

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**NEW RICHMOND POLICE DEPARTMENT EMPLOYEES' ASSOCIATION
LOCAL 216, LABOR ASSOCIATION OF WISCONSIN, INC.**

and

CITY OF NEW RICHMOND

Case 24
No. 67988
MA-14074

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc. 206 South Arlington Street, Appleton, Wisconsin 54915, on behalf of the Association.

Weld, Riley, Prens & Ricci, S.C., by **Attorney Stephen L. Weld**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 on behalf of the District.

ARBITRATION AWARD

At all times pertinent hereto, the New Richmond Police Department Employees' Association (herein the Association) and the City of New Richmond (herein the City) were parties to a collective bargaining agreement covering the period from January 1, 2007 through December 31, 2009. On May 6, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning an allegation that the City had denied Officer Thomas Wulf, the Grievant herein, vacation on July 4, 5 & 6, 2008 in violation of the parties' collective bargaining agreement. The undersigned was assigned to hear the dispute. A hearing was conducted on July 1, 2008. The proceedings were not transcribed. The parties filed their initial briefs by August 31, 2008. The City filed a reply brief on September 10, 2008. On September 18, the Association advised the Arbitrator that it would not be filing a reply brief, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the Employer violate the terms and conditions of the collective bargaining agreement when it denied Officer Thomas Wulf's vacation request for July 4, 5, and 6, 2008?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 3 – MAINTENANCE OF STANDARDS

- 3.1** Except as provided in this Agreement, the Employer agrees that all conditions of employment shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved whenever specific provisions for improvement are made elsewhere in this Agreement. Any disagreement between the Local Association and the Employer, with respect to this matter, shall be subject to the grievance procedure.

This provision does not give the Employer the right to impose or continue wages, hours, and working conditions less than those contained in this Agreement.

...

ARTICLE 7 – HOLIDAYS

- 7.1** Paid holidays are: New Year's Eve, New Year's Day, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, December 24 and Christmas Day.

...

- 7.6** There shall only be one officer on vacation or compensatory time off during any holiday listed in Section 7.1.

...

ARTICLE 10 – MANAGEMENT RIGHTS

- 10.1** The City of New Richmond possesses the sole right to operate City government and all management rights repose in it, subject to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

1. To direct all operations of City government;

. . .
2. To hire, promote, schedule and assign employees in positions within the bargaining unit;

. . .
7. To introduce new or improved methods or facilities or to change existing methods or facilities;

ARTICLE 11 – VACATION

. . .

11.2 Vacations may be taken at any time of the year with the approval of the Chief of Police or his/her designee; provided that, except in cases of emergency, a vacation request of less than one week (six days) shall be preceded by 48-hour or greater written notice and a vacation request of one work week or longer must be by prior written notice of at least seven (7) calendar days. The time limits referred to in this Section are exclusive of weekends. **SHORT TERM NOTICES:** Employees who are called for available overtime, with less than 48 hours notice due to vacation requests, shall respond to such request for available overtime when called, and if there is no response the Chief of Police or his/her designee may call the next available officer. **LONG TERM NOTICES:** Employees will be called on a rotating seniority basis for available overtime with more than 48 hours notice due to vacation requests, and shall have 24-hours to respond. If available employees do not respond within 24 hours the shift shall be “split” pursuant to Article 19, Section 19.6. The Chief of Police or his/her designee shall make written notice of the date and time the request was made. A vacation schedule shall be posted from November 1 to December 15, during which time each employee may select his/her vacation, by seniority, consistent with the following:

1. Each employee electing to select vacation during the November 1st through December 15th seniority selection period may designate his/her primary block of such vacation. [A “primary block” is defined as any period of a maximum of 12 consecutive vacation days.] This “primary block” of vacation shall be selected strictly by seniority.

