

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LABOR ASSOCIATION OF WISCONSIN
and
CITY OF WATERTOWN (POLICE DEPARTMENT)

Case #74
No. 68003
MA-14080

Appearances:

Benjamin M. Barth, Labor Consultant, N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of Labor Association of Wisconsin, Inc., and Watertown Police Association, Local 237.

Nancy L. Pirkey, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin, WI 53202, appearing on behalf of City of Watertown.

ARBITRATION AWARD

The City of Watertown, hereinafter City or Employer, and Labor Association of Wisconsin, hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The parties jointly requested that the Wisconsin Employment Relations Commission designate Commissioner Susan J.M. Bauman to serve as the arbitrator of a dispute concerning vacation scheduling. The undersigned was so designated. A hearing was held on July 16, 2008 in Watertown, Wisconsin. The hearing was not transcribed. The record was closed on September 2, 2008, upon receipt of all post-hearing written argument.

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

ISSUE

The parties stipulated to a statement of the substantive issue:

Did the Employer violate the expressed or implied terms of the collective bargaining agreement by denying the Grievant's vacation request of December 25, 2008 through December 29, 2008?

If so, what is the remedy?

Midway through the hearing, the Employer proposed the following procedural issue:

Was the grievance timely processed to arbitration?

Both issues are addressed below.

BACKGROUND and FACTS

The essential facts of this case are undisputed. In accordance with the collective bargaining agreement and past practice, the vacation selections for calendar year 2008 were to be made in the "vacation book". This book contained a copy of the Guidelines for Vacation Selection (quoted in full below) as well as separate pages for the officers, listed by seniority, on each watch. The book was given to the most senior person who selected a week or two consecutive weeks, entered the information on the appropriate page and then completed a leave request form and turned that in to his or her direct supervisor. If the pick comported with the vacation selection rules, the supervisor marked it on the master calendar and the officer then e-mailed the next officer on the list to make his or her selection.

The Grievant herein, Dayne Zastrow, picked November 23 to November 27, 2008 as his first 2008 vacation week selection on November 24, 2007. The next most senior officer, Greg Worzalla, picked December 24 through December 31, 2008 on November 29, 2007. The vacation picks proceeded in sequence and came back to Officer Zastrow who then requested the period December 25 through December 29, 2008 as his second vacation week. On December 10, 2007, Sgt. Engel denied the request in an e-mail message:

Dayne,

I am denying your vacation selection for 12/25-12/29/08 as it overlaps Officer Worzalla's vacation selection on 12/25 and 12/29.

Per the "Guidelines for Vacation Selection Memorandum" issued by Captain Meddaugh on 11/09/07, vacation selections may not overlap other officers on the same shift, unless specifically authorized by the Uniform Services Commander. You will have to take that up with him. I have denied other vacation requests this year that overlapped more than one day.

The section I am referring to is listed on Section F of the memorandum.

Sgt. Engel

Officer Zastrow appealed this decision to the Uniform Services Commander, Captain Meddaugh. Captain Meddaugh denied the Grievant the vacation time he sought.

On December 14, 2007, Officer Zastrow filed a grievance, Grievance No. 2007-57, in which he stated that Article II - Management Rights, Article IX - Vacations, and "any other Article, Section, Work Rule or Past Practice that may be applicable" had been violated. Officer Zastrow contended that if the Department approved the Grievant's vacation request, the Department would still be at appropriate staffing levels and that by denying the vacation request even though minimum staffing would still be met, "the employer has exercised its' management rights in an unreasonable manner". As a remedy, Officer Zastrow requested

...that the City cease and desist from violating the terms of the collective bargaining agreement. Further, the grievant is requesting that he be compensated at time and one-half for this vacation selection of December 25, 2008 through December 28, 2008 due to the unreasonable denial of his vacation request.

