

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CUDAHY PROFESSIONAL FIREFIGHTERS ASSOCIATION LOCAL 1801**

and

**CITY OF CUDAHY**

Case #116

No. 68562

MA-14270

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Appearances:

**John B. Kiel**, The Law Office of John B. Kiel, LLC., 3300-252<sup>nd</sup> Avenue, Salem, Wisconsin 53168, appearing on behalf of Cudahy Professional Firefighters Association Local 1801.

**Robert W. Mulcahy**, Michael Best & Friedrich LLP., 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the City of Cudahy.

**ARBITRATION AWARD**

The City of Cudahy, hereinafter City or Employer, and the Cudahy Professional Firefighters Association Local 1801, hereinafter Local 1801 or Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to assign a Commissioner or staff member to resolve a dispute between them regarding denial of vacation to MPO John Burke in August 2008. Commissioner Susan J.M. Bauman was so appointed. Hearing was held on April 1 and April 28, 2009, in Cudahy, Wisconsin. Transcripts of the hearing were filed on April 20 and May 11, 2009. The record was closed on July 9, 2009, 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 were unable to agree on a statement of the issue and agreed that the arbitrator could frame the issue based on the evidence and arguments presented. The Union proposed the following statement of the issue:

Did the City of Cudahy violate the collective bargaining agreement when it refused to allow Local 1801 member John Burke to be on vacation from his platoon assignment at Station 1 on August 17<sup>th</sup>, 20<sup>th</sup> and 23<sup>rd</sup>, 2008? If so, what is the appropriate remedy?

The Employer proposed the following statement of the issue:

Is the grievance substantively arbitrable?

Did the City violate Article 27 of the parties' collective bargaining agreement when it denied MPO Burke's vacation request dated June 30, 2008 for time off on August 17, 20, and 23, 2008?

The undersigned finds the issues to be:

1. Is the grievance substantively arbitrable?
2. Did the Employer violate the collective bargaining agreement when it denied MPO Burke's request for vacation on August 17, 20 and 23, 2008?
3. If so, what is the remedy?

### BACKGROUND and FACTS

The City of Cudahy Fire Department (Department) provides emergency medical services and fire suppression services to the residents of the City of Cudahy 24 hours a day, seven days a week, 365 days a year. The Department has two stations: Station 1 is located on the north side and Station 2 covers the southern part of the City. The Department has twenty-five members, headed by the Fire Chief. There are three individuals who hold the rank of battalion chief, and three who are lieutenants. The remaining members of the Department are motor pump operators (MPOs). The MPOs and the lieutenants are members of the bargaining unit represented by the Union. Lieutenants and Battalion Chiefs are considered officers for the purpose of having at least one officer on duty at all times.

The members of the Department, other than the Chief, work a 24-hour rotating schedule, on duty for a period of 24 hours, followed by 48 hours off duty. These individuals are assigned to one of three shifts: red, black or gold. Each shift is composed of two platoons, the group of employees assigned to a particular station. There are four employees assigned to each platoon, for a total of eight each shift. Three MPOs and a lieutenant are assigned to Station 1, and three MPOs and a battalion chief (BC) are assigned to Station 2. The Chief works 8 hours a day, 5 days per week on a regular basis. The Department has adopted a minimum staffing level of three persons per platoon or six per shift.

The Union has negotiated with the City over a period of more than twenty-five years, resulting in significant time off benefits for members of the bargaining unit. These benefits include vacation, holidays, funeral leave and sick leave and incentive days for accumulated sick leave. In addition, members of the bargaining unit are able to “trade” a shift with another member of the unit such that employee A will work for employee B with a promise that employee B will work for employee A at a time in the future. The collective bargaining agreement contains a scheme whereby employees may pick their vacation days in a series of either 3 or 6 consecutive duty days, including a time line for making such selections and ramifications for deferring selection; a method for selecting to receive pay or time off for named holidays; a means for selection of incentive days off; and a provision whereby the Chief may “restrict” holidays and incentive days when an employee is off work for more than two weeks as a result of illness, injury, military leave, or family medical leave.