2. In addition to the “primary block,” an employee may also sign up for one secondary block of vacation for the year; however, if there is conflict between such additional vacation period(s) and a junior employee’s “primary block” the junior employee’s “primary block” shall prevail. [A “secondary block” is defined as any period of a maximum of the balance of the annual vacation accrual of vacation days.] This “secondary block” of vacation shall be selected strictly by seniority.
3. Vacation, which the employee chooses not to request during the November 1st through December 15th seniority selection period may be taken by the employee during the year on a first come, first served basis, subject to the normal vacation approval mechanism.
4. The Employer will make every attempt at filling the vacancy created by a vacation request without calling in an employee while on his/her scheduled off-duty time, which is contiguous to the requested vacation time request.
5. Vacation requests shall be granted if the shift vacancies can be filled by any available personnel not to exceed three employees off at one time.

. . .

**ARTICLE 19 – OVERTIME,
COMPENSIBLE TIME OFF, COURT TIME**

. . .

19.6 Whenever there exists a full of [sic] partial regular patrol shift vacancy, which the Chief determines is to be filled, the Employer shall fill said vacancy as follows:

1. **Voluntary Available Bargaining Unit Personnel.** The Employer must offer a patrol shift vacancy to available bargaining unit employees. (An employee is not considered available where working the hours would result in less than seven and one-half (7.5) hour period between shifts.) If a bargaining unit employee accepts the offer, he/she shall be compensated in either pay or compensatory time at time and one-half (1.5). It is understood that any offer under this sub-section is voluntary in nature and the employee may decline same.

2. **Ordered Shift Extensions.** Where attempts to fill a vacancy under paragraph 1, above, fail, the Employer will then fill said vacancy by ordering an officer to extend his/her work hours in four (4) hours blocks, either at the end of his/her shift or at the beginning of his/her work shift.
 - a. **Short-Term Shift Extensions (72 hours or less).** An officer that has been ordered to extend his work hours has the ability to contact other officers that are scheduled to work, or are working with the officer, to see if they would be willing to extend their work hours in place of the officer.
 - b. **Long-Term Shift Extensions (72 hours or greater).** An officer that has been ordered to extend his work hours has the ability to contact other officers that are working the same shift to see if they would be willing to extend their work hours in place of the officer.

BACKGROUND

The New Richmond Police Department employs 12 patrol officers. The officers work a schedule of 6 days on and 3 days off and are assigned to one of three shifts, with four officers assigned to each shift. From November 1 to December 15 of each year, the officers are permitted to select a primary and a secondary block of vacation by seniority. Primary blocks take priority over secondary blocks, regardless of seniority. Any vacation time not allocated in a primary or secondary block can be taken throughout the year on a first come first served basis. The City has a minimum staffing requirement of two officers per shift to provide for public protection and to insure that officers have back up. Due to the rotation of work schedules, 20/21 days per month there are three officers on duty on a given shift. The other 10 days there are two officers on duty on a given shift. Thus, on 20/21 days per month the City may grant vacation and other leave requests to officers without needing to call in replacements. On the other 10 days the City must call in off-duty officers to fill shifts in order for officers to take leave.

On April 16, 2008, Officer Thomas Wulf made a request to take vacation on July 4, 5 and 6. As the request was made outside the November 1 – December 15 window, the request was to take vacation on a first come first served basis. The request was denied by Sergeant Gayle Freiseis because Officer Scott Turbeville had designated July 3-6, 2008 as a primary block of vacation. Wulf grieved the decision and the grievance was denied. The matter proceeded through the grievance procedure, resulting in this arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Association

The Association contends that the language of Article 11, Section 11.2, subsection 5 has been traditionally understood to mean that up to three officers could be off at one time. Two of the positions could be filled by offering overtime and the third could be left unfilled. During negotiations over the 2007-09 contract, the City proposed to revise the language of Article 11 to limit vacation requests to two per day and only one per shift, but that language was rejected and the City dropped its proposal. Now, the City is asking the arbitrator to redefine the language of Article 11 to interpret the phrase "...off at one time" to mean "on one day and no more than one per shift," in effect giving the City what it could not obtain in bargaining. This would violate Article 3 - Maintenance of Standards, which requires that all conditions of employment be maintained at not less than the highest standards existing at the time the agreement was signed. Further, it would require the arbitrator to modify the language of the contract, which is expressly prohibited by Article 4 - Grievance Procedure. The Chief's denial letter makes it clear that he wished to curtail overtime in order to convince the City Council to hire additional officers. Nevertheless, the language of the contract is clear that three officers may be off at once and the grievance should be sustained.