The grievance was discussed at Step 1 of the grievance procedure on December 14, 2007. It was presented to the Chief on December 20, 2007 and denied on December 31, 2007:

MEMORANDUM

TO: Officer Dayne Zastrow
CC: Officer Christopher J. Karnatz, Association Representative
FROM: Chief Charles S. McGee
DATE: December 31, 2007
SUBJECT: Step 2 Response to Grievance 2007-57

With respect to the above captioned grievance presented to me on December 20, 2007, I find that no contract violation occurred. Consequently your grievance is denied.

The matter was not pursued for a period of time. On March 26, 2008, Labor Consultant for Labor Association of Wisconsin, Benjamin M. Barth, e-mailed Chief McGee:

Chief,

Dayne filed a grievance on December 20, 2007 when his request for vacation on December 25 - December 29 was denied because it overlaps with another officer. However, it has been brought to my attention that as of March 7, 2008, the Sgt. on Dayne's shift is now on vacation during the same timeframe that Dayne requested and was denied. Can you please look into this and let us know why Dayne's vacation was denied but the Sgt. is allowed off.

Thank you for your time in this matter.

The Chief responded by e-mail on March 31, 2008:

Ben,

This stems from a December 4, 2003 arbitration ruling which prohibited the City from allowing sergeants to pick a vacation block first ahead of a member in the bargaining unit. Since that time sergeants have picked last and if the City has to pay overtime to accommodate that pick, then so be it. In the instant case, Dayne's second pick (Christmas) overlapped Greg Worzalla's pick (Christmas) by two days, and, in accordance with the vacation selection guidelines, he was rightly denied. Sergeants are not subject to those guidelines and Sgt. Engel chose to be off at Christmas.

Hope this helps.

By letter dated April 2, 2008, addressed to Mayor Ron Krueger, the grievance was advanced to Step 3 of the grievance procedure. Mayor Krueger, in a letter to Ben Barth dated April 10, 2008, advised that the Watertown Finance Committee had denied the grievance:

RE: Grievance #2007-57

Dear Mr. Barth,

Please be advised that the Watertown Finance Committee reviewed your above numbered grievance at its April 4, 2008, meeting. The grievance was denied based upon the fact that City of Watertown's Police Department's senior staff followed existing protocols and established policies. Officer Zastrow had already taken and been approved for his first vacation choice. Officer Worzalla's first vacation choice was over the Christmas period. Officer Zastrow's second choice overlapped Officer Worzalla's first choice and was denied. The fact that a police sergeant was on vacation at the same time has no bearing on this grievance.

By letter dated April 18, Mr. Barth informed the Mayor that the Association was proceeding to arbitration in this matter. A hearing was held on July 15, at which time the Association presented evidence in the form of a number of calendars which demonstrated that there were times that an overlap of officers on vacation occurred, with departmental approval:

- December 24, 2007: Officer Meloy and Officer Caucutt
- December 26, 2007 – December 28, 2007: Sgt. Kaminski, Officer Neidner, Officer Brower, Officer Pauli
- December 30, 2007: Sgt. Engel and Officer Worzalla
- December 31, 2007: Sgt. Engel and Officer Worzalla
- June 24, 2008: Sgt. Engel and Officer Teuteberg
- July 24, 2008: Officer Repta and Officer Schroeder
- July 26, 2008: Sgt. Johnson and Officer Schroeder
- July 27, 2008: Sgt. Johnson and Officer Schroeder
- November 23, 2008: Sgt. Engel and Officer Zastrow

Additional facts are included in the **Discussion**, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE II -MANAGEMENT RIGHTS

2.01 -The Association recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers or authority which the Employer has not specifically abridged, delegated, or modified by other provisions of this Agreement are retained as the exclusive prerogatives of the Employer. Such powers and authority, in general, include, but are not limited to the following:

