

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF NIAGARA

and

**WISCONSIN COUNCIL 40, LOCAL 17529-C,
NIAGARA EMPLOYEES, AFSCME, AFL-CIO**

Case 3

No. 67941

MA-14059

(Sick Leave Payout upon Retirement Grievance)

Appearances:

Mr. Dennis O'Brien, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, appearing on behalf of Local 17529-C.

Attorney James M. Kalny, Davis & Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the City of Niagara.

ARBITRATION AWARD

Local No. 17529-C, Niagara Employees, hereinafter referred to as the Union, and the City of Niagara, hereinafter referred to as the City or the Employer, are parties to a Collective Bargaining Agreement (Agreement or Contract) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. On April 17, 2008 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the alleged failure of the City to pay the proper amount of sick leave to Assistant Police Chief Gary Spade (Grievant). The undersigned was appointed as the arbitrator. Hearing was held on the matter on August 12, 2008 in Florence, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was transcribed and is the official transcript of the proceedings. The parties filed initial post-hearing briefs and replies by November 26, 2008 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were not able to stipulate to the issues to be decided by the Arbitrator and left it to the Arbitrator to frame the issues.

The Union states the issues as follows:

1. Did the City violate the practice of the parties when it paid the grievant less than 30% of a thousand (1000) hours accumulation?
2. If so, what is the remedy?
3. What did the practice indicate the parties agreed to for accumulation?

The City states the issues as follows:

Is the Collective Bargaining Agreement clear and unambiguous in regard to how sick leave payout at retirement is to be calculated?

If not,

Is there a binding past practice between the parties in regard to the calculation of sick leave payout at retirement?

The Arbitrator states the issues as follows:

Did the City of Niagara violate the Collective Bargaining Agreement when it failed to pay Assistant Police Chief Gary Spade 30% of 1000 hours (100 days) of accumulated sick leave upon his retirement?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XXV - SICK LEAVE

- Section 1. All employees covered by this Agreement shall receive sick leave with pay at the rate of fourteen (14) days per calendar year. Unused sick leave may be accumulated to a maximum of one hundred (100) days.

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Section 4. Upon retirement or death (benefit to be paid to heirs), each employee shall receive payment for thirty percent (30%) of accumulated unused sick leave.

ARTICLE XXXII - STANDARDS

The Employer agrees that all standards of employment relating to wages, hours of work, and general working conditions shall remain unchanged as those in effect prior to the signing of this Agreement unless changed by specific provision in this Agreement or side letters incorporated therein.

ARTICLE XXXIII - ENTIRE AGREEMENT

The parties agree that they have negotiated fully and effectively in reaching this Agreement based upon a full disclosure by each of all matters properly the subject of collective bargaining. Accordingly, the parties agree that the terms and provisions of this Agreement and any additions, side letters, schedules or exhibits incorporated therein represent the entire understanding reached by them in good faith and that there are no other matters unresolved which either will later claim, should be a part of this Agreement. Finally, this Agreement, as such, may be changed only by mutual consent of the parties.

BACKGROUND

This matter relates to the payout of accumulated sick leave to Assistant Police Chief Gary Spade upon his retirement in 2008. He was paid an amount equal to 30% of a total of 1000 hours, or 300 hours, less the amount of hours he used in the last year of his retirement. Thus, he actually received an amount (200.7 hours) less than 30% of 1000 hours when, according to the Union, he should have been paid a total of 30% of 1000 hours, or 300 hours of pay.

THE PARTIES' POSITIONS

The Union

There has clearly been a practice which supports the Grievant's assertion that he should have been paid 300 hours of pay upon his retirement, instead of the 200.7 he was actually paid. Arbitrator Carlton Snow explains how a past practice is defined, used and how arbitrators determine its existence. He says that a past practice is a pattern of prior conduct consistently undertaken in

recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action. A past practice may be used to clarify ambiguous contract language, to implement general contract language, or to create a separate, enforceable condition of employment. Some arbitrators use past practice to modify or amend clear and unambiguous contract language.