The City argues that vacation has been denied on the same grounds in the past without the Association filing grievances. In all occasions in 2006 and 2007, except one, the employees were either able to find replacements, or adjust their vacation schedules, or did not seek to grieve the matter. In the other case, a grievance was filed, but was not pursued beyond Step 2 due to illness of the Association Labor Consultant. There is, therefore, no past practice of the Association not filing grievances, which refutes the City's argument.

Article 11, Section 11.2 provides the City with a process for calling in employees, either with short or long term notice, to fill vacancies created by vacation requests. It was clear to both parties that implementing that language would require the payment of overtime. Further, subsection 4 requires the Department to make every effort to fill the vacancy so that the request may be granted. There is no evidence that the City made any attempt to fill the vacancy here.

According to Chief Samelstad, in 2005, the City made a decision to stop using part-time employees, which had been previously done to permit more than one employee per shift to request vacation at the same time. The Chief hoped to reduce costs and at the same time convince the Council to hire more full-time officers. It is clear, however, that in order to sell the plan the Chief had to reduce the outlay for overtime. This has impaired the employees' ability to utilize their allotted vacation in violation of the contract. The Association requests that the grievance be sustained, that the City be required to cease and desist from denying vacation requests and be required to adhere to the contract, and that the Grievant be granted an additional three days of vacation to compensate him for his inconvenience.

The City

The City asserts that the Association's request would require the City to grant three vacation requests each calendar day, even if doing so would leave the City with inadequate police protection. It maintains that Article 10 – Management Rights gives the City authority to grant or deny vacation requests as part of its power to direct and schedule City operations. Testimony from the Grievant, Union Steward Borgen and Lieutenant Cody revealed that it is mutually recognized that there are situations where the City may appropriately deny vacation requests, such as emergencies, holidays, special events, lost children, murder investigations, or if the vacation would reduce staffing below minimum levels. Other than holidays, however, none of these circumstances are referenced in the contract. In this case, the Grievant's shift would have been understaffed, making the denial justified.

Since 2006, the City has had a clear and consistent practice of requiring two officers to be on duty per shift. The language of Article 11.2, Section 5 states that vacation requests shall be granted if shift vacancies can be filled by available personnel, not to exceed three employees at one time. The predecessor agreement reveals that "available personnel" was previously understood to mean part-time employees. From 1994-2006, vacancies would be filled by members of the Department's reserve corps of part-time officers. In 2006, the reserve corps was eliminated and an additional full-time officer was added to each shift. In response to the grievance, the Chief explained that the intent of the move was to be able to honor vacation and comp time requests without incurring additional overtime. At the same time, the requirement of having two officers on each shift was added. Employer Exhibits 1 & 4 list vacation requests that were denied in 2006 and 2007 due to lack of minimum staffing if they had been granted. The Grievant was also aware of this practice and even testified that he had withdrawn a vacation request in 2007 after he discovered that another officer would otherwise be on duty alone. In negotiations for the 2007-09 contract, the City proposed language to memorialize the practice of requiring two officers on duty on each shift. Despite the fact that the Association disagreed, the City made it clear it would not grant vacation requests that would result in fewer than two officers on a shift and it has consistently applied that standard since. Its action here, therefore, cannot be considered arbitrary or capricious.

The City asserts that the grievance has no merit and that there was no violation of the contract. It further, asserts, however, that even in the event the grievance is deemed to have merit, the requested remedy of additional vacation days for the Grievant is inappropriate, inasmuch as the Grievant was not denied vacation, but merely had to use it at another time.

The Association in Reply

The Association declined to file a reply brief.