- A. To determine its general business practices and policies and to utilize personnel, methods, and means efficiently and flexibly.
- B. To manage and direct the employees of the Employer, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by the work force and each employee and to determine the competence and qualifications of the employees.
- C. To determine the methods, means, and personnel by which and the location where the operations of the Employer are to be conducted.
- D. To take whatever action may be necessary in situations of emergency.
- E. To utilize temporary, provisional, part-time, or seasonal employees when deemed necessary.
- F. To hire, promote, transfer and lay off employees and to make promotions to supervisory positions.
- G. To suspend, demote, or discharge employees.
- H. To establish or alter the numbers of shifts, hours of work, work schedules, methods, or processes.
- I. To schedule overtime work when required.
- J. To create new positions or departments; to introduce new or improved operations or work practices; to terminate or modify existing positions, departments, operations, or work practices; and to consolidate existing positions, departments, or operations.
- K. To make and alter rules and regulations for the conduct of its business and of its employees.

ARTICLE IX -VACATIONS

9.01 -Employees shall be entitled to the following annual vacations in accordance with their continuous service with the Employer:

Ninety-nine (99) hours after twelve (12) months of continuous service

One hundred forty-four (144) hours after seven (7) years of continuous service

One hundred eighty hours (180) hours after fourteen (14) years of continuous service

Two hundred twenty-five (225) hours after twenty-one (21) years of continuous service

9.02 -Vacation schedules, including the number of employees able to be on vacation at the same time, shall be approved by the Police Chief or his representative.

9.03 -Vacations must be taken in the year in which they accrue or they shall be considered lost. Up to one (1) week's vacation may be carried over until April 1st of the following year with the prior written approval of the Chief. The grant or denial of approval shall be at the sole discretion of the Chief. Carried over vacation time will not be scheduled until employees are allowed to exercise current year preferences.

...

ARTICLE XVI — SENIORITY

...

16.06 — Seniority shall apply to vacation selection and shift preference to the day shift. Seniority shall also apply to layoffs and recall from layoffs providing the Employer retains the necessary qualified employees for its operations.

ARTICLE XVII — GRIEVANCE PROCEDURE

...

Section 17.02 - Both the Association and the Employer recognize that grievances and complaints shall be settled promptly and at the earliest possible stage and, therefore, agree that the grievance processes must be initiated within ten (10) days of the incident or within ten (10) days of

the date the employee should have had knowledge of the incident. Any grievances not reported or filed within such ten (10) day period shall be invalid. The procedure for the adjustment of the grievance is as follows:

Step 1: The employee and/or the Association representative shall take the grievance up orally with the employee's Captain. The Captain shall attempt to make a mutually agreeable satisfactory adjustment within five (5) days.

...

Step 3: The grievance shall be considered settled in Step 2 above unless, within ten (10) days from the date of the Police Chief's or his representative's regular answer or last date due, the aggrieved employee and/or Association shall request in writing to the Mayor that the dispute be submitted to the Finance Committee of the Common Council. The Finance Committee may confer with the aggrieved employee or the Association before making its decision and shall submit its written decision to the aggrieved employee and the Association within twenty (20) days from its receipt of the grievance.

Step 4: The grievance shall be considered settled in Step 3 above unless, within ten (10) days from the date of the Finance Committee's decision or last date due, the aggrieved employee and/or Association shall notify the Mayor in writing that the matter is to be submitted to arbitration and shall request the Wisconsin Employment Relations Commission to submit a list of five (5) names for arbitration.

...

17.05 — Upon completion of this review and hearing, the arbitrator shall render a written decision as soon as possible to both the Employer and the Association which shall be final and binding upon both parties. In making his decision, the arbitrator shall neither add to, detract from nor modify the language of this Agreement. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the Employer, nor shall such right be

limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right.

17.06 — All grievances not submitted or appealed by the grievant or his representative within the time limits specified herein shall be deemed abandoned grievances and as such shall be considered as being resolved in favor of the Employer. Time limits provided for in this Article may be extended, however, by mutual consent of the parties.

RELEVANT POLICIES AND PROCEDURES

Guidelines for Vacation Selection Dated November 9, 2007

This memorandum lists the procedure for vacation selections. It also memorializes the memorandum issued by Chief McGee on 12/23/03.

