BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF ST. FRANCIS

and

ST. FRANCIS PROFESSIONAL POLICE ASSOCIATION, LOCAL 217 OF THE LABOR ASSOCIATION OF WISCONSIN

Case 91
No. 68418
MA-14234

Case 92
No. 68545
MA-14266

Appearances:

Michele M. Ford, Crivello Carlson, S.C., 710 North Plankinton Avenue, Milwaukee, Wisconsin, 53203, appearing on behalf of the City of St. Francis.

Benjamin M. Barth and **Michael Yogerst**, N116 W16033 Main Street, Germantown, Wisconsin, 53022, appearing on behalf of St. Francis Professional Police Association, Local 217 of the Labor Association of Wisconsin.

ARBITRATION AWARD

The City of St. Francis ("City") and the St. Francis Professional Police Association, Local 217 of the Labor Association of Wisconsin ("Association") are parties to a collective bargaining agreement dated January 1, 2008 through December 31, 2009 ("Agreement"). That Agreement provides for final and binding arbitration of disputes arising thereunder. On October 6, 2008, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a dispute related to a request by the Grievant, Michael Dornak, to use compensatory time. That case was designated Case 91, No. 68418 MA-14234 ("Case 91"). At the parties' request, the Commission provided a panel of five WERC-employed arbitrators, and the parties thereafter selected the undersigned to serve as arbitrator for Case 91. On January 7, 2009, prior to the scheduled hearing in Case 91, the City filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a dispute related to the same Grievant's request to use compensatory time and vacation time. That case was designated Case 92, No. 68545 MA-14266 ("Case 92"). The parties jointly requested that the undersigned serve also as arbitrator

for Case 92. The parties further stipulated to the consolidation of Case 91 and Case 92, such that a single hearing would be held and a single award would be issued addressing the merits of both cases. A hearing was held with regard to the consolidated cases on September 2, 2009, in St. Francis, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made. Each party submitted a post-hearing brief, the last of which was received on February 3, 2010, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The parties agreed to allow the undersigned to frame the statement of the issue to be heard. The City proposes the following statement of the issue:

> 1. Did the employer violate the express or implied terms, including past practice, of Sections 11.02 and 11.05 of the January 1, 2008 collective bargaining agreement by virtue of the denial of any leave requests made for August 4, 2008, November 1, 2008, or November 2, 2008, by Officer Michael Dornak?
>
> 2. Did the employer violate the express or implied terms, including past practice, of Section 6.05(a) of the January 1, 2008 collective bargaining agreement in denying leave for August 4 and November 2 of 2008 for Officer Michael Dornak?
>
> 3. Did the employer violate Section 3.01 of the January 1, 2008 collective bargaining agreement in denying leave requests made by Officer Michael Dornak for August 4, 2008, November 1, 2008, and November 2, 2008?
>
> 4. If so, what is the remedy?

The Association proposes the following statement of the issue:

> Did the employer violate the express or implied terms of the collective bargaining agreement and past practice of the parties when it denied Officer Dornak's request to use compensatory time off on August 4th, 2008, and November 2nd, 2008, or when it denied a previously approved vacation request for November 1st, 2008? If so, what is the correct remedy?

The undersigned adopts the following statement of the issue:

Did the City violate the Agreement when it denied the Grievant's leave requests for August 4, 2008, November 1, 2008, and November 2, 2008? If so, what is the appropriate remedy?

BACKGROUND

The facts material to this case are essentially undisputed. The Grievant Michael Dornak is a police officer employed by the City's Police Department ("Department") and a member of the bargaining unit represented by the Association. The grievances that gave rise to this case relate to the Department's denial of Dornak's request to use compensatory time to take leave from work on August 4, 2008, and November 2, 2008, and the Department's denial of Dornak's request to use vacation time to take leave from work on November 1, 2008.

