. The agreement does provide certain benefits for officers under various conditions, which are contained in the respective Articles. Each Article which pertains to the benefits at issue here must be examined.

Article 8 – Vacation, of the 2003-2004 agreement provides officers with a certain number of hours vacation after certain numbers of years continuous service. Importantly, it states:

> Vacations shall be prorated for first year workers and administered thereafter on a calendar year basis.

This indicates two things. The vacation hours are figured on a calendar year, and proration is limited to the first year. The example in the Article sets out first year proration by months, but does not go beyond the first year. Proration is not mentioned or stated in the Article as to

continuous service (after the first year) which might contain other leave, such as sick leave,[2] funeral leave, or the taking of vacation itself. Vacation would continue to accrue while those leaves are taken. There is no distinction in Article 8 between paid or unpaid leave as far as accruals or prorations are concerned.[3] The number of years of service must be continuous. That is administered on a calendar year basis. That part of the Article does not say on a monthly, daily or any other basis. This needs to be contrasted with other parts of the agreement. The agreement language on longevity is in Article 10 – Longevity, and did not change between the 2003-2004 contract and the 2005-2007 contract. The same phrase, "continuous service" exists there as a qualifier for those hired before 1/1/94, so it does not apply to Grievant, who was hired in 1995. The phrase is thus of no aide here. However, the balance of the provision provides for $2.25 per month paid service retroactive to the first day ofemployment. In this instance, "service" is modified by "paid". This leads to the conclusion that the paid service cannot be for one in an unpaid status, such as Grievant's leave without pay. The placement of "paid" as a modifier or qualifier to service for longevity is contrasted with continuous service for vacations, which is not modified or qualified by "paid". In turn, this leads to the conclusion that the continuous service for vacations does not have to be in a paid status. As to Article 8, under these circumstances, continuous service most reasonably is understood to be years of service that are not interrupted by a period where the officer is not an employee. Here, Grievant has always been an employee – an employee on an unpaid leave of absence status, but an employee none the less. A leave of absence perpetuates the employment relationship during the absence of an employee while relieving that employee of the responsibility to be present and to perform. *How Arbitration Works,* Elkouri & Elkouri, 6th Ed. p. 1083 (citations omitted). Grievant certainly was an employee for health insurance benefits and that is a matter which is further protected by FMLA. The agreement also provides for an education benefit, which was paid to Grievant without proration. That provision is in Article 29 – Educational Benefits. It is an annual benefit, which is consistent with the calendar year basis provided in Article 8 for vacation. Similarly, Grievant's seniority was not prorated by the City. Seniority is in Article 9, and is simply by length of service. There is no accrual or proration language in the Article. Similarly again, the Article 14 clothing allowance was not prorated. Other than a provision for the termination or resignation of a probationary

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[2] Accrual of sick leave itself is discussed below.

[3] This is quite different in the policy manual for non-unionized City employees. For them, vacation is specifically not earned during a leave of absence or other noncompensable status for periods exceeding ten working days. No such language has been negotiated into the collective bargaining agreement. The language in the policy is:

> 15-1-8 Vacation credits are not earned by an employee during their leave of absence without pay, a suspension without pay, or when an employee is otherwise in a noncompensable status, should such period without pay exceed ten working days in any calendar year.

To be clear, this policy provision is not being interpreted in this award. It does not control the collective bargaining agreement. Although it indicated that the City would actually accrue up to ten working days of vacation during a leave without pay (such as FMLA), the policy is referenced to show that non-accrual or proration could have been negotiated into the collective bargaining agreement for vacation if that is what the parties intended.

employee, the Article contains no proration or accrual language. The annual certification pay under Article 6 was not prorated. The non-proration by the City of education benefits, seniority, clothing allowance and certification pay is consistent with an understanding that service includes leave of absence. This is consistent with the limited use of proration and other considerations mentioned above. None of these Articles conflict with each other. As to vacation, on a calendar basis Grievant has continuous years of service which would place her at the 148.5 hours of vacation level. The agreement does not provide that the vacation past the first year should be prorated.

Holiday pay is at issue and those provisions are set out in Article 11 – Paid Holidays. It states:

> All officers will receive eight and one-half holidays paid at their double time rate of pay (136 total hours of pay). Holiday pay shall be paid once a year on the Friday before Thanksgiving.

There is nothing in this Article which prorates anything. It does not even prorate the first year as does the vacation Article. Given the vagaries of the calendar and officers' work schedules, they may or may not work any particular holiday. Particular holidays are not even named or identified. They accrue or are entitled to the holiday pay in any event. This is not a situation where an officer may be hired, for example, just after Thanksgiving, resign days later, and demand the entire benefit. In such a situation the provision for paying holiday pay once a year would have some bearing on the intent of the Article. But that is not what is at issue here. The Article very clearly says what is says. Officers <u>will</u> receive, and pay <u>shall</u> be paid. Grievant has always remained an officer - on unpaid leave of absence status – and an employee of the City in the police department for the year. The Article requires she be paid for eight and one-half holidays at double time.

The sick leave benefit is in Article 12 A. It references the City Code, but the City Code was not introduced as an exhibit. The City policy for non-unionized employees was introduced, but not identified or argued by the parties as being the same as the City Code. Therefore, it is the remainder of the Article which is left to interpret, which states in pertinent part:

> . . . sick leave shall accumulate at the rate of one (1) day for each month of service in the calendar year, and may be accumulated to an unlimited number of hours.