On June 30, 2008, MPO Burke submitted a request for vacation on August 17, 20 and 23. The request was denied by Chief Posda.<sup>1</sup> MPO Burke was assigned to Station 1. MPO Hartje was also assigned to this platoon, but was on military leave for most of 2008, including the three days that Burke wanted to take his vacation. In addition, MPO Steuber had a previously approved holiday for August 17 and 23 and BC Schmidt had a previously approved holiday for August 20. Steuber and Schmidt were assigned to the same shift, but a different platoon, as the Grievant. The Chief’s denial of Burke’s vacation led to the instant grievance which was filed on July 21, 2008. The letter denying the grievance states:

I received Grievance 08-101 on July 21, 2008. This grievance was accepted and dated by Battalion Chief Schmidt on 7-17-2008. I am denying this grievance for multiple reasons but not limited to those stated herein. I did not deny MPO Burke’s request for vacation as stated in the grievance as I did not receive a request for said vacation until July 21, 2008. Since I have just received Mr. Burke’s request for a vacation that

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<sup>1</sup> Chief Posda was actually serving as the Interim Chief of the Department during all times relevant to this matter. He will, however, be referred to as Chief throughout this Award.

was not submitted within the prescribed limits set forth in Article 27 of the Collective Bargaining Agreement, his request will be denied. Since this is a restricted shift, one person on Military Leave and another person on an approved holiday, the employer reserves the right to deny the vacation at this time. As per article 27 states “the employee shall lose the right to select by seniority for that particular vacation choice and shall not be able to cancel a holiday of another employee (with a vacation selection) if the other employee’s holiday had been reserved and approved according to the rules governing holiday selection.

The grievance also states “it is Chief Posda’s belief that if the vacation pick is not submitted within the time limits he has the ability to deny it”. I am not denying someone their vacation, just the dates they are requesting.

The grievance states that under Article 26, the Chief has the ability to place a shift under restriction and further that the restriction only applies to holidays and incentive days, not vacations. This is false as Article 27 does allow the Chief to restrict vacations if the vacation is not marked down within the prescribed limits and an approved holiday has been reserved.

Although MPO Burke was unable to utilize vacation on the requested days, he did arrange trades with other firefighters for at least two of the days in question and he was able to utilize his vacation at a later time. The grievance was pursued by the Union:

Chief Posda:

Pursuant to Article 13 Paragraph B of the collective bargaining agreement, I am notifying you that Local 1801 wishes to take grievance 08-101 to the next step in the grievance process, the Arbitration board. I believe your interpretation of the contract is incorrect. As you know vacation and holiday selection is on a platoon basis not a shift basis. It is understood that the shift is restricted, and that holidays have been approved. I am not asking to have the approved holidays cancelled. The approved holidays are at another platoon or station. The platoon in which the vacation request was submitted does not have an employee off on either holidays or vacation.

Sincerely,

Jeffery Bloor /s/  
President  
Cudahy Firefighters Local 1801

The parties were unable to resolve the matter and it proceeded to arbitration before the undersigned.<sup>2</sup>

Additional facts are included in the DISCUSSION below.

## **RELEVANT CONTRACT PROVISIONS**

**(2004 -2006)**

### **ARTICLE 1 – RECOGNITION**

. . .

Wherever the term “**EMPLOYEE**” is used in the Memorandum of Agreement, it shall mean and include only those employees covered under the terms and conditions of this agreement.

### **ARTICLE 2 – DEFINITIONS**

These definitions shall apply to all sections of this contract except as otherwise provided in this contract.

- A. **SHIFT** – Shall be defined as one (1) twenty-four (24) hour tour of duty at both stations.
- B. **PLATOON** – Shall be defined as a group of employees assigned to a specific station on a shift.
- C. **WORKDAY** – One (1) twenty-four (24) hour tour of duty shall be counted as one (1) workday.

### **ARTICLE 4 – MANAGEMENT RIGHTS**

The City possesses the sole right to operate City government and all management rights shall be vested in it, but such rights must be exercised consistently with the other provisions of this contract. These rights which are normally exercised by the Fire Chief include, but are not limited to, the following:

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<sup>2</sup> Although the collective bargaining agreement calls for a tripartite arbitration panel, the parties agreed that this matter could be resolved by one arbitrator.

- A. To direct all operations of the City Government.
- B. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge, and take other disciplinary action against employees pursuant to the reasonable rules and regulations of the Cudahy Fire and Police Commission and the Cudahy Fire Department.
- C. To relieve employees from their duties because of lack of work or for other legitimate reasons.
- D. To maintain efficiency of City Government operations entrusted to it.
- E. To introduce new or improved methods or facilities.
- F. To change existing methods or facilities.
- G. To contract out for goods or services.
- H. To determine the methods, means and personnel by which such operations are to be conducted.
- I. To take whatever actions which must be necessary to carry out the functions of the City in situations of emergency.
- J. To take whatever action is necessary to comply with State or Federal law.
- K. To establish reasonable work rules and daily schedules of work.
- L. The City agrees to its obligations under Wisconsin Law to bargain with the Association relating to the "IMPACT" of any decisions on the wages, hours or working conditions of the employees. This does not impose any obligation upon the City relating to any decisions which they are empowered to make without bargaining with the Association.

The Association and the employees agree that they will not attempt to abridge these management rights, and the City agrees it will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

## **ARTICLE 12 – GRIEVANCE PROCEDURE**

A. *Definitions of Grievance:* A grievance shall mean any controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute of any employee or group of employees concerning this contract. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinance and rules which are matters processed under existing procedures.

...

- I. ***Interpretation of the Contract:*** For all grievances involving an interpretation of the terms and conditions of this contract, the Grievance Initiation Form shall be presented to the Chief. The Chief shall be required to consult with the Labor Negotiator concerning the grievance. The Chief shall then, within fourteen (14) calendar days, inform the employee and the Association in writing of the decision made on the grievance. The decision made by the Chief shall be final and binding upon the City, however, the Association shall have the right to submit the grievance to arbitration.

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### **ARTICLE 13 – ARBITRATION PROCEDURE**

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***D. Jurisdiction of Arbitration Board:*** The Arbitration Board shall only have jurisdiction to determine compliance with the provisions of this agreement and whether or not the dispute is arbitrable. On grievances where the subject matter raises a questions [sic] arbitrability, the Arbitration Board shall first hear and decide the questions or [sic] arbitrability unless mutually agreed otherwise. The Arbitration Board shall not have the jurisdiction or authority to add to, amend, modify, nullify or ignore in any way the provisions of this agreement and shall not make any award, which in effect, would grant the Association or the City any matters which were not obtained in the negotiating process.

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### **ARTICLE 26 – HOLIDAYS**

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All employees shall have the option to take either compensatory time off or receive payment for these holidays. Any replacement days off shall be given these employees as jointly determined by the individual employee and the Chief. Holiday compensatory time may be reserved on a first come, first serve basis within each platoon, provided no one else in that platoon is scheduled for vacation or holiday. Holidays may be reserved more than ninety (90) days in advance only by procuring a written consent form signed by all the other members of that platoon. Replacement days may also be taken as full days.

Any pay for unused holidays shall be one hundred fifty dollars (\$150.00) for a full holiday, and seventy-five dollars (\$75.00) for each unused half-holiday. Effective 01/01/98, Any [sic] pay for unused holidays shall be one hundred seventy-five dollars (\$175.00) for a full holiday, and eighty-seven dollars and fifty cents (\$87.50) for each unused half holiday.

If compensatory time is not taken for all holidays on or before December 31<sup>st</sup> of each year, employees will receive payment for these holidays (not taken) in the next payroll period. The holidays set forth in this section shall accrue on the above dates, and any employee receiving the benefit of such holiday before it accrues, and subsequently terminates employment with the City agrees to have the City deduct from the employee's final pay check the values of such holiday or holidays received. Officers will choose holidays to ensure that only one Officer per shift is on a holiday at the same time (per 01/01/92)

The Fire Chief reserves the right to restrict holidays for any long term absence (2-weeks) on duty injury, resignations, long term absences, extended illnesses (2-weeks), or emergency situations on a particular shift. If this situation occurs, the Fire Chief shall honor all holidays marked within the ninety (90) day period, but reserves the right to cancel holidays beyond the ninety (90) day period and maintains the right to cancel any future holidays on the affected shift involved. Three (3) holidays may be split into six (6) twelve-hour increments; these half-day holidays may be taken from 7:00 a.m. to 7:00 p.m., or 7:00 p.m. to 7:00 a.m.

The Fire Chief shall honor all holidays marked within the ninety (90) day period but reserves the right to cancel holidays beyond the ninety (90) day period and maintains the right to cancel any future holidays on the affected shift involved if the holiday being scheduled would reduce the manning of the shift involved to below the minimum standard in effect at this time. Holidays cannot be restricted, if the restriction is caused by a delay in hiring replacement personnel.

#### **ARTICLE 27 – VACATIONS**

Each employee shall receive an earned vacation leave, with pay, from anniversary date of hire as follows:

- A. After one (1) year of service – six (6) work days.
- B. After eight (8) years of service – nine (9) work days.
- C. After fourteen (14) years of service – twelve (12) work days.
- D. After twenty (20) years of service – fifteen (15) work days.



Selection of vacations shall be based on seniority per platoon. Only one man per station, per platoon, shall be allowed on vacation during any specific period of time. Vacations shall be selected in rotation in multiples of any three (3) consecutive work days, and a maximum of any six (6) consecutive workdays, in any one selection. All Officers will choose vacations to insure that only one Officer per shift is on vacation at the same time. Selection of vacation shall be as follows:

- 1<sup>st</sup> pick by – January 1
- 2<sup>nd</sup> pick by – January 10
- 3<sup>rd</sup> pick by – January 20
- 4<sup>th</sup> pick by – January 30
- 5<sup>th</sup> pick by – February 7

In the event an employee does not schedule a vacation within these prescribed limits, the employee shall lose the right to select by seniority for that particular vacation choice and shall not be able to cancel a holiday of another employee (with a vacation selection) if the other employee's holiday had been reserved and approved according to the rules governing holiday selection.

#### **ARTICLE 29 – SICK LEAVE**

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#### **Incentive for Non-Use of Sick Days:**

Incentive to be calculated as: one (1) sick leave incentive day shall be granted after fifty (50) accumulated sick days; one (1) additional incentive day after one hundred fifty (150) accumulated sick days; one (1) additional incentive day after two hundred twenty-five (225) accumulated sick days; one (1) additional incentive days after three hundred (300) accumulated sick days; etc. in seventy-five (75) days increments (where there is an actual limit spelled out above on sick days of one hundred fifty (150) days – this does not apply to this section – “UNLIMITED ACCUMULATION” will be counted for sick leave incentive days based on the same concept of one day earned per month of employment and subtract the days used to maintain a total.) All incentive days shall be scheduled by September 30<sup>th</sup>, and used by December 31<sup>st</sup>. Time off is regulated by the same rules as “Holidays.” Incentive days can only be carried over to the following year in the event of a long-term illness on a shift. An Incentive Day must be earned by January 1<sup>st</sup> of the year that it will be scheduled to be used. If the Incentive Day/s are not scheduled and taken, no compensation will be given.

(emphasis in original)

## DISCUSSION

The basic facts in this case are undisputed. On June 30, 2008, MPO John Burke requested three days of vacation in August 2008. The request was denied. The Union contends that the clear and unambiguous language of the collective bargaining agreement required the City to grant Burke these days off as vacation. The City, on the other hand, contends that because the request was made after February 7, a shift restriction was in place and other officers on the same shift already had approved holidays for the days in question, Burke's request should not have been made and was appropriately denied. The City also argues that this matter is not substantively arbitrable.

### The Grievance is Substantively Arbitrable

It is the Employer's contention that the ability to take vacation when a restricted shift is in place and another individual has an approved holiday, if the request is made after February 7, is a new benefit that the Union seeks to obtain through the grievance process rather than at the bargaining table. The City also asserts that the Union President thinks he has found a "loophole" in the contract that allows for vacation approvals under these circumstances, but that permitting the vacation time requested by MPO Burke would, in reality, be a deviation from the past practice of the City and the Union in how vacation time is approved. The City relies on the definition of grievance in Article 12A of the contract, and the proviso that "[t]he grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinance and rules which are matters processed under existing procedures" to support its claim that the grievance is not substantively arbitrable.

Interestingly, the City's written argument in this case first addresses the merits of the grievance and then, having established to its satisfaction that the manner in which it was administering the vacation procedures was consistent with the contract and existing procedures, claims that the instant grievance is not substantively arbitrable. There is a genuine dispute as to the meaning of the applicable contract language, as well as the existing procedures regarding approvals of vacation time requests made after February 7. Accordingly, it can hardly be said unequivocally that the Union is seeking to change existing procedures and the merits of the dispute must be addressed to determine the proper meaning of the contract. The grievance is substantively arbitrable.

### The Merits

The parties hereto have, over a period of many years, negotiated successive collective bargaining agreements that memorialize understandings reached regarding wages, hours and conditions of employment. Like most contracts between municipal employers and firefighter unions, the collective bargaining agreements have provisions dealing with vacation and holiday time off. In Cudahy, the agreement provides for additional time off for non-use of sick leave (incentive days) and also provides that, under certain circumstances, the Fire Chief is able to restrict shifts such that holiday and incentive day selections may be denied or cancelled if outside a 90 day window. The crux of the dispute between the parties is whether the existence of a shift restriction and an approved holiday within the 90 day window on one platoon of a shift can result in the denial of a vacation request by an employee on the other platoon if made after February 7.

The collective bargaining agreement provides, at Article 27, for a number of considerations in the selection of vacations if they are selected in the 5 rounds of selection process ending on February 7:

- a. Selection of vacations shall be based on seniority per platoon.
- b. Only one man per station, per platoon, shall be allowed on vacation during any specific period of time.
- c. Vacations shall be selected in rotation in multiples of any three (3) consecutive work days, and a maximum of any six (6) work days, in any one selection.
- d. Officers are to choose vacations to insure that only one officer per shift is on vacation at the same time.
- e. Selection is done in five (5) rounds, with the last to be completed by February 7.

Furthermore, in the event an employee does not schedule a vacation within these prescribed limits:

- a. The employee loses the right to select by seniority for that particular vacation choice.
- b. The employee shall not be able to cancel a holiday of another employee (with a vacation selection) if the other employee's holiday had been reserved and approved according to the rules governing holiday selection.

In the case at bar, MPO Burke sought to schedule the vacation at issue after February 7. MPO Hartje, a member of MPO Burke's platoon, was on military leave at the time of the request, meaning that the Chief had restricted the shift. This restriction was in effect at the time of the requested vacation.

The concept of a shift restriction was negotiated into the collective bargaining agreement many years ago when the Union agreed to incorporate a means whereby the Chief could control the City's overtime costs associated with individuals taking various types of time off. Restricted shifts are specifically referenced in Article 26, Holidays, of the Agreement:

The Fire Chief reserves the right to restrict holidays for any long term absence (2-weeks) on duty injury, resignations, long term absences, extended illnesses (2-weeks), or emergency situations on a particular shift. If this situation occurs, the Fire Chief shall honor all holidays marked within the ninety (90) day period, but reserves the right to cancel holidays beyond the ninety (90) day period and maintains the right to cancel any future holidays on the affected shift involved. Three (3) holidays may be split into six (6) twelve-hour increments; these half-day holidays may be taken from 7:00 a.m. to 7:00 p.m., or 7:00 p.m. to 7:00 a.m.

The Fire Chief shall honor all holidays marked within the ninety (90) day period but reserves the right to cancel holidays beyond the ninety (90) day period and maintains the right to cancel any future holidays on the affected shift involved if the holiday being scheduled would reduce the manning of the shift involved to below the minimum standard in effect at this time. Holidays cannot be restricted, if the restriction is caused by a delay in hiring replacement personnel.

The same concept is incorporated by reference in Article 29, Sick Leave, as it applies to incentive days: "Time off is regulated by the same rules as 'Holidays.'" Significantly, Article 27 relating to Vacations does not contain a reference to the Chief's ability to restrict a shift. This forms the basis for the Union's contention that MPO Burke was denied his August vacation days in violation of the collective bargaining agreement.

The Union argues that the collective bargaining agreement was carefully written by the parties and that it incorporates exactly what the parties agreed to. Employees can opt to be paid for their holidays, or to take them in time off. Vacations, however, must be taken in time off during the appropriate year, or the employee will not receive the vacation benefit. There is no ability to cash out vacation or to carry over the time until the following year.

According to the Union, since shift restrictions are not mentioned in Article 27, the Chief cannot restrict an employee's ability to request, and have approved, vacation at any time if three consecutive days exist and no other person is off duty from his/her platoon due to an approved, scheduled vacation. Further, the Union contends that

failure to schedule vacation by February 7 has no negative consequences to the employee other than s/he loses the right to select by seniority for that particular vacation choice and s/he cannot cancel a holiday of another employee if the other employee's holiday had been reserved and approved according to the rules governing holiday selection. The Union therefore believes that MPO Burke should have been allowed his vacation without affecting the previously scheduled holidays of MPO Steuber and BC Schmidt.

The City argues, in part, that MPO Burke's vacation could not be granted because Steuber's and Schmidt's holidays were approved during the 90 day window and Burke could not cause these holidays to be cancelled. The Employer also takes the position that, essentially, all bets are off should an employee fail to make his or her vacation selections by February 7. Unlike the Union that argues the only benefit lost by deferring a vacation selection is the ability to bump other employee vacations based on seniority or approved holidays, the City is of the mind that the "one per platoon" provision is also negated.

The collective bargaining agreement provides, at Article 27 that "Only one man per station, per platoon, shall be allowed on vacation during any specific period of time." During the vacation selection period, up to February 7, the parties are in agreement that the City always approves vacation selections such that one person from each platoon, comprising two per shift, can be off. Since 8 employees are scheduled to work each shift, this provides for minimum staffing on that shift. The crux of the dispute herein is the Union's contention that this language requires the City to approve one person from each platoon to be on vacation at all times, regardless of when the request is made and whether a shift restriction is in place.

In my opinion, the language does not support the proposition that the City is required to allow one person per platoon to be on vacation, even during the vacation selection process, up to February 7 of each year. There is, however, a clear past practice, understood by all – Union and Employer alike - that prior to February 7, one person will be permitted to select vacation on each platoon, as long as there is an officer remaining on the platoon, during the vacation selection process, whether or not a shift restriction exists.

The pivotal sentence in question is: "Only one man per station, per platoon, shall be allowed on vacation during any specific period of time." The Union focuses on the word **shall** and contends that the Employer has no discretion, ever, to deny vacation to one person per platoon with the limited exception of an approved holiday within the 90 day window should the vacation request be made after February 7. The Union ignores the word **only** that is the first word in the sentence. As such, this is a statement of the maximum number of employees that can be on vacation at any particular point in time, not as a mandate that one person must always be permitted to take vacation from each platoon at all times.

The Union argues that because the one person per platoon benefit is not one that is specifically listed as "lost" if a vacation selection is deferred until after February 7, it is a benefit that remains in effect. The Union would prevail in the instant matter if the sentence said "One man per station, per platoon, shall be allowed on vacation . . ." That language would constitute a mandate that one person must be permitted vacation on each platoon and would have required that the City allow MPO Burke's vacation request, absent a clear statement that this provision evaporated in the event the selection was not made by February 7. That is not, however, the language in the collective bargaining agreement and the Union's argument must fail.

While it is true that the reference to shift restrictions is found in Article 26, Holidays, and by reference in Article 27 with respect to use of Incentive Days, the City's interpretation of the agreement as a whole, does not require the rewriting of the provision to specifically include vacations in Article 26 as the Union contends: *The Fire Chief reserves the right to restrict holidays **and/or vacations** for any long term absence (2-weeks) on duty injury, resignations, long term absences, extended illnesses (2-weeks), or emergency situations on a particular shift.* The shift restriction, as applicable to both holidays and incentive days extends far beyond what the City has done with the Grievant's vacation request. The language of Article 26 permits the City to cancel holidays and incentive days when a shift restriction is in place, except under certain limited circumstances. The City has not cancelled, nor attempted to cancel, MPO Burke's vacation. Had he chosen these days as vacation days prior to February 7, they would be honored, or "golden" in the words of many Department members who testified. Burke did not opt to make his vacation selection prior to February 7<sup>3</sup> and, therefore, the days in question were not available to him because he could not cancel the previously approved holiday selection of other individuals and a shift restriction was in place.

Despite a clear past practice of interpreting the sentence in question to allow one person per platoon to take vacation at the same time, if the vacation selection was made by February 7, there is no requirement that the Employer be required to interpret the sentence in a like manner for vacation selections made after February 7. Inasmuch as the bargained language does not require, as the Union argues, that one person be permitted on vacation on each platoon, it is a reasonable exercise of management rights to administer the provision as it has with regard to vacation selections made after February 7.

The Union is correct when it states that the Notice of Shift Restriction does not indicate that the shift restriction being implemented affects vacations. The document in question cites the language of Article 26 of the collective bargaining agreement related

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<sup>3</sup> Union President Bloor testified to legitimate reasons why Burke failed to make his vacation selection prior to February 7.

to shift restrictions (as quoted above), indicates that for any requested holiday during the restriction, the Shift Holiday Waiver form will need to be completed, and further acknowledges that Article 27 – Vacations.

The Vacation, Holiday and Incentive Day Waiver form is required for solicitation for vacation, holiday, and incentive day changes/cancellations or for a holiday or incentive day request for Restricted Platoons. The upper portion of the document is utilized when an employee wishes to alter a vacation, holiday or incentive day by either changing or cancelling it. The document requires only that the employee discuss the anticipated change or cancellation with members of his/her platoon. The lower portion of the document requires discussion and agreement with members of the shift to take a holiday or incentive day during a platoon that is restricted. The shift members must sign indicating that they either consent or dissent with the proposed holiday or incentive day. Thereafter, the Fire Chief must sign off.

The Union is also correct when it states that these documents have nothing to do with vacation selection on restricted shifts, and that the Notice of Shift Restriction advises that Article 27 of the collective bargaining agreement will be adhered to with respect to vacations. The reference to vacation on the Waiver form relates only to the possible change in a vacation, not to a vacation selection, whether it is made before or after February 7. Signatures of shift members of the Waiver are required only for a requested holiday or incentive day, not for a vacation.

The reference to the fact that Article 27-Vacations of the collective bargaining agreement will be adhered to in the Notice of Shift Restriction is just a statement that Article 27, whatever it means, will be followed with respect to vacation selection even though a shift restriction is in place. It is very likely that these forms were drafted to address the usual case – where a vacation selection was made during one of the five rounds of vacation selection by February 7. In such a situation, it would be anticipated that the vacations would be granted in the normal course of events, allowing only one person per platoon to take vacation. The notice and the waiver do not appear to have been drafted in anticipation of a selection of a vacation day after February 7 when a shift restriction is in place. Regardless, however, neither document adds to, or deters from, the fact that the language of Article 27 allows the Employer to deny the vacation request under the circumstances presented by the instant grievance.

The Employer, primarily through the testimony of Chief Posda, emphasized the checks and balances of the system the City has established to assure that the vacation, holiday and incentive day schedules are readily available to all and that they can be referenced by employees seeking to add a vacation or a holiday to their own schedules. Having so many different places that the information is kept appears, on its face, to be an appropriate system to establish the needed checks and balances to ensure employees are able to get their benefit time off and ensure that the City does not incur excess

overtime. It appears, however, that there are many opportunities for error, especially if the fact that a shift is restricted is not noted on the calendar(s), but is merely part of the folder that contains the calendar. The granting of the small number of extra days off during 2007 and 2008 that the Union contends establish a past practice of granting vacation under the conditions here, and which the City contends are errors, could probably be avoided if a different record system were utilized.

Although both parties contend that the language of the collective bargaining agreement and that of Article 27 in particular, is clear and unambiguous and supports their respective positions, both parties expended considerable time and energy in introducing evidence of past practice in support of their positions. As noted above, I find that the language of Article 27 is quite clear and unambiguous and does not support the Union's position. However the past practice evidence is of note, and support, for the Employer's position and worthy of comment.

The Union introduced evidence of several instances over the two year period 2007-2008 during which a restricted shift was in effect and two employees on the same (restricted) shift but different platoons were granted vacation time off when requested after February 7. Interestingly, Union President Jeffrey Bloor, the Union's sole witness for its case in chief, was involved in almost all of these events and, as a lieutenant, he is able to approve his vacation and that of others. Some of these instances were approved by Battalion Chiefs who, according to Chief Posda's testimony, erred in approving these vacation requests and, in some cases, have acknowledged that these approvals were made in error. The City contends that these few instances were an insignificant number of occurrences out of several hundred time-off requests each year. It is unclear from the record as to how many of these occurrences involved similar circumstances to the instant case: a restricted shift, an approved holiday on the opposite platoon, and a request for vacation made after February 7.<sup>4</sup> While the Chief's testimony that these instances were mistakes is obviously self-serving, the number of examples that the Union has brought forth can hardly meet the standard of being a past practice: unequivocal, clearly enunciated and acted upon, readily ascertainable over a period of time as a fixed and established practice accepted by both parties.<sup>5</sup>

The City's "evidence" of past practice is challenging in that, with the exception of one specific instance involving MPO Siggelkow in an unspecified year, it was unable to present examples of vacation request denials under the circumstances presented

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<sup>4</sup> The majority of examples produced by the Union were examples of vacations for two employees, on the same shift but different platoons, being allowed vacation when a restricted shift was in place. In some of the instances at least one of the vacation requests was made prior to February 7, and the other after. The City contends these were approved by mistake.

<sup>5</sup> Elkouri and Elkouri, HOW ARBITRATION WORKS, 6<sup>th</sup> Ed., at p. 608.



here.<sup>6</sup> It is the Employer's contention, as testified to by Chief Posda, former Chief Demein and retired Shift Commander Ellerman, that employees "know better" than to make vacation requests under these circumstances, that in the event an employee did make such a request the form was returned to the employee with an explanation and direction to pick different times and that except in the case of MPO Burke, that the employee did make a different request.<sup>7</sup> Chief Posda testified that, other than in this case, there are no time off request forms on file that indicate a request for vacation has been denied. The City attempts to establish a past practice of disallowing vacation picks under the circumstances presented here by proving a negative – the (almost) non-existence of such vacation requests and denials.

It is the Union that has the burden of proof to establish that there is a past practice of permitting vacation requests under these circumstances. It must prove that the practice extends over a period of time. Here, the Union was only able to demonstrate a limited number of examples, almost all involving Lt. Bloor as either the employee on vacation or the officer that approved the vacation. In fact, the Union did not examine the records prior to 2006, a fact in itself that indicates the Union did not have evidence, or believe evidence existed, that such a practice was of long standing.

In rebuttal to the City's testimony, the Union called former MPO Zawikowski who retired in 1994 and had served on the Union bargaining team in the 1970s when much of the language at issue herein was initially bargained, though it has been somewhat amended since then. Mr. Zawikowski testified that the shift restrictions were never intended to allow the City to restrict vacations. He also testified that the Union and the City "agreed and discussed the intent to only allow one person off per platoon on vacation at a time, one at each station, one at each platoon so everyone could get their vacations in." Because vacation could not be carried over or paid out, it was important that everyone was able to take their vacations, but it was acceptable to restrict holidays since the employee could be paid for holiday time not taken. Mr. Zawikowski testified that, in his opinion, if a vacation day is requested on a platoon that has four people on it, the vacation must be granted, regardless of whether a shift restriction is in place. This statement supports the Employer since with MPO Hartje on military leave, there were only three employees on the platoon in question.

While the testimony from a retired Union negotiator and member of the bargaining team is certainly supportive of the position that the Union has taken in this grievance, it does not affect the fact that the language of the agreement does not require that one person per platoon be permitted to be on vacation at a time. The language of

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<sup>6</sup> Apparently, MPO Siggelkow did not grieve the denial but instead assisted the Department in improving the Notice of Restricted Shift.

<sup>7</sup> Neither party elicited testimony from current bargaining unit members as to their understanding of this provision and practice, and, in fact, the Grievant did not testify.

Article 27, and the wording of Mr. Zawikowski's testimony make clear that *no more than one person per platoon* may be on vacation at a given time. It may well be that during the course of Mr. Zawikowski's employment with the City there were no requests for vacation time off when there was a restricted shift and an approved holiday on the opposite platoon. It may be that such requests were never made, were routinely denied (as the City claims), or were granted. There is absolutely nothing on this record that would support the idea that such requests were granted, routinely or otherwise. While the bargaining history, from the Union perspective, is interesting, in the absence of contemporaneous documentation or even testimony that demonstrates that the interplay of shift restrictions, vacation selection after the "cut-off" and others with approved holidays or vacations was discussed, it sheds little light on the intent of the parties. Mr. Zawikowski's testimony, in fact, was as self-serving as, according to the Union, the City's reference to the 2007 and 2008 approvals of vacations as errors.

The Union's second rebuttal witness was retired MPO Relihan. Mr. Relihan testified that during part of his vacation in 2003 he suffered an injury and was unable to return to work on schedule. He returned in November, at which time he still had two weeks (6 days) of vacation left. He was able to schedule one week at the end of November, but the other week was difficult to schedule as employees had requested holidays after they knew he would be returning and that the shift restriction would be lifted. Ultimately, he was able to select three consecutive days at the end of December, after his request to carry over the days into the following year was denied.

Mr. Relihan was not aware of whether there was a shift restriction in place when he was granted his vacation time off in December 2003. There is nothing in the record that indicates how his situation is akin to that of MPO Burke in 2008.

The record is quite clear that MPO Burke was able to utilize all of his vacation in 2008, though not on the August days that he wanted. MPO Burke was able to utilize trades to take time off on August 20 and August 23, and inasmuch as he did not testify, the record is silent as to whether he was disadvantaged in any manner by not taking time off on August 17.

Both the City and the Union feel quite strongly about this issue. According to some of the City's witnesses, Union President Bloor thought he found a "loophole" whereby vacation time has to be granted if nobody on the same platoon was on vacation or on an approved holiday or incentive day within the 90 day window. The Employer appears to have a long time understanding that vacations are "golden" if selected by February 7 but are subject to denial when there is a shift restriction in effect and an employee has an approved holiday within the window period. It appears to the undersigned that neither party thought about the instant situation at the bargaining table, and it is axiomatic that one cannot achieve through the grievance procedure what one should obtain at the bargaining table. The Union claims the City seeks an additional restriction without bargaining for it; the City contends that the Union seeks an additional benefit without bargaining for it.

This is a matter that has not been analyzed by the parties heretofore. There is no malice on the part of either. There is a genuine dispute as to the requirements of the collective bargaining agreement which, like most such documents, do not cover every situation that can arise in the employment situation. Here, because of the word “only” in Article 27: “**Only** one man per station, per platoon, shall be allowed on vacation during any specific period of time”, I must find that the City can limit the number of persons on vacation, on a particular platoon, at a specific period of time. However, because of the past practice of the parties to always allow one person per platoon to take vacation when the vacation selection is made by February 7, it is only with respect to vacation selections that are deferred until after February 7 that the Employer may limit the number of employees on vacation.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

**AWARD**

1. The grievance is substantively arbitrable.
2. The Employer did not violate the collective bargaining agreement when it denied MPO Burke vacation on August 17, 20, and 23, 2008.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 17<sup>th</sup> day of August 2009.

Susan J.M. Bauman /s/

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Susan J.M. Bauman, Arbitrator