The City denied the Grievant's leave requests because it claimed that they conflicted with an administrative policy setting forth guidelines for leave usage in the Department. The background leading up to that policy is relevant. On December 19, 2007, City Police Chief Brian Kaebisch sent out an interoffice memorandum indicating that a previously issued memorandum, which apparently had been in place since August of 2006 and had set forth a different leave usage policy known as "Directive 1.17", was being rescinded.[1] Chief Kaebisch's December, 2007 memorandum also stated that a Department policy would be issued in the future that would address all leave issues. The record indicates that there had been comments by members of the Department to Chief Kaebisch indicating a desire to have guidelines put into place as to how leave could be used. On February 7, 2008, Chief Kaebisch posted Policy 3/440, which read as follows:

I: INTRODUCTION

The following policy sets forth the definitions, administrative policy and procedural guidelines applicable to the administration of vacation, personal days, holidays, Management Days, and compensatory leave by department personnel.

II: POLICY

In the administration of leave time, it is the policy of this department to attempt to address the competing objectives of meeting the department's operational staffing levels while accommodating earned leave time and management of the

[1] The City quotes portions of Directive 1.17 in its post-hearing brief. In doing so, it cites to pages one and two of Joint Exhibit 14. Joint Exhibit 14, however, is a single-paged, two-lined e-mail message from Captain Thomas Dietrich to the Grievant. It does not contain or reference any portion of Directive 1.17. Indeed, although Directive 1.17 was referred to by name at hearing, the substance of that policy does not appear to be a part of the record before me.

schedule. Our objective is to strike a balance between individual and department needs.

III: DEFINTIONS

A. **Seniority-** The annual vacation periods for the patrol bureau shall be selected first by rank and then on a seniority basis. The annual vacation periods for the detective bureau shall be selected on a seniority basis,

B. **Work Unit-**a grouping of personnel whose functions are essentially similar or share common objectives and who normally function independently of other groupings with regard to work load.

C. **Premium Pay-** Payment at time and a half.

D. **Hierarchy of Cancellation-** The ability to cancel a day with two or more requests of different leave time for that date- compensatory time, Holiday, Management, Single Vacation, Personal Day, Vacation Block, Regular Off.

IV: ADMINISTRATIVE GUIDELINES

A. **Vacation Weeks-** Shall be selected by seniority by members in the collective bargaining unit. Members shall select (1) two week period or (2) one week periods with one Holiday addition. After the initial selection, members shall select the remaining vacation weeks available to them.

(1) Vacation week shall not exceed ten days.
(2) Vacation weeks shall not exceed seventeen days.
(3) Vacation weeks shall not exceed twenty four days.
(4) Vacation weeks shall not exceed thirty one days.

A vacation schedule will be available on or before December 15th. Weekly vacation selections shall be finalized by February 1st of said year.

All sworn personnel who have earned more than two vacation weeks shall have the option of selecting the maximum of five vacation days one day at a time. These selections will not be processed until every member has selected their block vacations

for that calendar year. Only one officer per shift shall be granted such leave. Multiple requests for the same date will be approved by seniority.

Holidays- Not more than six holidays may be taken as scheduled duty days off in lieu of pay when optimum staffing levels are met on that date without payment of premium pay to another member. Single Holiday leave requests may be granted on specific holidays and specific shifts based on the needs of the department and approval by the administrative staff. Not more than one Holiday may be taken in conjunction with a vacation period unless otherwise authorized by the Chief of Police or designated administrative staff.

B. **Personal Days-** Each full time member shall be granted (24) hours of personal leave with pay. Only one officer per shift shall be granted a personal day; multiple requests received on the same day will be granted on a seniority basis.

C. **Management Days-** Apply to non bargaining members; will only be approved when optimum staffing levels are met without the payment of premium pay.

Such requests will not be approved or placed on the schedule more than thirty days in advance.

D. **Compensatory Time-** Will only be approved when optimum staffing levels are met without the payment of premium pay. Requests for compensatory time for the entire shift will have priority over partial day. Multiple requests received on the same day will be granted on a seniority basis. Compensatory time will only be granted if the member has sufficient time accrued when the request is made.

Such requests will not be approved or placed on the schedule more than thirty days in advance.

E. **Switches-** Individual employees may exchange shifts or off days as long as it does not create payment of premium pay. The switch must be agreed to in writing with the understanding it will be the obligation of the employees, not management, to maintain the optimum staffing levels. A leave request slip must be completed

and forwarded for approval. No more than two switches will be allowed in a block of leave time.