Arbitrator Mittenthal sets forth the factors generally applied by arbitrators in determining whether a past practice exists. The practice must have clarity and consistency of the pattern of conduct; there must be longevity and repetition of the activity; there must be acceptability of the pattern; and the parties must mutually acknowledge the pattern of conduct. Citing Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961)

Here, the practice (of paying retiring employees 30% of a total sick leave accumulation of 1000 hours regardless of how much sick leave they use in the last year of employment) is clear and consistent. Ellen Venstra, Fiscal Accounts Manager/Deputy Treasurer, testified that she had been responsible for keeping the employee records for sick leave for almost 20 years and she used this method taught to her by her predecessor. The sick leave accumulation is noted on the check stub of each employee and additions and subtractions were made to that total. She also calculated the sick leave payout for retiring employees. In the past she had always calculated the payout in the same manner until the instant dispute when City Manager Novak told her to alter the calculation method. Niagara is a small city. This is significant because there are few retirements and even fewer which require the answers for the questions raised here. Until the instant dispute the record indicates that the City calculated the payout by taking 30% of the amount shown as accumulated sick leave on the pay stub if less than the maximum allowed (1000 hours for police). If the number of hours of sick leave accumulated exceeded the maximum for the payout then 30% of the maximum was used to calculate the payout sum. This was true and consistent every time and it was 30% of the payout maximum even though each of the three (prior retirees Brault, Chamberlain and R. Spade) had used sick leave in their final year of employment.

For over 20 years on a weekly basis the employees of the City received a paycheck stub including an amount for accumulated sick leave. This amount was regularly adjusted for usage. The amount of accumulation was never restricted to a maximum. Moreau and Zigman testified that the restriction referenced in the contract was to define the maximum payout upon retirement to an amount not greater than 30% of 100 days times the normal number of hours per day. The number of hours recorded on the pay stubs of Zigman and Moreau still indicate an amount greater than the maximum for payout mentioned in the contract. So the practice has longevity and repetition.

Arbitrators generally agree that past practice may be used to create a separate, enforceable condition of employment in appropriate circumstances. If a collective bargaining agreement is silent about a particular topic and a practice has been in effect for an extensive period of time, arbitrators

often use past practice to infer the existence of a term not set forth in the written agreement, assuming there are no contractual barriers to such an analysis. In the instant matter there are several indications that the parties did agree to the method by which the sick leave would be accumulated and paid out upon retirement. First, Novak told Venstra to change the method she had used in the past so it is clear that he was aware of her customary method. When the Grievant's brother retired in 1999 he used 150 hours of sick leave (in his last year of employment) and received 30% of 1000 hours. So did Brault in 1994 and Chamberlain in 1996. The City produced two witnesses to speak against the practice but one was the Chief of Police, a supervisor when R. Spade retired and was paid, according to the City, incorrectly. The other witness was ex-Mayor Bousley during whose career Brault and Chamberlain retired and were paid the same way. Regarding claims that a practice was not mutually acknowledged or agreed to, Arbitrator Roumell observed:

"In order for past practice to serve as a useful aid in interpreting contractual language, both parties must have been fully aware of the practice. Arbitrators tend to impute knowledge of a practice to management where supervisors know of a practice." GREATER LOS ANGELES ZOO ASSOC., 60 LA 838 (Christopher, 1973) (Arbitrator's note: The above is the citation provided by the Union and the undersigned believes that Arbitrator Roumell may have been citing another arbitrator in another case.)

So, in the instant dispute it is abundantly clear that the City, through its agent Venstra, knew of the practice and any claim by the City that such pay-outs were in error are not supported by the record. Hence, there is acceptability of the pattern.

There is mutual acknowledgment of the pattern. The Union operated from the belief that if an employee accumulated in excess of the contractual maximum for pay-out of sick leave, then even if they used sick leave in the year they retired, they would receive 30% of the maximum (100 days-1000 hours). There are no examples that differed from that method. Venstra always used that method and there is no evidence that the City ever gave notice that the sick leave accumulation and pay-out had been mistakenly administered in the past. Where there is a practice which the City claims was contrary to the contractual language, it is incumbent on them, as the proponent of the language to give the Union notice that it would no longer follow the practice. Arbitrator Talent wrote:

"However, where there has been a past practice, contrary to the explicit language of the agreement, either party must give due notice of requiring strict adherence to the clear and unambiguous language of the contract at a subsequent time. This is in the interest of equity and justice, especially when the other party may claim to have been relying on the practice. It would preclude any claim of prejudice, waiver or estoppel." MODINE MANUFACTURING COMPANY, 60 LA 141, 144 (Talent, 1973)

The Union cites Arbitrator Roumell in *AWREY BAKERIES, INC.*, AAA No. 54 30 0106 (1973) as standing for the proposition that even in cases which contain no clear ambiguity in the contractual language, a long standing and mutually accepted past practice can act as a modification of the contract through consent and acquiescence of the parties.