1. Definitions:

A. VACATION

(1) The taking of five (5) vacation days in a row between scheduled days off.

(2) The taking of five (5) vacation days split around three (3) regularly scheduled days off.

B. VACATION DAY

(1) A single day taken as a vacation which does not meet the criteria mentioned above.

2. General Guidelines for Vacation Selection:

A. No vacations may be selected for Thursday, Friday, Saturday, and Sunday of Riverfest unless approved by the Chief of Police or his designee.

B. Vacations shall be selected according to seniority on each Watch.

C. A vacation day is considered the same as a holiday or compensatory day and may be canceled as deemed necessary by the Chief of Police or his designee (i.e. exigent and unforeseen events or circumstances).

D. Vacations selected pursuant to the rotational bid process may not be changed or canceled by the employee unless authorized by the Chief of Police or his designee.

E. Any employee may select two vacations to run consecutively, however, they are considered to be two picks and the employee will forfeit his or her next turn in the rotation of picks.

F. Vacations selected may not overlap with those of other officers on the same shift unless specifically authorized by the Uniform Services Commander.

G. No vacation carried over into the next year will be scheduled until all other employees on the shift are allowed to exercise current year preferences. Vacation days carried over must be taken prior to April 1st.

3. Vacation Section Procedure:

A. Officers must indicate in the vacation book both the dates(s) of their vacation and the date the selection was made. He or she shall also fill in the dates on the 2008 calendar behind the shift vacation pick charts.

(1) Sergeants are not in the pick rotation.

B. After making his or her pick, the officer shall complete a leave request form and turn it in to his or her direct supervisor. The direct supervisor will mark the vacation days on the master calendar.

C. Once a pick has been made, the officer who just selected will send an e-mail to the next officer in order of seniority that it is his or her turn to make a selection. An electronic copy of the e-mail shall be sent to the shift sergeant. Once notified, the officer shall have **three (3) working days** to make a selection or pass. If a selection is not made in three (3) working days, the officer will automatically forfeit his or her pick.

(1) The next officer's three (3) days start on the work day that he or she receives the e-mail.

D. After the bidding process has been completed and an officer has passed on his or her next selection, any vacation selected after that date will be with the approval of the shift sergeant. The pick will carry the weight of an extra day off and cannot be used to bump another officer's pre-scheduled time off.

NOTE: Officers should be diligent in using vacation when scheduled. No more than five (5) days may be carried forward and if too many days are carried into December, the possibility exists that some time could be lost.

(Emphasis in original)

POSITIONS OF THE PARTIES

With regard to the substantive issue, whether the Grievant should have been allowed to take vacation during the period December 25 through December 29, 2008, the Association makes two points: that the Watertown Police Department acted in an arbitrary and capricious manner when it denied the Grievant's vacation request and that a bona fide past practice exists to permit overlapping of vacation.

With respect to the procedural issue, whether the grievance was processed in a timely fashion, the Association contends that the Employer waived its right to make this claim because it waited until the hearing to assert it. In fact, the Association points out that the claim was made during the hearing, not even at the start of the hearing. The Association quotes extensively from numerous arbitral decisions to the effect that Employers waive the right to contend that a grievance is untimely when they wait until the hearing to raise the issue.

The Association asks that the grievance not be dismissed as untimely, that the grievance be sustained, that a decision be provided no later than December 1, 2008 and as a remedy, the Association requests that the Employer be ordered to cease and desist from violating the expressed and implied terms of the collective bargaining agreement; a finding that a bona fide past practice exists between the parties allowing officers from the same shift to overlap on vacation days; that the Grievant be granted his vacation for December 25 through December 29 and if the decision in this matter be received after those days, that the Grievant be compensated at time and one-half for the days he is required to work, December 25 through December 29.