The District in Reply

The District asserts that the fact that its bargaining proposal regarding vacation language was rejected does not mean that the arbitrator is precluded from accepting the City's arguments and denying the grievance. This position has been taken by numerous arbitrators. (citations omitted) It is not given that the fact that the City made a proposal means it did not already have the rights asserted. In this case, the City has always had the right to deny vacation requests based on its rights to direct operations, establish reasonable schedules and change existing methods of operations. Here, the purpose of the proposal was to make the contract consistent with the changes in practice that went into effect in 2006. The parties understood the need to make changes, as is reflected in the removal of the reference to part-time officers. The City is not asking the arbitrator to give it language it could not obtain in bargaining, but to recognize the City's inherent authority to make staffing decisions based on community needs and officer safety.

The City also reasserts that there is a consistent past-practice since 2006 of denying vacation requests where granting the request would result in fewer than two officers per shift. This system has worked smoothly up to now, as acknowledged by the Association in its admission that there have been no previous grievances because either the officers were able to make other arrangements or did not come forward to request that grievances be filed. The Association has asserted that the City's policy has affected employees' ability to schedule vacation, but there is no evidence that this is so. The Grievant's request was on a first come, first served basis, which is lowest priority. Nevertheless, there is no evidence that the Grievant was denied the right to use his vacation, just the right to take it at a time that would put the community or another officer at risk. The City never agreed to reduce staffing decisions to a question of numbers regardless of policing needs. The grievance should be denied.

DISCUSSION

In this case, the Grievant, Officer Thomas Wulf sought to take vacation July 4-6, 2008.
¹ Officer Scott Turbeville, who works the same shift, had already asked for, and had been granted, vacation for those days as his primary vacation pick. Wulf's request was denied, therefore, because otherwise only one officer would have been on duty during that shift. The Association asserts that the language of Article 11 provides that three officers may be off at any one time and that the denial of Wulf's request was a violation of the contract. The City maintains that the language of Article 11, Section 11.2 should be properly interpreted to mean that "three employees off at one time" means three per day, or one on any given shift. It further contends that it has authority under its management rights to limit time off requests in order to provide for adequate staffing.

¹ At the hearing, the Association acknowledged that Wulf's request for vacation on July 4 was barred by Article 7.6, which permits only one employee to take vacation or compensatory time off on Independence Day. Thus, the vacation request for July 4 is moot.

There is no question that for the City the protection of the public and the safety of the officers on the force should be paramount concerns. Indeed, these concerns should be shared by the Association, as well, and there is no reason to believe that they are not. On the other hand, the parties have bargained language into their contract that specifically details how vacation requests are to be handled and, unless there is some overriding consideration, this language should be given its full weight and effect.

Here, Section 11.2 sets out the methodology for the processing of vacation requests. It specifies that primary and secondary vacation requests are initially made between November 1 and December 15 of each year and that, thereafter, employees may request to use any remaining vacation days on a first come, first served basis. Primary and secondary requests have priority over first come, first served requests, regardless of seniority. The provision also specifies that “employees will be called on a rotating seniority basis for available overtime with more than 48 hours notice due to vacation requests, and shall have 24 hours to respond. If available employees do not respond within 24 hours the shift shall be ‘split’ pursuant to Article 19, Section 19.6.” Finally, Section 11.2 requires the City to attempt to fill vacancies, if possible, without calling in employees on their off-duty hours contiguous to the vacant shift, but that “vacation requests are to be granted if the shift vacancies can be filled by any available personnel, not to exceed three employees off at one time.”

The City argues forcefully that minimum staffing requirements must override vacation preferences, and that its ability to do so is encompassed within its management rights. The management rights clause states, however, that the general grants of authority contained therein are subject to, and thus may be limited by, specific language elsewhere in the contract. The vacation language set out in Section 11.2 is very specific and, therefore, to the extent that it conflicts with the language of the management rights clause, the vacation language typically must control. This language requires that where more than 48 hours advance notice is given of a vacation request, the City will offer overtime on a rotating seniority basis to any available officers to fill the vacant shift. If no one accepts the overtime, then the Chief is to split the open shift and order officers on the preceding and following shifts to extend their shifts to fill the opening. This language is clear and unambiguous and establishes that whenever a vacation request is made an attempt must be made to fill the vacancy with other available officers in order to honor the vacation request.