The 'zipper clause', Article XXXIII - The Entire Agreement, supports the Union's position here because the parties have agreed that the unwritten practices are to be considered as terms of the agreement. "Further, those terms are zipped up tight in the agreement. As a minimum, they are required to give notice to the other party during bargaining of their objection to the continuance of the practice."

The City accused the Union of trying to get two grievances for the price of one because there are two groups of employees which would be effected by this grievance. The Police contract, which embodies the 1000 hour maximum sick leave accumulation and the Waste Water Operators contract which has an 800 hour limitation. The Union perceives itself as a single group and is not attempting to get two for one.

In conclusion, the record supports the Union's claim of past practice. It is apparent that the City wishes to walk away from what it has agreed to, but if it wished to alter the established practice it should have raised the issue at the bargaining table. Arbitral reasoning and the parties' Agreement bar the action of the City in this dispute. It should not be allowed to eliminate a long-standing practice unilaterally.

The City

The controversy between the parties concerns the interpretation of Sections 1 and 4, Article XXV of the Collective Bargaining Agreement. The City contends the sick leave retirement pay-out is calculated based on the amount of 100 days maximum accumulation less any sick leave used in the year of retirement. The Union argues that the Contract provides for payment based off of 100 days regardless of any use of sick leave in the year of retirement. There is no need to interpret the Agreement regarding sick leave payout because there is no ambiguity in the controlling language. Citing Elkouri & Elkouri, *How Arbitration Works*, 5th Ed., p. 470, an agreement is ambiguous only if plausible contentions may be made for conflicting interpretations of the language. The plain words of Sections 1 and 4, Article XXV are not susceptible to reasonable alternative readings. The first part of Section 1 states the rate at which sick leave is earned annually and the second part of that section provides that unused sick leave may be accumulated up to a certain amount. Section 4 creates a retirement benefit and provides that each employee shall receive a payment upon retirement in the amount of 30% of accumulated sick leave. Reading Section 1 and 4 together, as the Arbitrator must do, because sick leave can only be accumulated up to a maximum of

100 days, and the sick leave benefit is based on 30% of the accumulated sick leave, the only reading giving consistent meaning to the terms used in the Contract is the meaning used by the City.

The Union's interpretation requires the Arbitrator to go outside of the terms of the Contract because it allows for an accumulation in excess of the stated maximum of 100 days. Arbitrators are not to legislate and the grievance provision of the parties' Contract limits the Arbitrator to the terms and provisions of that Agreement and prevents him from adding to it, detracting from it or modifying it in any way.

The Union advances the proposition that a past practice exists. Past practice need not be addressed inasmuch as the plain words of the Contract clearly provide for payment of 30% of sick leave that has been accumulated and unused as described in the Contract. The Union has failed to show a past practice. Keeping a total of accumulated sick leave noted on a paycheck stub does not overrule the Contract language nor does the fact that three incidents of payment based on the total lifetime accumulated sick leave in the past create a past practice. There is no evidence of a past practice nor was there any mutuality about the alleged past practice. The elements of a past practice are missing here. It was not unequivocal; it was not acted upon nor clearly enunciated; and it was not readily ascertainable over a period of time as a fixed established practice by both parties. The only evidence on record as to why the City paid out increased amounts in the three prior incidents is that it was a mistake. It was in error.

The interpretation of the Contract as argued by the Union was never intended by the parties. Wodenka, testifying as Chief Negotiator for the Union said Section 4 was created to provide for a new payout benefit based on 100 days of unused sick leave less any time used in the final year. Bousley, Wodenka's counterpart on the City's negotiating team, testified that he agreed with Wodenka. This dual statement of intent is uncontroverted and is the best evidence of the intent of the parties. Also, Section 4 was added to the Contract with knowledge of the existence of Section 1. If a different manner of determining the amount of unused accumulated sick leave was intended, it should have been addressed at that time.

The Union's Reply

The evidence supports the Union's assertion that there was a clear past practice binding on the parties. The elements of unequivocal, frequent and long-standing practice of recording accumulated time-off benefits on pay stubs was in existence and "the Union interpreted this to mean that the City intended to record its use of vacation and sick leave." Venstra had done this for many years.

The dispute "distills to, 'Is there a mutually agreed upon way of doing things?'" The Union is not responsible for informing the City of its understanding of how the City keeps records. The

method used to record time-off benefits and to relay that information to employees was the only method used by the City. On the one hand, the City agrees that the Contract language is clear but on the other hand the City acted differently. Contrary to the testimony of Bousley and Wodenka (who recalled agreements over ten years ago) the Union witnesses “testified that it was their belief the contractual limitation on accumulation was solely related to a payout for the accumulated sick leave of the retirees.” The Contract limit was intended to limit the payout upon retirement, not the amount of unused sick leave available.

The City’s position regarding keeping a record of total accumulation for tracking sick leave abuse doesn’t make sense. The total accumulation doesn’t tell them much about abuse. The check stub tally could have easily been stopped at 100 days times the number of hours worked.

Several concepts are addressed in Article XXV. Under that Article Chief Wodenka allowed R. Spade over 30 days time off in his last year before retirement and he was still paid 30% of the maximum 100 days. Despite his (Wodenka’s) testimony, his actions support the Union. The City is attempting to eliminate a benefit without bargaining. The Union cites FRUEHAUF TRAILER CO., 29 LA 372, 375 (Jones, 1957) as standing for the proposition (the Arbitrator believes) that prior binding past practices can span successive agreements. Article XXXII requires that all standards of employment relating to wages, hours of work and general working conditions shall remain unchanged unless the change is bargained. The City did not bargain this change. The Union cites STURGEON BAY SCHOOL DISTRICT, MA-7373 (Levitan, 1993) as standing for the proposition that a 10 year old practice agreed upon by the parties meets the test for a valid past practice.

In conclusion the Union asks the Arbitrator to declare a past practice because there is clear evidence that it always paid retiring employees in the same method and because the Union relied on the City to record and calculate the accumulation of sick leave on the weekly pay stub. The Union cites NICOLET HIGH SCHOOL DISTRICT, MA-10243 (Gratz, 1999) as standing for the proposition that management is bound to honor a long-standing and uniform practice even in the face of clear and contradictory language, and that the practice may be repudiated during bargaining forcing the Union to change the contractual language or live by its clear meaning. A past practice is binding if based on an agreement to amend the contract. Such an agreement can be implied when parties knowingly apply a practice contrary to the plain language of the contract. Arbitrators require proof that the practice is of long duration, frequent application, and with clear knowledge of the parties, just as in the instant matter.

City’s Reply

The Union actually argues two past practices exist. The first, recording lifetime accumulation of sick leave on check stubs (the tracking practice) which practice gives rise to the second practice of paying retiring employees sick leave based on that total accumulation (the payout practice). It is

remarkable that the Union claims that a tracking practice can modify the Labor Agreement. It was never discussed between the parties and there is no evidence that it was ever intended to be a part of the Contract. It does not have its origin in the relationship between the parties but was a unilateral act of the City directed by the Common Council. The absence of mutuality is too pronounced to find a binding past practice. There is no evidence that the City intended to create some kind of injury reserve based on total lifetime usage of sick leave and the unlimited accumulation of sick leave is a significant benefit which can only be achieved by bargaining.

The Union has not proved the payout practice to be binding. In order to reach the payout practice one must first accept the tracking practice as binding. But even if the tracking practice were binding the payout practice argument fails because there was no mutual intent. No representative of the City had the authority to interpret it in a manner in which this lifetime data was used to determine sick leave payout at retirement nor that the City had knowledge of the practice.

The Union's arguments lead to the conclusion that the payout practice was contrary to the plain words of the Contract and actually support the City's argument. On page 8 of its Brief, the Union states: "The amount of accumulation was never restricted to a maximum." To reach this conclusion one must totally disregard Section 1 of the Labor Agreement which specifically states that the "unused sick leave may be accumulated to a maximum of 100 days." The parties intended what the plain words state – unused sick leave accumulates up to 100 days each year and the sick leave payout is 30% of what is unused of that 100 days in the last year of (before) retirement.

There is no evidence that any decision maker was aware of the mistaken payouts. The Union would like the Arbitrator to ignore the fact that the last time pay-outs upon which the Union relies took place 15 years ago before Niagara was even a City.

The Union's argument that the City was required to give notice prior to discontinuing the payout practice illustrates the folly of finding a binding past practice where there is no evidence of mutuality. There is no evidence that the City had knowledge that Venstra used the past practice as alleged by the Union and, without that knowledge, it would have been difficult to give notice of the discontinuance of it. Venstra's payout calculations were contrary to the plain meaning of the Agreement and the intent of the parties. They were mistakes. She assumed the total lifetime accumulation of sick leave on the pay checks was the basis for the payout and she did not look at the Agreement or even ask a supervisor. She was mistaken.

DISCUSSION

The Union argues that a valid and binding past practice exists in Niagara. That practice, according to the Union, is the practice of paying retiring employees 30% of a total accumulation of sick leave in the amount of 100 days of pay regardless of sick leave usage in the last year before

retirement. In the case of the Police, that total accumulation amounts to 1000 hours since the Police employees work a 10 hour shift, and in the case of DPW the total accumulation amounts to 800 hours since DPW employees work an 8 hour shift. The Arbitrator notes that the grievance before him relates only to a member of the Police Department. That having been said, the Award herein would have been identical had a DPW employee been the subject of a similar grievance. Both contracts are identical in their language and the facts applicable to that language are likewise identical.

In the absence of a written agreement, any alleged past practice, if it is to be binding upon the parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954) and a long line of cases which follow it. A number of arbitrators have modified the CELANESE analysis slightly but the core elements required amount to essentially the same concept. The practice must be clear, consistent and accepted by both parties. In short, it must be mutually accepted and agreed upon. These are accepted elements arbitrators analyze when referring to a past practice as an aid to contract interpretation.

Past practice is widely used to interpret ambiguous and unclear contract language. The use of a past practice to modify clear and unambiguous language has, infrequently, been used by arbitrators. The modification of clear contractual language based on a past practice is not widely favored by arbitrators because the written agreement is generally considered to be the best evidence of the intent of the parties. Also, arbitrators are not permitted to go beyond the express intent and bargain of the parties and if the meaning of the written agreement is clear there is no reason to rely on past practice to interpret the language since clear language needs no interpretation. See St. Antoine, Theodore, ed., *The Common Law of the Workplace*, 81 (BNA, 1998). Arbitrator Summers observed that, “[i]n interpreting a collective bargaining agreement probably nothing is more capable of constructive use or susceptible to serious abuse as appeals to custom and practice.” STANDARD BAG CORP., 45 LA 1149, 1151 (Summers, 1965). The undersigned believes that, in the face of ambiguous language, evidence of past practice may be used constructively to put meaning to the unclear language employed by the parties. The undersigned also believes that in the face of clear and unambiguous language the use of custom and practice is generally not relevant. Plain language, not capable of alternative meaning, is an undisputed fact. Custom or past practice cannot be used to change the explicit terms of an agreement because to do so would alter the true intent of the parties and arbitrators are not authorized to alter the true intent of the parties, but rather to give that intent effect. (See PHELPS DODGE COPPER PRODS. CORP., 16 LA 229, 233 (Justin, 1951). Ambiguous language is language, the meaning of which cannot be determined without reference to evidence beyond the language itself. “Where... the simple facts allow both sides to advance plausible contentions for conflicting interpretations...” the arbitrator may declare the words to be ambiguous. KEEGO HARBOR, MICHIGAN, POLICE DEPARTMENT, 114 LA 859, 863 (Roumell, Jr., 2000) (quoting INLAND EMPIRE PAPER COMPANY, 88 LA 1096, 1102 (Levak, 1987).

The simple facts in this case as they relate to the contract language do not allow both sides to advance plausible contentions for conflicting interpretations. The language is clear and unambiguous and is not capable of alternative meaning. The Union seems to agree. It's argument appears to be that, even though the language may be clear, the past practice in this case should take precedent over the language and that "...if an employer, after permitting a past practice to be established, now insists on the written language of the agreement, the employer must put the Union on notice." The Union further cites Arbitrator Roumell in *AWREY BAKERIES*, AAA No. 54 30 0106 (1973):

There is no clear ambiguity in the contractual language, nor is there a gap to be filled. However, it is clear that the parties have modified this contract language by a past practice that extends over the past 30 years and has been consistently followed either company and the Union (sic). Additionally, as required of any modification of the contract, that (sic) Arbitrator finds that the Union has consented to and acquiesced in the course of conduct.