The initial argument of the Employer addresses its contention that the grievance is not arbitrable because it was not processed through the steps of the grievance procedure on a timely basis. The City contends that it believed that the issue to be addressed was whether the Grievant should have been approved for vacation during

Christmas week if a sergeant was allowed to take vacation that week. The initial grievance, the denial of the Grievant's vacation, had been filed in December and answered in December. No action was taken until March 26 when Association Representative Ben Barth e-mailed the chief and raised the question of why a sergeant was allowed the vacation time off that overlapped with that of another officer when the Grievant was not allowed that time off. According to the Employer, "[r]ather than start the grievance process over again, the City allowed the expired grievance to proceed based on these intervening facts and the new issue presented." In essence, the Employer contends that "the City did not receive notice that the Grievant intended to pursue his original grievance to the Finance Committee on to arbitration until the Grievant disclosed that fact at the arbitration hearing. Thus, the City was under no obligation to raise the procedural issue of timeliness until the arbitration hearing." The City agrees that the question of whether the Employer violated the collective bargaining agreement by allowing the sergeant to take vacation on the days in question is timely, but the question of whether there was a violation in December when the Grievant was initially denied the vacation days is time-barred.

As to the substantive issue, the City argues that the Chief has the sole discretion to grant or deny requests for vacation and that decision cannot be overturned in arbitration. Such clear and unambiguous language must be applied by the arbitrator. In response to the vacation schedules covering a six (6) month span presented by the Association that demonstrate only three (3) examples where the Chief agreed to an exception to the general rule of allowing only one officer on vacation per shift, the City argues that the Association presented no evidence as to why the Chief made the exceptions or whether there were extenuating or special circumstances that existed which resulted in the Chief exercising his sole discretion to approve the overlapping vacations. There is no evidence in the record to support an Association argument that the Chief exercised his discretion in an unreasonable manner, and the examples shown are insufficient to establish a past practice.

The Employer also contends that the Chief created a reasonable work rule which is valid and enforceable under the facts presented here. The City also points to an arbitration award issued in 2003 by Arbitrator McAlpin and contends that award must be given full force and effect. The City points out that Arbitrator McAlpin stated that sergeants were not members of the bargaining unit represented by the Association and, therefore, the City could schedule vacations among those personnel as it saw fit. The City has done just that by excluding the sergeants from the vacation selection rotation and permitting them to take vacations which overlap that of bargaining unit members.

Finally, the City argues that the remedy of time and one-half sought by the Association in the event that this award sustains the grievance and is issued too late for the Grievant to take the requested days as vacation has no basis in the collective bargaining agreement, is without precedent and is improper. The City requests that the grievance be dismissed in its entirety.

DISCUSSION

Timeliness

At the start of the hearing in this matter, the parties stipulated to the substantive issue to be decided by the arbitrator. No procedural issues were raised. However, during the cross-examination of the Grievant, it became apparent that although the grievance had not been advanced to Step 3 of the grievance procedure after the Chief's denial on December 31, the Grievant wanted the original grievance pursued. The City contends that it was under the impression that the grievance being pursued was that of denial of the vacation time to the Grievant while granting the days in question to Sgt. Engel, resulting in overlap of vacation with another member of the bargaining unit, Officer Worzalla.

As noted, the City did not raise its timeliness objection until the hearing was well underway. Whether or not the City realized that the original grievance was being pursued, as well as grieving the granting of the requested time to Sgt. Engel, the substantive issue that was stipulated to covers both grievances.¹ Additionally, at no time prior to the cross examination of the Grievant did the City either raise the timeliness question or clarify that it was only addressing the question of whether a contractual violation had occurred when the vacation days in question were granted to Sgt. Engel. In his April 10th denial of the grievance, Mayor Krueger specifically addressed the initial grievance, including the grievance number, 2007-57: "Officer Zastrow's second choice overlapped Officer Worzalla's first choice and was denied." The denial also addressed permitting Sgt. Engel to take off the days that the Grievant had been denied: "The fact that a police sergeant was on vacation at the same time has no bearing on this grievance." Mayor Krueger's response did not differentiate between the two ways in which the Grievant contends his contractual rights had been violated, and the response did not raise the question of timeliness at all.

