

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUKESHA CITY EMPLOYEES' UNION, LOCAL 97
OF THE AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

CITY OF WAUKESHA

Case 175
No. 67021
MA-13712

Appearances:

John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044316, Racine Wisconsin 53404-7006, for Waukesha City Employees' Union, Local 97 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Donna Hylarides Whalen, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188-3646, for the City of Waukesha, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve a grievance filed on behalf of John Cesar, who is referred to below as the Grievant. Hearing was held on September 27, 2007 in Waukesha, Wisconsin. The testimony of a witness who was unavailable on September 27 and rebuttal testimony was taken by teleconference call on October 9. The hearing was not transcribed. The parties filed briefs by December 3, 2007.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

Did the City violate the collective bargaining agreement and long established past practice when it failed to allow the Grievant vacation and holiday time earned and payable in calendar year 2006?

If so, what is the appropriate remedy?

The City states the issues thus:

Did the Employer violate Section 14.03 of the labor agreement when it failed to allow the Grievant to carry over his vacation at the end of calendar year 2006?

If so, what is the appropriate remedy?

I view the record to pose the following issues:

Did the City violate the collective bargaining agreement when it failed to allow the Grievant to carry over one hundred-one hours of vacation and eight personal holiday hours from calendar year 2006 to calendar year 2007?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 – GRIEVANCE AND ARBITRATION PROCEDURE

. . .

6.03 . . . The arbitrator shall have no authority to add to, delete from, or modify the terms and conditions of this Agreement or to decide on issues not submitted. . . .

. . .

ARTICLE 14 – VACATIONS

. . .

14.02 Employees who have earned their initial period of paid vacation shall be required to take their vacation between the anniversary date of their employment and December 31, of that same year. The entitlement will be held over if department scheduling does not permit such use.

14.03 After the period of employment described in 14.02, employees may take their vacations, in increments of not less than two (2) hours, at any time during the calendar year in which they become eligible for that vacation if the work load of the department permits. During the month of December, should an employee's scheduled vacation be canceled by the City, the canceled vacation will carry-over into the following year. All "carry-over" vacation must be used by March 31st of that year. Upon request, an employee shall receive his or her vacation pay prior to leaving on his or her vacation.

14.04 Upon termination, retirement or death, all earned vacation shall be paid on a prorated basis.

...

ARTICLE 15 – WORKER'S COMPENSATION

15.01 For the first four (4) months an employee is on Worker's Compensation, the City will pay the employee the difference between the amount of Worker's Compensation and their regular net pay. . . .

BACKGROUND

The Step 2 grievance form alleges City violation of Sections 14.02 and 1403, and seeks that the Grievant be made whole for eight hours of personal holiday and one hundred-one hours of vacation earned, but not used, in 2006. James Payne, the City Administrator, denied the grievance at Step 3. His written response, dated March 19, 2007, states:

...

. . . the language of Section 14.03 is clear in its intent . . . the Department states that it has been long standing policy that leave that is not used in the year granted is forfeited. Further, what his supervisor may have said is of no consequence since (the Grievant's) injury and ability to work did not hinge the information and was, in any case, contrary to contract language. . . .

It is undisputed that the Grievant was on Worker's Compensation leave of absence on a full-time basis between mid-October of 2006 and January 3, 2007. He returned to work on a part-time basis, and ultimately obtained a full release to return to work. Throughout his leave, the City paid the Grievant the difference between Worker's Compensation payments and his regular net pay.

The balance of the evidence is best set forth as an overview of witness testimony.

The Grievant

The Grievant has worked for the City since December of 1978. On October 4, 2006, he hurt his back while unloading a truck. He was taken by ambulance for diagnosis and treatment of the injury and was forced to take leave for the balance of calendar year 2006. At the time of his injury, he had scheduled vacation in the last week of October as well as for deer hunting season and the time between Christmas and New Year's.

In early November of 2006, his foreman Don Roberts, as well as Roberts' supervisor, Tom Fell, called to advise him that he would forfeit his earned leave time if he could not report back to work before the end of the year. The Grievant confirmed this with the Human Resources Department and then brought the matter to the Union. Ultimately, Bruce Wery told the Grievant that they would meet with Fell to discuss the matter.