In that case the Arbitrator found the past practice to be so deeply ingrained in the dealings between the parties so as to have constituted a joint modification of the clear contract language. There may be fact situations which can support such a conclusion. This case is not one of them, though. The undersigned believes that in order to allow a past practice to modify clear contractual language, the practice must be of very long duration and the evidence must show conclusively that during the life of the practice the parties mutually agreed that the practice demonstrates their true intent. In addition, the practice, over that period of time, must be so repetitive that there can be no doubt that it represents the unequivocal intent of the parties. In the instant case, the practice was of long duration - arguably 19 years or so, but it fails the repetitive test and the mutuality test. The evidence shows that it was implemented only three times over that period. True, we are dealing with a small number of Union members and few retired over that period, but this fact supports the notion that, because there were few occasions to overpay the retirees, it was easier to make the occasional mistake when they did retire. There were fewer instances for management to catch the error. More importantly, the evidence clearly shows that there was no mutuality regarding the practice. Former Mayor Bousley testified very credibly that the purpose of showing lifetime accumulation of sick leave on paycheck stubs was not meant to modify any contractual language but was used by the City to record total sick leave relative to sick leave use in an effort to track sick leave abuse. The City is free to keep its records in whatever form it desires and showing the total lifetime accumulation on a paycheck stub does not work to modify the parties intentional bargain as reflected by the clear and unambiguous contractual language. In addition, the Union's former president and negotiator for this language, Wodenka, credibly testified that it was the intent of the Union in bargaining the retirement payout clause and the maximum sick leave accumulation clause that sick leave payout at retirement be limited to 30% of the maximum accumulated sick leave of 1000 hours and that the words 'maximum accumulated sick leave at retirement' means that any sick leave used in the last year of work be deducted from the 'maximum accumulated'. Mayor Bousley, the City's contract negotiator

for this language, confirmed the City's intent to be the same as the Union's. The Union argues that knowledge of Assistant Treasurer Venstra's method of payment be imputed to management and that this knowledge proves that the City intended the practice to be binding on them. The undersigned does not impute such knowledge to management for the reasons stated above.

The Union's position regarding the requirement of notice from the City of its intent to discontinue the so-called practice is somewhat unclear. It seems to argue that, after having received notice, if any had been received, the City would then have had to bargain the issue with the Union. This is would be true if the contract language were ambiguous and the past practice were binding upon the parties. But in the face of clear and unambiguous language, one party is free to give notice to the other (at the time of bargaining) of its repudiation of a practice which differs from the clear contractual term thus unilaterally bringing an end to it. At that point the parties may materially change the language to conform to the prior practice or not. If not, they then live by the terms strictly construed. (See NICOLET HIGH SCHOOL DISTRICT, MA-10243 (Gratz, 1999))

The current contract took effect on January 1, 2008. The grievance was lodged on December 12, 2007 and the City's response to the grievance, wherein it advised the Union that the payment to Spade was a mistake, is dated December 14, 2007. This response constitutes an effective repudiation of any past practice which *may have existed*, (Arbitrator's emphasis) coming as it did when a new agreement was being negotiated. Even so, the undersigned does not find that a binding past practice exists in this case. The sick leave language in Article XXV is quite clear and does not require the Arbitrator to look beyond it to past practice as an aid in its interpretation. Under Section 1 of that Article the Contract provides that sick leave may be accumulated to a maximum of 100 days. It does not say "maximum of 100 days plus whatever the employee uses in the last year prior to retirement" as the Union seems to argue. Such an interpretation is not plausible and would increase a substantial benefit to the membership and modify the meaning of the contractual terms and the Arbitrator is not authorized to do that. Section 4 of Article XXV, which the Arbitrator reads along with Section 1, clearly states that when an employee retires he or she will receive 30% of his or her accumulated *unused* sick leave. (My emphasis) This does not mean, as the Union would seem to argue, "30% of accumulated unused sick leave except that we won't count any sick leave used during the last year of employment." Again, such an interpretation is not plausible and would work to modify the express terms of the Agreement giving the membership a benefit for which they have not bargained. Maximum unused accumulated sick leave at retirement means exactly what it says and includes any sick leave used during the last year of employment. Thus, any sick leave used during the last year of employment must be deducted from the maximum of 100 days to determine the appropriate amount of unused accumulated sick leave of which 30% is to be paid to the employee at retirement.

Because there is no binding past practice to be continued, the so-called 'zipper clause' found in Article XXXII holds no relevance in this matter.

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

AWARD

1. The City of Niagara did not violate the Collective Bargaining Agreement when it failed to pay Assistant Police Chief Gary Spade 30% of 1000 hours (100 days) of accumulated sick leave upon his retirement.
2. The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 12th day of December, 2008.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
7375