On April 18, the Association advised that it wished to proceed to arbitration and on May 7, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission. Although the Mayor was the addressee of the first letter, and was sent a copy of the second, no mention of failure to follow the timelines of the grievance procedure was made by the Employer until after the hearing in this matter commenced.

Although there is no question that the Association did not process the initial grievance in accordance with the time limits set forth in the collective bargaining agreement, the Employer failed to raise this issue until well into the arbitration hearing. In accordance with well-established arbitral precedent², the undersigned considers the timeliness challenge to be waived.

¹ This assumes, of course, that there are really two different questions: the initial denial to the Grievant and the subsequent granting of the days to Sgt. Engel.

² See, ELKOURI AND ELKOURI, How Arbitration Works, 6th edition, pp. 219-220.

The Merits

During the second round of vacation picks in November 2007 the Grievant attempted to secure the period December 25 through December 29 as vacation days off. The Grievant had chosen, and had approved, a different week of vacation during the first round of picks, a round during which Officer Worzalla chose and had approved the period December 24 through December 31. Upon receipt of the Grievant's request, Sgt. Engel denied the request, citing the Guidelines for Vacation Selection which prohibit overlap of selected vacations with other officers on the same shift unless specifically authorized by the Uniform Services Commander. The Grievant asked for authorization from the Uniform Services Commander and was denied. A grievance was filed in which it is contended that the denial was a violation of the collective bargaining agreement and that approval of the requested vacation would not result in the Department being below appropriate staffing levels and that the employer had exercised its management rights in an unreasonable manner since minimum staffing would still be met if the vacation was approved.

The collective bargaining agreement provides that at Section 9.02:

Vacation schedules, including the number of employees able to be on vacation at the same time, shall be approved by the Police Chief or his representative.

In accordance with this provision and Article 2.01 K of the contract, the Chief has promulgated Guidelines for Vacation Selection. These guidelines prohibit officers from selecting overlapping vacations without authorization from the Uniform Services Commander. Neither the collective bargaining agreement nor these guidelines mention minimum staffing requirements or "appropriate staffing levels". Appropriate staffing levels, as a general rule, are determined by management, in accordance with general management rights. Nothing in the collective bargaining agreement between the Association and the Employer has abrogated the right of management to determine the level of staffing, and in fact those issues have specifically been reserved to management, see Article 2.01 of the collective bargaining agreement, subsections B, C and H. The rules of vacation selection promulgated by the Police Chief are reasonable and do not violate the terms of the collective bargaining agreement between the parties.

At hearing, the Association presented evidence to demonstrate that there is a past practice of allowing overlap of vacation time which would have occurred had the Grievant been awarded the vacation week he sought. This evidence (calendars for the months of November and December 2007 as well as for June, July, November and December of 2008) demonstrated the following overlapping vacation schedules:

- December 24, 2007; Officer Meloy and Officer Caucutt
- December 26, 2007 - December 28, 2007; Sgt. Kaminiski, Officer Neidner, Officer Brower and Officer Pauli
- December 30, 2007; Sgt. Engel and Officer Worzalla
- December 31, 2007; Sgt. Engle and Officer Worzalla
- June 24, 2008; Sgt. Engel and Officer Teuteberg
- July 24, 2008; Officer Repta and Officer Schroeder
- July 26, 2008; Sgt. Johnson and Officer Schroeder
- July 27, 2008; Sgt. Johnson and Officer Schroeder
- November 23, 2008; Sgt. Engel and Officer Zastrow