The accumulation of this benefit is stated differently than vacation or holidays. It does accumulate by each month of service, as opposed to annually. The contrast in language with the longevity Article is again apparent. Where the longevity payment is for "paid"

service, the sick leave provision is not conditioned on "paid" service. This is similar to the "years of continuous service" qualifier for vacation, albeit for a shorter period. The same principles apply. Grievant remained an employee in unpaid leave status. Her relationship with the City was not separated. She was on leave under the agreement and that is why she was not paid. But she did not loose all benefits under the agreement. Grievant's leave does not alter the language of the agreement, which accumulates the benefit by month of service. The agreement does not contain language requiring the actual performance of duties in order to qualify for certain benefits, as some agreements do. See, e.g., DENMARK SCHOOL DISTRICT, CASE NO. 62909 (GALLAGHER, MAY, 2004).[4] And, being in continuous service on an annual basis for vacation logically includes each month of service during that year for sick leave.

The collective bargaining agreement appears to mention proration once, in the vacation Article as discussed above, and accrual once, in the kelly day provision of Article 12.E. Kelley days are not at issue, and Article 12.E sets out a method of accrual for that benefit which simply grants a Kelly day if the officer does not use sick leave during a calendar year. What is significant is that the parties did use proration in one circumstance. They knew how to use it and negotiate it into the agreement if that is what they intended.[5] They did not use proration in describing the benefits at issue.

Several former employees of the City have had their benefits prorated when they left City employment. The City argues that this shows a past practice or at least an understanding of the parties' intent that proration is applied to all the benefits at issue. However, as the Association points out, those employees actually separated their employment with the City for reasons of retirement, resignation or death, whereas, Grievant remained an employee. As an employee Grievant is entitled to the ongoing benefits, as opposed to retirement provisions, of the agreement. Those no longer employed reasonably would not be so entitled. Their benefits, if different, would need to be determined as of the time they left employment. Those circumstances are not present in Grievant's case.

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[4] In DENMARK SCHOOL DISTRICT, Arbitrator Gallagher made the following observation:

> The Association has argued that because the District consistently treated Piontek as an employee and because she was never separated from her employment as a 12-month District employee during her extended absence, she must be considered "employed" during her absence pursuant to Section 24.01 and therefore entitled to sick leave. If Section 18.06 were not included in this labor agreement, this argument would likely have been persuasive on this point. However, Section 18.06 provides that unless there is specific contractual language to the contrary, "any employee" who "works less than 540 hours per year" shall not be eligible for " fringe benefits."
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> Id. p. 15.

[5] It is the 2003-2004 agreement which is being interpreted. The parties did introduce as a joint exhibit the 2005-2007 contract which contains several added provisions for the proration of benefits. This is an after the fact circumstance which does support, but not control, the determination that the parties choose to only prorate the vacation benefit for first year new hires in the 2003-2004 agreement and not prorate other benefits.

The City has also prorated benefits for other employees on a medical leave or leave of absence, and argues that this is a past practice in support of proration for Grievant. As applied to these employees, and even to those who left City employment discussed above, past practice can be relevant and helpful in interpreting contract language. The prior City prorations for those on leave were for an employee in the AFSCME bargaining unit and for a non-represented employee. Neither were subject to the terms of the collective bargaining agreement at issue here. The evidence generally required to establish a binding past practice is discussed in *How Arbitration Works,* Elkouri & Elkouri, 6th Ed.

> When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."
>
> Another commonly used formulation requires "clarity, consistency, and acceptability." The term "clarity" embraces the element of uniformity. The term "consistency" involves the element of repetition, and "acceptability" speaks to "mutuality" in the custom or practice. However, the mutual acceptance may betacit -- an implied mutual agreement arising by inference from the circumstances. While another factor sometimes considered is whether the activity was instituted by bilateral action or only by the action of one party, the lack of bilateral involvement should not necessarily be given controlling weight.
>
> pp. 607-608 (citations omitted).

Here, there is nothing to indicate that the Association, on behalf of any of its members, ever accepted, unequivocally or otherwise, the proration of benefits for its bargaining unit employees (first year new hire vacations being the exception written into the agreement). The Association cannot be bound by incidents concerning the AFSCME bargaining unit or unrepresented employees. Those matters do not bear on the Association's agreement with the City and cannot be used to establish a past practice to aide in the interpretation of this agreement.

The City makes a very forceful general argument that the benefits in the agreement must be earned and they cannot be earned if one is not performing their duties while on unpaid leave. This argument is a strong one, but goes too far. It is persuasive as to wages, but not to accrued benefits under the specific terms of this agreement. Some benefits specifically require the employee to be in a paid status, such as longevity. Others, such as vacation, do not. Some are annual benefits without any further regard to accrual or proration, such as holiday, education, or certification. When one is on vacation or sick leave, for example, they are not

performing duties yet their other benefits continue and are not prorated under this agreement. Even here the City has kept intact the certification, education, seniority and clothing allowance benefits which are all on an annual basis. A City intent that benefits can only be earned while actively performing services cannot be supported by these facts. The contrary is. Although the City's argument sets out a very broad principle, the specific clauses and Articles in the agreement set out what benefits the employee is entitled to and under what conditions.

Considering the agreement as a whole, Grievant is entitled to the enumerated benefits and the Agreement does not provide for the proration of those benefits. Proration of those benefits while Grievant was on unpaid leave was in violation of several provisions of the Agreement.

Accordingly, based upon the evidence and arguments in this case, I issue the following

## AWARD

The grievance is sustained. The City will make Grievant whole by paying and crediting her with the amounts and hours that it prorated.

Dated at Madison, Wisconsin, this 17th day of April, 2007.

Paul Gordon /s/
Paul Gordon, Arbitrator

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