On April 28, 2008, Chief Samelstad wrote to Union Labor Consultant Thomas Bauer denying the grievance. (Jt. Ex. #3) In the letter, Samelstad makes it clear that he had been working in recent years to increase the number of full-time patrol officers and had, in fact, been successful in adding one officer to each shift. The trade-off for this, however, was that the Department stopped hiring casual part-time officers to fill open shifts. Further, according to the Chief, part of his justification in order to obtain Council approval for the additional officers was that it would reduce overtime. Since Officer Turbeville was already scheduled to be off, allowing Wulf to take time off, as well, would require another officer to work overtime to make sure minimum staffing requirements were met. Hence, the request was denied.

In my view, the Chief's concern for holding the line on overtime was understandable. Nevertheless, the contract language makes it clear that it is understood that the honoring of vacation requests may result in the creation of overtime and, what is more, that notwithstanding the creation of overtime, every attempt should be made to honor the vacation requests. In the previous round of bargaining, the City tried to negotiate a change in the language on Section 11.2 to specify that vacation requests may be granted to only one officer per shift on any given day, ostensibly to circumvent the requirement for creating overtime in the event that more than one officer requested time off on the same shift. The Association did not agree and the proposal was dropped.

The City asserts that the proposal was intended to codify what, in fact, was an existing practice, but in my opinion the record does not support this contention. Prior to the current contract, the practice was that open shifts were assigned to part-time auxiliary officers who were, in effect, casual employees. Although the use of the part-time officers to fill shifts was eliminated with the hire of additional full-time officers, the language describing the process for handling vacation requests remained unchanged, other than eliminating a reference to part-time officers. Samelstad testified that when the Association rejected the City's proposal he informed the Association's representatives that the City would interpret Section 11.2 in the future in accordance with the language it proposed. The Association took issue with the City's position. Subsequently, the City denied a vacation request by Sergeant Gayle Freiseis because another officer on the same shift had been granted leave. A grievance was filed, which was subsequently dropped. However, Samelstad testified that he agreed that the grievance was dropped over an untimeliness concern due to the illness of the Association representative and not due to a concession by the Association that the City's position was correct. He further stated that he agreed with the Association that the issue needed resolution.

In my view, this record establishes that there was no existing practice accepted by both parties of permitting only one officer per shift to take leave at any given time, nor of interpreting the language "three employees off at one time" to mean only one per shift. Undoubtedly, the City put the Association on notice that it interpreted the language that way, but it seems equally clear to me that the Association did not agree and that the Chief even acknowledged the difference and the need for clarification. In my view, "three at one time" means exactly that. One officer off on three different shifts on the same day does not mean the same as three off at one time, but at three different times, so the argument over the correct meaning of the language favors the Association.

This is not a case about the City's right to require minimum staffing. The City can most likely achieve minimum staffing when two officers are off on the same shift by either offering overtime or splitting the vacant shift, as provided in Sections 11.2 and 19.6. If, after exercising those options, there is still no one available to fill the shift, the City can then deny the leave request based on its need for a minimum number of officers on each shift. However, as I read the contract, before it can deny a vacation request due to staffing concerns, the City must first seek to honor the request and obtain coverage for the vacant shift by offering overtime to other available officers or splitting the shift. The City's concerns about overtime costs are

understandable, but they do not justify ignoring the clear language of the contract. There is no evidence in this record that the City made any attempt to fill Wulf's shift before denying his request and, in failing to do so, the City thereby violated the contract. Despite the City's violation, however, there is no evidence of any pecuniary harm to the Grievant and he, in fact, was allowed to use his vacation days later in the year, which will be reflected in the remedy.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The Employer violated the terms and conditions of the collective bargaining agreement when it denied Officer Thomas Wulf's vacation request for July 4, 5, and 6, 2008. In the future, therefore, the City shall comply with the overtime and shift-splitting provisions of Sections 11.2 and 19.6 before denying vacation requests based on staffing needs. The Grievant's request for additional days of vacation due to the City's violation has no merit and is denied.

Dated at Fond du Lac, Wisconsin, this 10th day of December, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