That meeting took place in late November or early December of 2006. Fell stated during this meeting that the Grievant should get a full release and then report for work. He would then be allowed to use the time he had earned in calendar year 2006 after he filled out the appropriate leave request forms. Fell added that while he was a unit member, he had been permitted to carry over and use earned leave in this manner. The Grievant informed Fell he anticipated a full return to work sometime in February of 2007.

The Grievant acknowledged that he could not recall the discussion in detail and was not sure whether Fell understood that he did not anticipate returning to work until after the end of calendar year 2006. He did not fill out any leave request forms in 2007 because Human Resources informed him that he had no 2006 leave to claim. He did not go back to Fell to complain, choosing instead to file a grievance.

Bruce Wery

Wery has worked for the City since May of 1975. He is currently the Union's President. In the fall of 1977, Wery was forced to take a Worker's Compensation leave of absence due to a knee injury. The injury kept him from taking three days of vacation he had scheduled for deer hunting in that year. His supervisor, Art Kuchenreider, told him to use the three days in January of 1978. Because the City only retains Worker's Compensation records for three years, he could not document this leave.

The meeting with Fell and the Grievant took place in the last week of November, 2006. Fell told them that when the Grievant could obtain a full release to work, he should report for work, work one day and then submit the leave request forms for the hours he earned but could not use in 2006. Fell also informed him that he had carried over leave in this fashion sometime ago, while a member of the bargaining unit. Fell became a supervisor in 1991. Wery was convinced that Fell understood that the Grievant could not hope to obtain a full release to work during 2006. They also discussed other employees who had used leave in this fashion, including Craig Stilwell. This was a Step 1 meeting, so the grievance had yet to be reduced to writing, and there was no documentation of the result of the meeting.

The Grievant did not complain to Fell after Human Resources told the Grievant he had no 2006 leave to claim in 2007. Wery, however, discussed the matter with Fell, who acknowledged that past practice should have made the leave available to the Grievant, but that the matter “was out of his hands.”

In response to Fell’s testimony, Wery noted that the Step 1 discussions involved not only whether the Grievant could use leave accrued in 2006 if he returned in 2006, but also whether he could use that leave if he could not return until 2007. Wery, Fell and the Grievant discussed how the Grievant would exhaust his 2006 leave balance after obtaining a full release to work in 2007 and discussed other employees’ carry over of leave, including Fell’s.

Craig Stilwell

Stilwell has worked for the City since March of 1985. In the late 1980’s, he incurred a back injury that forced him into a Worker’s Compensation leave of absence during the months of November and December. As a result of the leave, he could not use two days of vacation. His supervisor, Dave Allrickson, permitted him to use the vacation the following January, after Stilwell filled out leave request forms.

Peggy Kadrich

The City has employed Kadrich for roughly thirteen years. She currently serves as a Human Relations Specialist. In October of 2006, Fell phoned her. He noted that the Grievant was to undergo back surgery and could not be expected to return until 2007. He questioned Kadrich on what would become of any leave the Grievant had earned, but would be unable to use prior to his return to work. Kadrich informed Fell that the Grievant could substitute the accrued leave for Worker’s Compensation leave; but that the City ran a “use it or lose it” leave system. Perhaps two weeks later, Kadrich spoke to the Grievant who complained the system described by Fell worked an unfair result. Kadrich responded that the City was making the Grievant whole during his Worker’s Compensation leave and that the contract did not permit leave carry over.

Kadrich was unaware of any instance of leave carry over during her tenure. She did not know if any employee had lost vacation while on Worker’s Compensation leave of absence. For vacation to carry over on City payroll records would require manual data entry. Kadrich was aware of no such manual entries in City records.

Paul Feller

Prior to his retirement in July of 2007, Feller served as the City’s Director of Public Works. Feller denied the grievance at Step 2. He was aware of no exceptions to the City’s “use it or lose it” leave system. His knowledge of this system dates from May of 1995.

José DeLeon

DeLeon worked in a variety of unit positions in the City's DPW during his twenty-three year tenure as a unit member. He became a supervisor roughly three years ago. While a unit member, he served as Steward, Chief Steward and President. He served as President for roughly fourteen years. He was on the negotiating team for the 2004-06 labor agreement.

The parties did not make any changes to Section 14.02 during his tenure as President. They did, however, agree to change Section 14.03 roughly thirteen years ago, by adding the section's final two sentences. A heavy December snowstorm prompted the change. Three to four employees who reported for work during that storm forfeited vacation. DeLeon approached the City and secured an agreement to make the employees whole. Because one employee wanted time off rather than a cash payment, the parties negotiated a side letter that eventually became the final two sentences of Section 14.03.

The City has had a "use it or lose it" leave system throughout DeLeon's tenure. Roughly six to eight years ago, the City attempted in bargaining to change to an accrual/carry over system, but the Union would not agree to the change. DeLeon knew Stilwell, and although he could neither affirm nor deny Stilwell's testimony, he was unaware of any employee carry over of leave.

Donna Whalen

Whalen noted that during the processing of the grievance, the parties were in collective bargaining and that there were no discussions to alter Section 14.03 in the negotiations for a successor to the 2004-06 agreement.

Tom Fell

Fell is currently employed by the City as its Streets Superintendent. The Grievant asked Fell regarding vacation carry over, and Fell advised him that "it does not carry over." Fell is aware of no instance in which the City permitted an employee to carry leave from one calendar year to another. Fell is not authorized to approve the carry over of leave from one calendar year to another. He denied ever making a Worker's Compensation claim while a City employee. He may have told the Grievant that he could use vacation earned in 2006 if he returned to work in 2006, but he never indicated to the Grievant that he could use vacation earned in 2006 in the following year. Fell thought the Grievant was returning in 2006 at the time of their conversation in late November of 2006.

Further facts will be set forth in the **DISCUSSION** section.

THE PARTIES' POSITIONS

The Union's Brief

The Union contends, after a review of the evidence, that the facts are not disputed beyond the events of a Step 1 grievance meeting held in late November of 2006. Past practice evidence includes “irrefutable testimony that the City, as far back as thirty years ago, had allowed employees to carry-over unused vacation time into the succeeding calendar year when a workers’ compensation leave interfered with an employee’s ability to take the time off in a given year.”

At the Step 1 meeting, Fell agreed with the Union’s position, acknowledging that he had been the beneficiary of carrying over vacation when he was a unit employee. Payne’s March 19 letter acknowledges that Fell made this statement. In spite of this, the City failed to have Fell available to testify on September 27. When he testified on October 9, Fell “conveniently” forgot what he said at the Step 1 meeting and further denied indicating the Grievant could carry his 2006 vacation into 2007.

This convenient lapse of memory should not obscure that the City has a past practice confirming what Fell actually said at the Step 1 meeting. There is no relevant bargaining history on the point, and Union failure to propose to change Section 14.03 does no more than establish that the Union never saw any need to do so. Fell’s lapse of memory “must be seen for what it is – an attempt to muddy the waters and cover his derriere.” Against this background, the grievance should be sustained and the City compelled to stand by the resolution reached at Step 1.

The City's Brief

The City contends that “carry over” vacation eligibility is clearly and unambiguously addressed by Section 14.03. The only permitted instance of carry over eligibility is where a scheduled vacation is cancelled by the City during the month of December. To reach the result sought by the Union, the arbitrator would have to create language where none exists. This would violate Section 6.03. That Section 14.03 recognizes one exception to the “use it or lose it” rule is significant because “contracts that specify certain exceptions imply there are no other exceptions.” Arbitral precedent confirms this.

Even if Section 14.03 is considered ambiguous, DeLeon’s testimony establishes both a consistent City practice of denying carry over as well as specific bargaining to create the sole exception to this rule. That the Union declined in bargaining to accept “a proposed change to the language of the agreement which would have allowed carry over of vacation in exchange for a monthly accrual of vacation time” further underscores the weakness of the grievance. That the parties were in bargaining during the processing of the grievance and the Union failed to make any proposal to amend the agreement to reflect its reading of Section 14.03 establishes that they seek through arbitration a result never secured in bargaining.

What evidence the Union produced of past practice is isolated and dated. Fell denies that he ever got to carry over vacation. Even if the two remaining examples are credited, they precede the negotiation of the exception to the no carry over rule. No view of arbitral precedent justifies finding a binding practice on this evidence. Against this background, the grievance must be denied.

DISCUSSION

I have drawn on each party's statement of the issue on the merits without adopting either. The major difference between the parties' views is the City's attempt to focus solely on Section 14.03. I have adopted the Union's broader reference to the collective bargaining agreement, since the City's arguments point to agreement provisions other than Section 14.03; that section expressly incorporates Section 14.02; and the grievance cites Section 14.02. I have not included the Union's reference to "longstanding past practice" since the asserted practice is disputed. In any event, interpretation of the labor agreement demands a review of past practice evidence. I have adopted the Union's inclusion of holiday pay because the grievance seeks it, and my statement of the issue includes the specific claim made by the grievance. Because the parties each focus their argument on leave "carry over", I have adopted the City's specific reference to those terms.

The language of Section 14.03 does not unambiguously determine the grievance. The first sentence of the section addresses how and when vacation may be taken, subject to the application of Section 14.02. The first sentence refers to "the calendar year in which they become eligible for that vacation" but is silent on what becomes of vacation not taken in that "calendar year." Section 14.04 specifies a limited pay out option, and the second and third sentences of Section 14.03 address a specific carry over option. The City's assertion that the specification of these options denies the existence of any others may be persuasive, but highlights that the assertion rests on an inference drawn from the terms of Section 14.03 rather than on the sole plausible reading of them. Standing alone, Section 14.03 does not specify whether vacation or holiday hours accrued in one calendar year but not available for use due to Worker's Compensation leave can be carried over to the next calendar year.

Thus, the issue becomes whether the contract, as clarified by relevant interpretive guides, permits the Grievant to carry over to 2007 the 2006 vacation and personal holiday hours he could have used in 2006 but for his Worker's Compensation leave. The evidence on these guides favors the City's reading over the Union's.

As preface to examination of this conclusion, it is necessary to deal with the request for eight personal holiday hours. Article 14 governs vacations and does not refer to holidays. The Union cites no other contract provision to fill this void. What evidence the Union asserts regarding past practice deals with carry over of vacation. There is, then, no contract provision and no interpretive guide available to support the request for the carry over of personal holiday hours.

The language of Section 14.03 supports the City's view regarding vacation carry over. As it asserts, the specification of carry over to a single triggering event makes it difficult to conclude that the parties anticipated vacation carry over beyond City cancellations of vacation hours scheduled in December. The absence of any contract provision to grant vacation carry over to employees on Worker's Compensation leave undercuts the Union's view. That the labor agreement, at Section 15.01, requires the City to pay an employee on Worker's Compensation leave the difference between "the amount of Worker's Compensation and their regular net pay" affords more support for the City's reading of Section 14.03 than for the Union's. This support should not be overstated, but Section 15.01 assured that the Grievant was not financially penalized for leave he would have used but for his injury.

More significant to the resolution of the grievance is evidence of past practice and bargaining history. These are, in my view, the most persuasive guides to the resolution of contractual ambiguity since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation. Each favors the City's view over the Union's.

The testimony of each witness confirms that the City has consistently applied a "use it or lose it" vacation benefit at all times relevant here. Significantly, DeLeon's testimony establishes that the Union rejected an alternative during bargaining twelve to thirteen years ago. Against this background, the practice asserted by the Union turns on whether the parties created an exception to the "use it or lose it" rule, focused solely on Worker's Compensation Leave.

Past practice evidence on that point is undisputed only to Stilwell's and Wery's experience. The Union is correct that there is no reason to doubt the truth of their testimony. However, since the binding force of past practice is traceable to the agreement manifested by the bargaining parties' conduct, the issue is not whether they testified truthfully but whether those two instances establish an agreement by the parties to create a Worker's Compensation exception to the "use it or lose it" rule. The two instances fall short of this. Each involves the approval of a supervisor no longer in City employment. There is no indication that the approval went beyond an individual accommodation between the injured employee and the supervisor. There is no evidence of City knowledge of these instances beyond the affected employees and their immediate supervisor. Even if Worker's Compensation claims have been few in number and separated by large gaps in time, it is difficult to conclude a single instance roughly twenty years old coupled with a single instance roughly thirty years old concerning five total days of carry over vacation constitutes a binding agreement that governs a request for over twelve days of vacation and one day of personal holiday. This difficulty is complicated by the parties' specific agreement to create a limited carry over exception roughly twelve years ago. It is difficult to understand why the parties would state in the labor agreement an exception to the "use it or lose it rule" if exceptions had already been established by practice. That the Union found it necessary to codify the "snowstorm" exception undercuts its assertion that it was unnecessary to codify the "Worker's Comp" exception.

This leaves the evidence concerning Fell's experience and the Step 1 discussion as support for the grievance. This evidence is less significant as a matter of past practice than as an

assertion that the City granted the grievance at Step 1 and should be held to its bargain. Ignoring Fell's denial of ever making a Worker's Compensation claim, there is no evidence that the asserted claim is any more recent than those of Stilwell or Wery. Adding a third isolated incident to the Union's assertion of a binding past practice does not make it any more persuasive to conclude that the City and Union agreed by practice that Worker's Compensation leave operates as an exception to the "use it or lose it" rule.

The force of the Union's case thus rests on whether Fell granted the grievance at Step 1. On balance, the evidence manifests a misunderstanding more than an understanding. The parties chose not to reduce the understanding to writing. This complicates the issue rather than resolving it. The absence of a writing may reflect that the grievance did not concern an out-of-pocket loss and thus was treated more casually than it might otherwise have been. This has some significance since it strains the evidence to conclude that the parties reached a clear understanding. The Grievant could not recall the details of the conversation and could not specifically recall if Fell ever indicated that he understood that the Grievant did not anticipate a return to work before 2007. Wery clearly understood the point and believed he had communicated it clearly to Fell.

The evidence will not support finding an agreement was reached at the Step 1 meeting. Fell's denial of the agreement is credible. No less credible is Wery's assertion of it. The essence of an agreement is not, however, the clarity of either side's communication, but the clarity of the meeting of their minds. The context of the conversation lends little support for finding an agreement. Kadrich's testimony is undisputed and establishes that she spoke with Fell and with the Grievant prior to the Step 1 meeting, detailing to each that the City's "use it or lose it" system precluded granting the Grievant the carry over that he sought. The Grievant's testimony underscores this, by noting that Roberts and Fell informed him in early November that the "use it or lose it" system would result in the loss of his vacation if he could not report back to work before the end of 2006. There is no evidence to indicate Fell was authorized to, or ever indicated he could, overrule this view. Wery was not involved in the discussions until the Step 1 meeting in late November. That meeting was less a response to a clearly stated grievance than a discussion of the Grievant's belief that the City was treating him unfairly. The discussion appears to have been far ranging and less than clearly focused. The Grievant's limited recall of the conversation confirms this, since it is unlikely he would have such a limited recall if Fell had clearly reversed the City's position. Rather, it appears Fell gave a sympathetic hearing to their concerns. The view of the Step 1 meeting best supported by the evidence is that Fell, the Grievant and Wery left the meeting having heard the confirmation of their own views. The evidence falls short of establishing that they worked through their conflicting views to the point of reversing a decision communicated to Grievant on several occasions prior to the meeting. As confirmed by Steps 2 and 3, their views were not reconcilable, even if they were given a sympathetic airing at Step 1. The absence of a clear agreement at Step 1 precludes its enforcement as a matter of grievance arbitration.

In sum, the labor agreement affords no support for the carry over of the Grievant's eight hours of personal holiday from 2006 to 2007. Application of Section 14.03 to the grievance regarding the carry over of the Grievant's one hundred-one hours of vacation is not unambiguous. However, application of the interpretive guides argued by the parties to the evidence favors the City's view that the terms of Section 14.03, standing alone and as clarified by past practice and bargaining history, do not compel the City to permit the Grievant to carry over his 2006 leave into 2007. Whatever is made of the discussion at Step 1 of the grievance, it falls short of establishing mutual agreement to allow the carry over sought by the grievance.

AWARD

The City did not violate the collective bargaining agreement when it failed to allow the Grievant to carry over one hundred-one hours of vacation and eight personal holiday hours from calendar year 2006 to calendar year 2007.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 11th day of January, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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