Of these nine overlapping scheduled vacations, six (6) include overlap of an Officer's vacation with that of a sergeant; one includes a sergeant and three (3) officers, and two (2) demonstrate overlapping of two officers' vacations. The collective bargaining unit represented by the Association does not include sergeants. Sergeants are not bound by the Guidelines for Vacation Selection which is specifically addressed to Non-Supervisory Police Department Personnel. Accordingly, the six (6) incidents of an alleged past practice of allowing a sergeant to take vacation at the same time as an officer are irrelevant to the instant matter. Similarly, the fact that Sgt. Engel was allowed to take vacation in December 2008 in a manner which overlaps with Officer Worzalla's vacation pick is, in and of itself, not a deviation from the Guidelines for Vacation Selection and, therefore, not a sustainable grievance.³

It is necessary to analyze the remaining three (3) instances in which more than one officer's approved vacation overlaps with approved vacation of another officer: December 24, 2007, December 26 - 28, 2007, and July 24, 2008. Although the calendars received in evidence clearly show the overlaps of vacations as contended by the Association, no evidence was presented as to when the particular vacations were picked or whether there were extenuating circumstances that persuaded the Uniform Services Commander to approve these overlapping vacations. There was no testimony to explain why, on these particular days, there was deviation from the general policy that officers would not be allowed to take vacations that overlap with one another.

While the Association has established that there are times that the Police Department allows overlapping vacations, it has failed to establish that there is a past practice of allowing overlapping vacations. The elements of a past practice are well-established: the practice is unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Strong proof of the existence of a past practice must be

³ A 2003 arbitration award made clear that the Department was free to treat sergeant's vacation scheduling separate from that of the bargaining unit. Since then, the Department has done just that - it has established a separate system for those vacation picks and the Guidelines for Vacation Selection do not apply to the sergeants.

shown.⁴ Here, the Guidelines are clearly written which indicate that overlap is not permissible, except under certain circumstances. The denial of the Grievant's vacation request by Sgt. Engel includes a statement that he has denied other requests that overlapped by more than one day. The calendars submitted by the Association show three deviations from the prohibition of officer vacation overlaps in a period of more than one year. This can hardly be considered a clearly enunciated practice, over a reasonable period of time, to the effect that overlaps are allowed. To the contrary, the record establishes that few, if any, overlaps are permitted. Thus, the undersigned cannot make a finding that a past practice exists that allows for overlaps of vacation days.

The Association also contends that the City acted in an arbitrary and capricious manner when it denied the Grievant's vacation request. This is premised on an allegation that Sgt. Engel had a personal interest in the request and the Uniform Service Commander failed to use his authority to supersede Sgt. Engel's decision, thereby going "along with the conspiracy to take the days away from Officer Zastrow." The Association argues that if Sgt. Engel had not been interested in the same days as the Grievant, Officer Zastrow would have been allowed the days off. While it is somewhat disconcerting that Sgt. Engel was granted vacation for the period December 24 through December 28, overlapping Officer Worzalla's vacation on December 24 and 25, while Officer Zastrow was denied vacation for the period December 25 through December 29 which would have overlapped Officer Worzalla on December 25 and December 29, the Association has not provided any evidence in support of this conspiracy theory. The record establishes that the Association became aware of the dates of Sgt. Engel's vacation in early March, but it does not establish when Sgt. Engel actually requested and received approval for this vacation pick. Neither Sgt. Engel nor Uniform Services Commander Meddaugh testified at the hearing, and there is nothing in the evidence to support the contention that the Grievant's vacation request was denied because Sgt. Engel wanted to take those days for his vacation.⁵

The City argues that the relief requested by the Association is beyond the authority of this arbitrator as the collective bargaining agreement does not provide for payment at the rate of one and one-half times for working regularly scheduled hours. This point need not be addressed inasmuch as this award is being issued well before the dates at issue and because there is no basis upon which to sustain the grievance.

⁴ See, ELKOURI AND ELKOURI, at pp. 608-609.

⁵ Arguably, Sgt. Engel's taking off the days that were denied to the Grievant does not pass the "smell test". However, there is no evidence that the action was arbitrary or capricious.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 13th day of October, 2008.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator