

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.

and

CITY OF SHEBOYGAN FALLS (POLICE DEPARTMENT)

Case #27

No. 68598

MA-14281

Appearances:

Benjamin M. Barth, Labor Consultant, the Labor Association of Wisconsin, N116W16033 Main St., Germantown, WI 53022, appearing on behalf of the Labor Association of Wisconsin, Inc. for and on behalf of the Grievant Jesse Smith of the Sheboygan Falls Policemen's Association, Local 210.

Kyle J. Gulya, von Briesen & Roper, S.C., Suite One Thousand, Tenney Plaza, 3 South Pinckney Street, Madison, WI 53703, appearing on behalf of the City of Sheboygan Falls.

ARBITRATION AWARD

The City of Sheboygan Falls, hereinafter City or Employer, and the Labor Association of Wisconsin, Inc. for and on behalf of the Sheboygan Falls Policemen's Association, Local 210, hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five Commissioners or Commission staff from which to select an arbitrator to resolve a dispute between them regarding denial of paid time off. Commissioner Susan J.M. Bauman was selected. A hearing was held in Sheboygan Falls on July 7, 2009. The record was closed on October 13, 2009, upon confirmation that all written argument had been submitted by the parties.

This award addresses the question of whether the Grievant should have been granted paid time off for partial days on certain days immediately following his return from surgery in September 2008.

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.

ISSUES

The parties were unable to stipulate to the issues to be decided by the arbitrator, but have agreed to allow the undersigned to frame the issues. The Association frames the issues as follows:

Did the City violate the expressed or implied terms and conditions of the collective bargaining agreement when it denied Officer Jesse Smith's request to use compensatory time off, vacation or holiday time off on September 19th, 20th and 21st, of 2008?

The City frames the issue as follows:

Did the City violate the collective bargaining agreement by not granting the Grievant's compensatory time off, vacation time off and holiday time off requests for four hours on September 19, 2008, while the grievant was performing the full-shift light-duty assignment? If so, what is the appropriate remedy?

The undersigned frames the issues as follows:

Did the City violate the collective bargaining agreement when it denied the Grievant paid time off in September 2008? If so, what is the appropriate remedy?

FACTS

Jesse Smith, the Grievant herein, has served as a police officer for the City of Sheboygan Falls for more than ten years. In September, 2008, he had a medical condition that required surgery. On September 3, he advised Lieutenant Aaron Wigen that surgery was scheduled for September 5 and that he anticipated he would be off work for at least one week thereafter. He was seen by his physician on September 12 at which time he was advised that he was not able to return to work and should come back for a follow-up appointment in a week.

Smith had previously been scheduled to attend classroom training on September 17, and his supervisor, Deputy Chief Ross, inquired as to whether Officer Smith would be able to attend, inasmuch as his re-certification was overdue. In response to this inquiry, the Grievant spoke with his physician. On September 12, his physician authored a note that was faxed to the Police Department:

May attend classroom seminar for the Sheboygan Falls police department on September 17, 2008.

Lifting restriction of 15 pounds.

Follow up appointment scheduled for September 19, 2008 with Dr. Chleborad.

Upon receipt of this information, Deputy Chief Ross wondered whether Officer Smith would be able to return to work, on light duty, with the 15 pound weight restriction. Officer Smith attended the training seminar which was held on an off-duty day for him. Accordingly, he put in a slip for 6.5 hours of overtime which was approved and submitted by the Department for pay-out on September 19.

On September 17, Dr. Chleborad signed a Return to Work form that indicated Officer Smith could return to work, effective September 19, with a 15 pound weight restriction, with re-evaluation to occur on September 19. Upon receipt of this information, the Department directed Officer Smith to report to work immediately following his appointment on the 19th. He did not do so, but went home first and reported to the Department at approximately 12:15 p.m. Deputy Chief Ross had prepared a letter to Officer Smith that described the conditions of the light duty assignment that the Department created for him which was presented to Smith at that time:

September 19, 2008

Officer Smith,

As of today's date, your physician has indicated that you are able to return to work on light duty. The restriction indicates that you are not to lift more than 15 pounds. With this, the department has requested that you report to work under a light duty restriction beginning on today's date. Uniform attire will be uniform slacks, shirt and shoes. You are not to wear a duty belt. If you wish, you may wear your protective armor, which is completely your decision.

Your shift for the next week will be 1400 to 2230 hrs. As we are short in the clerical area due to Clerk Zak's Family Medical Leave. [sic] will be requested to assist Clerk Reich with filing, answering the phones,

handling minor complaints at the front counter. You should also work on clearing out items from the evidence cage that are no longer needed so long as you do not exceede [sic] your 15 pound restriction. If you need assistance moving items please ask a supervisor for someone to assist you. You can also work on archiving interview footage from the interview rooms.

When supervisors are working, they may also request that you perform needed tasks.

If you have any questions please see me.

DC

At the September 19 appointment, Dr. Chleborad continued the 15 pound restriction and told Smith to return for a re-assessment in 10 days. The return to work form the physician completed indicated a 15 pound weight restriction, but did not indicate any limitation on the number of hours that Smith could work. Dr. Chleborad did, however, verbally advise Officer Smith that he might tire easily and suggested that he ease into his return to work, perhaps working four hours each day for a few days until he regained his strength.

In light of this conversation with his physician, sometime after reporting to work on September 19, Smith began discussing time off with Deputy Chief Ross. He initially asked for four hours of compensatory (comp) time on September 19, but was told that he had no comp time available because the overtime he earned on September 17 had already been forwarded to payroll for payment, as Smith had opted to have accrued comp time paid out every two weeks rather than every three months. With no comp time available, and upon Officer Smith's request, Deputy Chief Ross reviewed the log of Officer Smith's available vacation and holiday time with him. Smith requested use of four hours of whatever was available that day.¹ Ross told Smith that this was not an option, inasmuch as he was on light duty. Officer Smith requested that the Deputy Chief run the possibility of his taking vacation or holiday time off by Chief Riffel and Ross reluctantly agreed to do so. Later that day, after speaking with the Chief, Ross advised Smith that the Chief had also denied the usage of vacation or holiday time while Smith was on this light duty assignment.

Later on the evening of September 19, Officer Smith heard a less senior officer, Officer Freville, request comp time for that day. Freville's comp time request was approved. Another less senior officer, Officer Rakow, requested two hours of holiday time for September 20. This, too, was approved.

¹ Smith testified that he requested time off for September 19, 20, and 21. Deputy Chief Ross testified that Smith only requested time off for September 19.

Officer Smith worked his entire shift on each of the days in question, September 19, 20 and 21. Although he may have been tired during his shift, he apparently was able to successfully complete the shifts without the need to leave early (using sick leave). On September 26, Officer Smith filed a grievance with the City contending that the terms and conditions of the collective bargaining agreement were violated when he was denied the requested time off on September 19, 20 and 21 and less senior officers were granted comp time on September 19 and holiday time on September 20, which time was requested on the dates granted. The parties were unable to resolve the grievance and the matter proceeded to arbitration.

Additional facts are included in the DISCUSSION, below.

PERTINENT CONTRACT PROVISIONS

Article IV – MANAGEMENT RIGHTS

- 4.1** Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for proper cause, and the right to relieve EMPLOYEES from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.
- 4.2** By way of further enumeration, and not as limitation because of such enumeration, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week, and to make such changes in the various details of the employment of various EMPLOYEES as it, from time to time, deems necessary for the effective and efficient operation of CITY business.
- 4.3** The right to contract for any work it possessed, and to direct its EMPLOYEES to perform such work wherever located is specifically reserved to the Employer.
- 4.4** The EMPLOYEES coming under the terms of this Agreement agree that they will provide a diligent work effort during their hours of employment and that personal matters will not be transacted during working hours.
- 4.5** The ASSOCIATION agrees that it will, at all times, promote the proper operation of the City of Sheboygan Falls and will make diligent efforts to protect the public interests of the City of Sheboygan Falls.

- 4.6** The City of Sheboygan Falls may adopt reasonable and binding rules and amend the same, from time to time, and the ASSOCIATION agrees to cooperate in the enforcement thereof, and the herein paragraph shall not be subject to the provisions of the grievance procedure.

...

Article VIII – HOLIDAY BENEFITS

- 8.1** The following holidays shall be deemed to be paid holidays:
- | | | |
|----------------|------------------|---------------------------|
| New Year's Day | Fourth of July | December 24 th |
| Easter Sunday | Labor Day | Christmas Day |
| Memorial Day | Thanksgiving Day | December 31 st |
- 8.2** In addition to the above, two (2) floating holidays may be taken as such time as is mutually agreed upon by the EMPLOYEE and the Chief of Police.
- 8.3** Any EMPLOYEE who is required to work on a holiday shall be permitted to take the equivalent holiday time at any other time subject to the scheduled approval of the Chief of Police.

...

Article XIV – VACATIONS

...

- 14.10 When Vacation May Be Taken:** In determining vacation schedules, the Head of the Department shall respect the wishes of the eligible EMPLOYEES on a seniority basis as to the time of taking their vacation insofar as the needs of the CITY will permit. The CITY shall post vacation scheduling rules from time to time. Vacation allowance shall be taken during the vacation year, except that EMPLOYEES who are required by their Department Head to defer all or part of their vacation for a given vacation period may be permitted to take it within the first six (6) months of the ensuing vacation year, after which it shall be lost.

...

Article XVII – SENIORITY

- 17.1** The CITY shall, during the life of the herein Agreement for the EMPLOYEES covered by same, recognize seniority as herein provided:

- 17.2 Layoff:** When it becomes necessary to reduce the work force, the last person hired in each classification will be the first person laid off, and, subsequent to any layoff, the last person laid off in each classification shall be the first person offered reinstatement.
- 17.3 Bumping Privilege:** Any EMPLOYEE laid off from each classification shall have the opportunity to replace any EMPLOYEE in another classification who has less seniority, provided he has the capability in the opinion of the CITY to perform the work in that classification.
- 17.4 Shift Preference:** In determining shift preference, including shift rotation, where similar classifications are involved the shift preference shall be given to the EMPLOYEE with the longest period of seniority. Shift selection shall be open to employees no later than November 1, and shall be completed no later than November 15. Primary vacation requests shall be approved by management no later than December 15. All requests submitted after December 15 shall be on a first-come, first served basis.

...

Article XXI – OVERTIME PAY

- 21.1** Time and one-half shall be paid for all hours worked in excess of the EMPLOYEE's regularly scheduled eight and one-half (8-1/2) hour shift. The EMPLOYEE's shift shall be scheduled so that they provide an average of approximately thirty-nine and seven tenths (39.7) hours per week. An EMPLOYEE shall be paid time and one-half (1-1/2) [sic] for all hours worked on his day off, and for hours spent in organized, approved training sessions. EMPLOYEES will receive compensatory time off for travel to and from classes outside of their regular working hours.

...

- 21.5 Overtime and Compensatory Time:** In lieu of pay for overtime worked, an employee may elect to take compensatory time off, at his option, at the rate of one and one-half (1-1/2) hours of compensatory time for each one (1) hour of overtime worked. Accumulation of compensatory time shall be in accordance with the provisions of the Fair Labor Standards Act. Overtime, at the employees' option, shall be paid out within the pay period that the overtime is earned, and compensatory time shall be accumulated throughout the year in an officer's individual account. Officers may use overtime and compensatory time existing in their individual accounts to add to their scheduled vacations with the advance written approval of the Chief. All unused compensatory

time in said account shall be paid to the individual officers on March 15th, June 15th, September 15th and December 15th of each year.

DISCUSSION

Although there is disagreement about a number of facts in this case, the essentials are not in dispute. The Grievant, Jesse Smith, was off work due to a medical condition which required surgery. He returned to work with a 15 pound weight restriction.² He was given a light duty assignment which, in large part, involved performance of clerical-like duties that were needed by the Police Department because a Clerk was on Family Medical Leave. The day that Smith returned to work, September 19, he was seen by his physician who advised him that he might become rather tired working an 8½ hour day having been off work since the beginning of the month and, therefore, he should consider “easing into” full time work by working only 4 or 4½ hours a day for the first few days. Although the doctor completed a return to work form that delineated the 15 pound weight restriction, the form did not indicate that Smith was unable to work a full day or that he should “ease into” working a full day.³

There is a dispute between the parties as to whether Officer Smith discussed working partial days with Deputy Chief Ross when he first reported to work at 12:15 p.m. on September 19 or if this conversation occurred later in the day. It is established that Officer Smith attended training on September 17, an off-duty day for him, and submitted a request for 6½ hours of overtime which was approved. Under the terms of the collective bargaining agreement between the Association and the City, overtime can be taken in pay or as compensatory time off. The contract also provides that unused comp time will be paid out every three months or at the end of the pay period in which it is accrued, at the employee’s option. On June 23, 2008, Officer Smith had requested that his overtime be paid out bi-weekly.

September 19 was the day that the bi-weekly payroll was submitted to the City. This had been done prior to Smith’s request for comp time that day. Accordingly, Ross advised Smith that he had no comp time available. Smith’s vacation and holiday hours were reviewed, but Ross rejected Smith’s request to utilize vacation or holiday time, a decision that was subsequently upheld by Chief Riffel.

The Association filed a grievance on September 26, 2008 contending that the Grievant’s requested time off was during non-business hours and the light duty assignment was clerical in nature and was not time sensitive or emergent. The

² Implied in the record is the idea that Smith was “forced” to return to work on light duty. Whether or not such is the case, Smith did agree to return to work and accepted the light duty assignment.

³ The Return to Work Report form does provide a space for limiting the number of hours/days and days/week that a returning employee may work.

Association asks that the Employer immediately make the Grievant whole by crediting one of the Grievant's time banks, compensatory, holiday, or vacation, in the amount of 12 hours as a result of unreasonably denying the Grievant's time off on September 19, 20, and 21, 2008. The Employer contends that the grievance was improperly processed, the request for time off was only for September 19, and that the grievance is without merit. It asks that the grievance be denied.

Although the initial response to the grievance raised the issue of the Grievant's failure to discuss the matter with the Chief prior to filing his grievance, this was not argued by the Employer in its brief-in-chief. Further, there is no question that the Chief was consulted by Deputy Chief Ross in making the decision to deny Officer Smith's time off on September 19, and that the Chief agreed with Ross' decision. Under the facts of this case, requiring Officer Smith to discuss the issue with the Chief prior to filing his grievance would put form over substance and add nothing to the discussion. Accordingly, the procedural objection does not prevent the undersigned from reaching the merits of this case.

Compensatory Time

It is clear that Officer Smith made a request to utilize four hours of compensatory time on September 19 to deal with anticipated tiredness or exhaustion associated with his return to work. It is uncontested on this record that payroll had been submitted to the City prior to the time that Officer Smith made his request. Having no compensatory time available to use, because he was to receive his six and one-half hours of overtime earned from attending training on September 17 on his paycheck, Officer Smith cannot make an argument that the denial of his comp time usage on September 19 violated the collective bargaining agreement or past practice between the parties. Even though Officer Freville, a less senior officer, had comp time approved that day, Officer Smith was not entitled to comp time since his bank was empty.

Similarly, Smith would have had no comp time available to use on September 20 or 21, had he made a request to utilize comp time on those days.⁴

Holiday and Vacation Time

Officer Smith initially accepted the decision of Deputy Chief Ross, confirmed by Chief Riffel, that because he was on this particular light duty assignment, his request to utilize available holiday or vacation time was denied. Officer Smith was not happy with this result, but he accepted it until later on the evening of September 19, when he

⁴ The Association argues that Smith requested time off for three consecutive days, whereas the City contends that the request was only for September 19. It is not necessary for me to determine whether Smith requested time off for one or three days, as this does not affect the outcome. The discussion that follows assumes that the request was for three days.

overheard a less senior officer, Officer Freville, request comp time for September 19. Freville's request was granted. Smith became more disconcerted about Ross' decision when Officer Rakow, the least senior officer in the department, was granted two hours of holiday time on September 20, the same day as she made her request.

The Association contends that the City violated the collective bargaining agreement in permitting a less senior officer to take holiday time, rather than granting either vacation or holiday time to Smith who requested the time off prior to Officer Rakow's request. The Association relies on Article 14.10:

When Vacation May Be Taken: In determining vacation schedules, the Head of the Department shall respect the wishes of the eligible EMPLOYEES on a seniority basis as to the time of taking their vacation insofar as the needs of the CITY will permit.

According to the Association, this language means that "[o]nce the grievant requested vacation time and had more seniority over other officers asking off for the same time, the Head of the Department must honor seniority if the employer is going to grant time off. There is no discretion afforded the employer to circumvent seniority once the employer has decided that someone can take off." (Association Brief, at p. 6) Additionally, it is the position of the Association that on both September 19 when Officer Freville was granted comp time and again on September 20 when Officer Rakow was granted vacation time, "[t]he less senior officers who were performing community safety duties were granted personal time off over an officer performing clerical duties. This shows the unfair treatment toward the grievant." (Ibid.)

The Employer contends that Section 17.4 specifically excludes seniority as a basis for vacation selections submitted after December 15:

Shift Preference: In determining shift preference, including shift rotation, where similar classifications are involved the shift preference shall be given to the EMPLOYEE with the longest period of seniority. Shift selection shall be open to employees no later than November 1, and shall be completed no later than November 15. Primary vacation requests shall be approved by management no later than December 15. All requests submitted after December 15 shall be on a first-come, first served basis.

It is clear that a request made on September 19 falls within the proviso that vacation requests submitted after December 15 shall be on a first-come, first served basis. Accordingly, the fact that the Grievant has more seniority than Officer Freville or Officer Rakow bears no relevance to this matter.⁵ What remains is whether the "needs of the CITY" allowed the Employer to deny Officer Smith's request for vacation while granting comp time to Freville and holiday time to Rakow.

⁵ The parties have a practice of requiring vacation requests to be made seven days in advance of the time off being requested. Clearly, there was no seven day notice given by Officer Smith but the decision herein is not based on the seven day notice period.

The contractual language regarding holidays states, at Section 8.2, “In addition to the above, two (2) floating holidays may be taken as such time as is mutually agreed upon by the EMPLOYEE and the Chief of Police.” At Section 8.3, the contract provides: “Any EMPLOYEE who is required to work on a holiday shall be permitted to take the equivalent holiday time at any other time subject to the scheduled approval of the Chief of Police.” It is clear that the time off that Officer Smith requested was not mutually agreeable to the Chief of Police, nor was it approved by the Chief. As there are no other contractual criteria for scheduling holidays, the only question for the undersigned to consider is whether the denial by the Chief was unreasonable, under the circumstances.

The analysis of the needs of the City and the reasonableness of the denial of time off to Officer Smith by the Chief turns on the particular assignment that Officer Smith was performing for the City on the days in question. The Department maintains a minimum staffing of six⁶ officers at all times, other than holidays. It would always be reasonable, in light of the needs of the City, to deny an officer’s request for time off, be it comp time, vacation or holiday, if granting of that time off resulted in less than minimum staffing. However, persons on light duty, such as Officer Smith, or on special assignments such as Staff Resource Officer or Desk Officer do not count towards minimum staff.⁷ Thus, the Association’s contention that officers performing community safety duties were given preference over Officer Smith who was performing clerical work does not provide any direction. Granting of comp time to Officer Freville and holiday time to Officer Rakow did not put the Department below minimum staffing. The City did not have to make a choice between allowing the Grievant the time off and allowing these other officers time off. The decision regarding Officer Smith must be analyzed apart from other staffing considerations on the days in question.

The Association argues that it is the *Patrol* needs of the City, not the *Clerical* needs that must be considered. (Emphasis in the Association’s briefs) The Association, however, has not demonstrated any place in the collective bargaining agreement or the practices of the Department to support its contention that the language of the contract regarding needs of the City is limited to the patrol needs. Rather, because the phrase “needs of the City” is unmodified by patrol, clerical, or other words, the phrase must include all needs of the City, including its clear and uncontested need to staff the clerical area and clear up the backlog of work to be done there.

Officer Smith’s light duty assignment was created to meet a need of the Department. Normally, there are two clerks providing support to the Department. Clerk Zak was on Family Medical Leave from August through December due to

⁶ Exhibit 24 is a 2001 memo that indicates a minimum staffing of five, but testimony at hearing referenced minimum staffing as six.

⁷ There are special rules relating to the School Liaison Officer.

childbirth. Clerk Reich had been on a pre-approved vacation for a number of weeks, leaving no clerical staff at all in the office, and a backlog of work accumulating. The Desk Officer was already working more hours than normal. In fact, the City had been using Kohler's police secretary for priority complaints. There was a significant backlog of work and the City needed Smith's assistance. According to Chief Riffel, he will not make work for officers to do – it is always in the best interests of the department when a light duty assignment is created. This light duty assignment created by the Chief and Deputy Chief Ross was no different. It was a critical light duty assignment. There was a need to get this work done, and the Department did not know how long Officer Smith would be on light duty and available to perform it.

There is no City or Department policy that prevents an individual on light duty from using comp time, holiday or vacation time (if available). Likewise, there is no requirement that such paid time off be granted to an individual who requests it, if the City has a legitimate reason to require the individual to work. Such was the case here. Officer Smith requested time off because he anticipated that he would be too tired to perform his duties. His physician had suggested, but not given written orders, that he “ease into” his return to work. The Department made a reasonable decision, based on the needs of the Department, to deny Officer Smith paid time off on the day(s) in question. Had Officer Smith truly felt exhausted to the point that he could not perform his assigned work he could have legitimately used sick leave that the Department could not have denied. Though Officer Smith testified that he was “spent” at the end of his shifts on September 19, 20, and 21, he was able to work the entire shift each day and did not request use of sick leave. The City was within its rights to deny Officer Smith the time off he requested, based on the needs of the City at the time.

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

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 24th day of November 2009.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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