Switches will not be approved or placed on the schedule thirty days in advance.

F. **Funeral Leave-** Each member shall receive three consecutive scheduled days off with pay in conjunction with the funeral.

H. **Single Vacation Days-** All sworn personnel who have earned more than two vacation weeks shall have the option of selecting the maximum of five vacation days one day at a time. No requests for single vacation days will be processed until every department member has selected their vacation weeks for that calendar year.

V: Submission of leave time requests

A. All requests for leave time shall be submitted to the Captain of Police, or in his absence, the Lieutenant of Police for approval.

B. The goal of management is to maintain the optimum amount of resources to assure adequate coverage and meet the departmental needs. Therefore, our objective is to allow only one officer off per shift including vacation weeks. Any exceptions to this will need to be approved by the administrative staff.

C. The type of leave time requested and approved and placed on the schedule cannot be changed at a later time unless you wish to cancel that request or utilize a switch on that single date.

NOTE: Any pre-approved leave time request is subject to cancellation for the needs of the department.

On January 11, 2008, prior to the point in time when Policy 3/440 was posted but after the point in time when Chief Kaebeish issued the memorandum stating that a policy would be forthcoming, Grievant Dornak had submitted a request to take a vacation day in lieu of his scheduled shift of November 1, 2008. Vacation requests are submitted during a vacation selection process that occurs annually in the Department. During that process, the Department schedule is circulated. Department members, each of who gets two, three, four, or five weeks of vacation per year, are allowed to block-out ten days of vacation on the first round of vacation picks. These vacation days can be taken either in a full ten-day period or in two separate five-day vacation blocks. After the first round of vacation picks is completed, the

Department schedule is then circulated again among Department employees who receive more than two weeks of vacation. Department employees are required to use their vacation days in five-day blocks, except that any employee who receives more than two weeks of vacation can elect to use his or her final week of vacation as single days.

While the vacation selection process is underway and after it has concluded, the Department apparently takes no immediate action either to approve or disapprove vacation selections. Captain Thomas Dietrich, who is second-in-command in the Department, has responsibility for monitoring the Department's schedule. After vacation selections are made, Dietrich does not review the entire year's schedule to ensure that all selections are in compliance with Department rules. Rather, Dietrich typically will look a few weeks ahead on the schedule to ensure that any imminent scheduling needs, such as those created by upcoming vacations, will be met.

In early 2008, after Dornak had placed his first four weeks of vacation on the schedule, he selected November 1, 2008, as a single day of vacation. That selected day came directly on the tail end of a late October five-day vacation block Dornak already had chosen. After Dornak placed his November 1 vacation selection on the calendar in early 2008, it remained there until late September of 2008. On September 27, 2008, Dornak received an e-mail message from Captain Dietrich, stating that Dornak's November 1 vacation selection was being cancelled. The reason for the cancellation was that Policy 3/440 provided that only a holiday or a switched-day could be added to a five-day vacation block, whereas Dornak had attempted to add a single vacation day to his vacation block. Dornak grieved this denial as a violation of the Agreement. That grievance is being heard through the present proceeding.

Also, on February 1, 2008, Dornak had submitted a request to be able to use compensatory time off for August 4, 2008, and November 2, 2008. On February 7, 2008, Captain Dietrick advised Dornak that his request to use compensatory time was being denied as a violation of Policy 3/440. Dornak was told that Policy 3/440 only allows compensatory time requests to be made no more than thirty days before the time would be used, and Dornak's request was too far advanced.[2] Dornak also grieved this denial as a violation of the Agreement. That grievance is also being heard through the present proceeding.

The record indicates that neither of Dornak's requests for leave time would have created overtime in the Department. Further, there was no special circumstance present or event occurring on any of the three days for which Dornak had requested leave.

When Policy 3/440 was posted on February 7, 2008, the City and the Association were engaged in collective bargaining negotiations that ultimately resulted in the Agreement that is applicable to this case. The parties did not discuss Policy 3/440 or any of its terms at the bargaining table.

[2] Consistent with this policy, the City allowed another Department officer to use compensatory time on one of these days, because that officer made his compensatory time request less than thirty days before the requested leave date.

The Agreement contains the following management right clause:[3]

ARTICLE III - MANAGEMENT RIGHTS

Section 3.01: The Association recognizes the prerogatives of the City to operate and manage its affairs in all respects in accordance with its responsibility and powers or authority which the City has not officially abridged, delegated, or modified by the Agreement and such powers or authority are retained by the City. These management rights include but are not limited to the following: the right to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to lay off, to make job assignments within the normally scheduled shift, to discipline or discharge for just cause, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to determine and uniformly enforce minimum standards of performance, all of which shall be in compliance with and subject to the provisions of this Agreement.

The Agreement contains the following relevant provision relating to the grievance process:

ARTICLE V – GRIEVANCES

Section 5.01: Definition: Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

. . .

The Agreement contains the following provisions that are relevant to the use of compensatory time:

ARTICLE VI - WAGES

Section 6.05 – Compensatory Time Off: Subject to the needs and requirements of the City, the concept of "compensatory time off" is recognized. Participation in the compensatory time-off program by the officer is voluntary and will not deny an officer any overtime wages. Compensatory time will be used to compensate an officer for time worked beyond the normal duty

[3] The City and the Association have agreed that the Agreement dated January 1, 2008 through December 31, 2009 is the contract applicable to this dispute. That Agreement was marked as Joint Exhibit 1 at hearing in this matter. The "relevant language" section of the Association's post-hearing brief, however, does not set forth provisions from the Agreement. That section of the Association's brief contains provisions that relate to the general topics that are relevant to this dispute, but do not match the provisions as they appear in the Agreement. This is not a discrepancy, however, that persuades me that the Association's analysis was misguided, because the substantive, "argument" section of the Association's brief cites and appears to rely on the correct provisions from the Agreement.

schedule, and will be given in the form of time-off from work instead of wages, calculated at the appropriate rate. An officer may divide the overtime between compensatory time-off and overtime pay as the officer sees fit. Compensatory time-off shall be approved provided the following requirements are met. Requests for time off shall be submitted as follows:

a) The Chief of Police, Captain, Detective, Shift Sergeant or Acting Shift Commander has the authority and responsibility to approve or disapprove requests for compensatory time-off of officers assigned to his shift. Officers must have the approval of their regular Shift Sergeant; the Investigator must have the approval of the Detective. In the absence of the approving authority, the next level in the chain of command may be sought for approval. In no case however, shall a police officer or investigator seek approval from higher authority if there is time to seek approval from their immediate supervisor. Requests for compensatory time-off must be made at least twenty-four (24) hours in advance of the shift in writing to the proper party. The Mayor or Chief of Police, Captain of Police, Detective or Sergeant shall have the right to deny or cancel compensatory time-off already approved in the event of an emergency or other justifiable occurrence, including but not limited to the manning requirements of the department.

b) Regular officers will not be used as replacements.

c) An individual officer may not accumulate more than one hundred (100) hours of compensatory time due in his account.

d) Officers may transfer compensatory time from one to each other's account with the approval of the Chief of Police.

e) Compensatory time off will not be allowed unless the officer has accumulated sufficient time in his account.

The Agreement contains the following provisions that are relevant to the use of vacation time:

ARTICLE XI – VACATIONS

Section 11.01: Each regular full-time police officer shall be entitled to the following vacation with pay:

Ten (10) working days after one (1) complete year of service

Fifteen (15) working days after five (7) [*sic*] complete years of service

Twenty (20) working days after thirteen (13) complete years of service

> Twenty (25) working days after twenty-one (21) complete years of service
>
> **Section 11.02:** Vacations shall be selected by seniority in accordance with Section 17.01 of this Agreement consistent with the requirements of the Department. A police officer shall select one (1) two (2) week period or two (2) one (1) week periods. After the initial selections, police officers shall select the remaining vacation weeks available to them. An officer entitled to more than two (2) vacation weeks shall have the option of selecting the final vacation week, one (1) day at a time, in accordance with this provision.
>
> . . .
>
> **Section 11.05:** The Chief of Police or his representative shall have a vacation schedule available for the police officers on or before December 15, so that vacation selection can be made for the following year. Five (5) day vacation blocks shall be finalized by February 1st of said year. Thereafter, vacations shall be awarded on a first come, first served basis.

POSITIONS OF THE PARTIES

City

The City's position in this case is that the denial of the Grievant's leave requests was not a violation of the collective bargaining agreement. According to the City, it was permitted by the terms of the Agreement to implement Policy 3/440, and the Grievant's leave requests were inconsistent with that Policy. In its post-hearing submission, the City first makes four arguments under the heading "jurisdiction of the arbitrator and the standard of review". First, the City points out, generally, that arbitrators obtain their authority from the relevant collective bargaining agreement and cannot, except by agreement of the parties, determine the scope of their authority. Second, the City points out that neither party has challenged the arbitrability of the grievances that are the focus of this case. Third, the City contends that the bargainability of the adoption of Policy 3/440 was not raised by the Union. In so arguing, the City states as follows:

> In order to argue that the adoption of Administration Policy 3/440 was a mandatory, permissive or non-bargainable issue that should have been raised during the bargaining process resulting in the 2008-2009 Agreement, the Union was required to file a petition for declaratory relief under Wis. Stats. 111.40(4)(b) [*sic*][4], which provides in relevant part:

[4] This provision is set forth at Section 111.70(4)(b), Wis. Stats.

> (b) Failure to bargain. Whenever a dispute arises between a municipal employer and a union of its employees concerning the duty to bargain on any subject, the dispute shall be resolved by the commission on petition for a declaratory ruling. The decision of the commission shall be issued within 15 days of submission and shall have the effect of an order issued under s. 111.07. The filing of a petition under this paragraph shall not prevent the inclusion of the same allegations in a complaint involving prohibited practices in which it is alleged that the failure to bargain on the subjects of the declaratory ruling is part of a series of acts or pattern of conduct prohibited by this subchapter.

The Union's decision not to file a petition for declaratory relief prohibits the argument that the policy is or should have been part and parcel of the 2008-09 Collective Bargaining Agreement.

The City's fourth argument relating to the jurisdiction of the arbitrator and standard of review comes under a heading that states that "[t]his [m]atter is [r]estricted to [w]hether the [t]erms of the 2008-09 [a]greement [g]ave Dornak the [r]ight to the [l]eave [t]ime [a]t [i]ssue". The City's argument set forth in that section reads, in its entirety, as follows:

> The provisions dictating the standard of review in the 2008-09 Agreement, in relevant part, are as follows:
>
> > **Section 5.01: Definition:** Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.
> >
> > * * *
> >
> > **Section 5.04: Definition:** The arbitrator shall neither add to, detract from, nor modify the language of this agreement in arriving at a determination of any issue presented for final and binding arbitration . . . .
>
> (See Agreement, Joint Exh. 1, pp. 2-3).

The City's second area of argument relates to past practice. The City anticipates that the Union will argue that a past practice or implied term of the Agreement created rights relating to the use of leave time. The City contends that any past practice is subject to termination at the end of the term of a collective bargaining agreement if a party gives notice of the intent not to carry the practice over into the next agreement. After such notice is given, the other party must have the practice written into the agreement to prevent its discontinuance.

According to the City, to the extent that the Association argues that Directive 1.17 constituted a past practice, the Association was put on notice of discontinuation of that practice when the Association was informed by Chief Kaebisch that Directive 1.17 had been rescinded. The Association's subsequent decision to enter into the Agreement without incorporating those asserted past practices or implied terms bars any argument that a past practice exists.

Finally, the City argues that it was authorized by the terms of the Agreement to adopt Policy 3/440.[5] The heading of this section of the City's brief suggests that its argument will focus on the management rights clause of the Agreement. The City's argument in this section, however, reaches beyond that provision to allude to or specifically reference other provisions in the Agreement. The City's argument begins as follows:

> The relevant portions of all provisions governing vacation time subject approval to the discretion of management given the needs and requirements of staffing. For example, the compensatory time provision states in relevant part:
>
> > Section 6.05 – Compensatory Time Off. Subject to the needs and requirements of the City, the concept of "compensatory time off" is recognized. . . .
> >
> > a) The Chief of Policy, Captain, Detective, Shift Sergeant or Acting Shift Commander has the authority and responsibility to approve or disapprove request for compensatory time-off of officers assigned to his shift. Officers must have the approval of their regular Shift Sergeant, the Investigator must have approval of the Detective. In the absence of the approving authority, the next level in the chain of command may be sought for approval. In no case however, shall a police officer or investigator seek approval from higher authority if there is time to seek approval from their immediate supervisor. Requests for compensatory time-off must be made at least twenty-four (24) hours in advance of the shift and in writing to the proper party. The Mayor or Chief of Police, Captain of Police, Detective or Sergeant shall have the right to deny or cancel compensatory time-off already approved in the event of an emergency or other justifiable occurrence, including but not limited to the manning requirements of the department.
>
> This language, on its face, unambiguously vests discretion in management to grant or deny requests for compensatory time off. *Dodge County Sheriff's*

[5] The heading of this portion of the City's brief reads as follows: "The Adoption of Falls within the Management Rights Clause of the Agreement". Presumably the City intended for this heading to reference "Policy 3/440", stating, "The Adoption of Policy 3/440 Falls within the Management Rights Clause of the Agreement".

Department Sworn Employees, Local 1323-B, AFSCME, AFL-CIO and Dodge County, Case 182, No. 49432, MA-7952 (1993) (Christopher Honeyman, Arbitrator).

The City goes on to also assert that the DODGE COUNTY decision turns on Arbitrator Honeyman's reading of the management rights provision applicable in that case. The City's brief states the following relating to this point:

> The union contract contained a management rights provision that provided in part:
>
> > 3.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the number of Employees to be employed … the nature and place of their work and all other matters pertaining to the management and operation of the County … This shall include the right to assign and direct Employees, to schedule work … Further, to the extent that rights and prerogatives of the Employer are not explicitly granted to the Union or Employees, such rights are retained by the Employer….
>
> Arbitrator Honeyman held that it was unnecessary to consider past practice or any of the other arguments advanced by the union, because:
>
> > "Simply, this is a matter in which the collective bargaining agreement is quite clear. Article 3.1 of the Agreement expressly reserves to management "the number of employes to be employed" as well as "the right to assign and direct employes" and "to schedule work." These rights are clearly broadly stated and clearly include the ability to determine how many employes are needed on a shift."
>
> The 2008-09 Agreement contains a similar management rights provision, in which management reserves "the right to plan, direct and control the operation of the work force . . ."

The City then turns its attention back to the subject of past practice, devoting the remainder of its brief to discussing the principles of past practice as they have been applied primarily by Arbitrator Raleigh Jones. This section of the City's brief reads as follows:

> Arbitrator Honeyman's decision to ignore past practice in the face of unambiguous contract language is consistent with principles of contract interpretation applied in the past by Raleigh Jones. For example, Jones has stated:

> Past practice is primarily used or applied in the following circumstances: 1) to clarify ambiguous language in the parties' agreement; 2) to implement general contract language; 3) to modify or amend apparently unambiguous language in the agreement; or 4) to establish an enforceable condition of employment where the contract is silent on the matter. [Footnote inserted here citing, "*In the Matter of the Arbitration of a Dispute Between Douglas County Professional Human Services Employees Union, Local 2375, AFSCME, AFL-CIO and Douglas County (Human Services),* Case 218, No. 52805, MA-9109 (1995) (Raleigh Jones, Arbitrator)."]

Jones has also rejected evidence of past practice where the contract language is clear, so that none of the above conditions exist. [Footnote inserted here citing, "Id."] As another arbitrator put it:

> "It is a generally accepted principle of contract interpretation that contract language which is clear and unambiguous outweighs or trumps a past practice. Even a well-established and long-standing practice cannot be used to give meaning to, or countervail, a provision which is clear and unambiguous. When a conflict exists between the clear and unambiguous language of the contract and a long-standing past practice, arbitrators usually follow the contract, and not the past practice." [No citation provided.]

Arbitrator Jones applies past practice the same way:

> It is a long-recognized principle in grievance arbitration that a well-established practice will not be used to interpret clear and unambiguous language and will not countervail clear contract language. Application of this principle . . . means that the contract language prevails over the Employer's past practice. Said another way, the interpretation of the insurance provision is governed by its express terms – not the Employer's practice which is contrary and has no contractual support whatsoever. [Footnote citing, "*In the Matter of the Arbitration Of A Dispute Between Bloomington Teacher's Association and Bloomington Sch. Distr.,* Case 4, No. 46577, MA-7010 (1992) (Raleigh Jones, Arbitrator)."]

As indicated above, even assuming the contract language on the right to take holiday time off was proven to be ambiguous, Dornak cannot argue that the past practice of allowing officers to take holiday time at their discretion is incorporated into the 2008-09 contract.

> Where a party wishes to prove a past practice, it must be understood by the parties that there is an obligation to continue doing things this way in the future. [Footnote inserted here citing, *"Douglas County Professional Human Services Employees Union, infra."*] Since the minimum manning scheme and loss of overtime were discussed at the bargaining table, and the Union agreed to the abandonment of the scheme, the Union may not be able to show that the parties intended the scheme to continue into the new contract term. [No citation provided.]

Arbitrator Jones has stated that "continued use of past practice resulting from mistake does not create a new enforceable past practice where the mistake was rectified and the management subsequently administered the contract as written. [Footnote inserted here citing, *In the Matter of the Arbitration of a Dispute Between Federation Of Nurses And Health Professionals, Local 5001, AFL-CIO and United Regional Medical Services,* Case 5, No. 50835, A-5212 (1994) (Raleigh Jones, Arbitrator).] In that case, Arbitrator Jones stated:

> Finally, the Union notes that the Employer did not implement the changed standby pay language until December, 1993 – some seven months after the 1993 contract became effective. The Employer acknowledged at the hearing that this delay was caused by a management screw-up. Be that as it may, the record shows that since December, 1993 (when it denied the grievant standby pay for the time spent working after a call in to work), the employer has administered the standby pay clause as written. Specifically, it has paid standby pay for all hours before and after a call in to work, but not for time spent actually working. As a result, no contract violation has been found.

Union

The Union's position is that the City violated the Agreement when it denied the Grievant's leave requests. In so arguing, the Union first contends that, where there is no proof of disruption, it is an unreasonable use of management rights to deny a leave request. Citing TIN PROCESSING CORP., 15 LA 568 (SMITH, 1950), the Association asserts that there was no proof of disruption here and the City therefore acted in an arbitrary and capricious manner when it denied the Grievant's leave request.

Specifically with regard to the Grievant's request to use compensatory time on November 2, the Association asserts that the requirements the Grievant was obligated to adhere to in requesting such leave time are set forth at Section 6.05 of the Agreement, which includes the following statement:

> Requests for compensatory time-off must be made at least twenty-four (24) hours in advance of the shift and in writing to the proper party.

The Association asserts that the Agreement does not mention that requests for compensatory time cannot be submitted more than thirty days in advance, as required by the City in this instance. The Association further asserts that the City has failed to explain why it denied the Grievant's compensatory time-off request. It also points out that the City approved a compensatory time request for another officer for the same date in November that had been requested by the Grievant, and it asserts that this fact is further evidence that the Department acted in an arbitrary and capricious manner when it denied the Grievant's request to use compensatory time.

The Association asserts that the Agreement does not provide for the limitation imposed by the City with regard to the Grievant's request to use vacation time, either. It asserts that the Department abused its management rights when it refused to allow the Grievant to attach a single vacation day to a five-day vacation block.

The Association further argued that its position in this case is supported by what it characterizes as a bona fide past practice. With regard to that issue, the Association argues as follows:

> The City, for many years, has applied its interpretation of the language to include allowing employees off on compensatory time off and vacation when there are five employees working. None of Officer Dornak's time-off requests would have created an overtime situation in the Department.
>
> It has been well established that in order for a past practice to be valid, certain conditions must be met. Arbitrator Justin in Celanese Corp. of America, 24 LA 168, 172 (1954), defines practice as:
>
> > "In the absence of written agreement past practice to be binding on both parties must be 1) unequivocal; 2) clearly annunciated and acted upon; and 3) regularly ascertainable over a reasonable period of time and is a fixed and established practice **accepted by both parties**." (Emphasis added)
>
> See also the opinion of Arbitrator [Mittenthal] MFC Corp 46 LA 335, 336 (1966)
>
> > "A practice, to be enforceable, must be supported by the ***mutual agreement*** of the parties. Its binding quality is due not to the fact that it is past practice, but rather to the agreement on which it is based." (Emphasis in original)

See Hussman Corporation, 84 LA 137 (Roberts 1983)

> "V. Finally, the Company relies in large measure on past practice and custom. There are several aspects to this inquiry.
>
> First of all, a past practice and custom is not binding simply because something has been done in a particular way in the past, even in violation of the contract. A binding past practice and custom is binding because the practice or custom evidences a **mutual agreement** or understanding between the parties. As stated in Ford Motor Company, 19 LA 237, 24-242:
>
> > "Its binding quality is due, however, not to the fact that it is a past practice but rather to the agreement in which it is based."
>
> Any understanding between the parties in order to be binding must be predicated upon **mutual understanding and agreement** that something must be done in a particular way. The only difference between an expressed agreement, whether written or oral, and an agreement evidenced by past practice and custom is that in the former case the mutuality of the agreement is expressed whereas in the latter case it arises more informally and may be inferred from the conduct of the parties/evidence of mutuality of agreement or understanding is nevertheless necessary and essential to the binding quality of either.
>
> Two common elements in all of the above definitions, which are clear in the present case, is that of mutual understanding and mutual agreement. It is clear to the undersigned that there is a meeting of the minds as it relates to the interpretation of how the Department has approved vacation and compensatory time off requests in the past. The Association is requesting that the Arbitrator agree that the City acted in an unreasonable manner when it denied Officer Dornak's vacation and compensatory time off requests.

Finally, the Association argues that the grievances should be sustained because the City changed a benefit that is a mandatory subject of bargaining. Its argument on this subject reads as follows:

> The Association contends that the benefits of vacation usage and compensatory time off are mandatory subjects of bargaining. As cited in City of Waukesha (Fire Department), "The test or standard to be used in determining whether a proposal relates to a mandatory subject of bargaining is whether the subject is "primarily" or "fundamentally" related to wages, hours, or conditions of employment. Subjects which are "primarily related to the formulation or management of public policy" are non mandatory subjects" [*sic*] (Case XLII, No. 25239, DR(M)- 134, Decision No. 17830, (1980).

> In light of the above, the City failed to provide any evidence in the record that it sought to bargain a change to limit when officer's can request time off or that would prevent employees from adding a single vacation day to a block of vacation. The Employer cannot change a mandatory subject of bargaining on a whim. The case law is very clear that any change must be sought through negotiations or arbitration. In the instant case, the Employer did not pursue either method and thus violated the agreement.

DISCUSSION

At the outset it is necessary to note that, on the day before hearing in this matter, the City withdrew Directive 3/440 as a Department policy. As a result of that action, the Association withdrew a grievance it had filed objecting, generally, to the implementation of Directive 3/440. At hearing in the present case, the City took the position that the withdrawal of that grievance precluded the Association from making the argument that Directive 3/440 constituted a violation of the Agreement. In arguments made during the proceeding, it pointed out, accurately, that the two remaining grievances regarding Dornak's denied leave requests did not make any reference to Directive 3/440. Consistent with this approach, the Association's post-hearing brief does not make a single reference to that policy, but rather measures the City's denial of the Grievant's leave requests against the terms of the Agreement and what the Association claims is an established past practice. Regardless of the recent fate of Directive 3/440, the City's argument that the Association has precluded itself from challenging the legitimacy of that policy, and the Association's decision to avoid mention of the same, it is undisputed that Directive 3/440 was the basis for the City's denial of the Grievant's leave requests. That being the case, a decision in this case requires some attention to the terms of that policy.

The City elicited significant testimony at hearing as to whether Directive 3/440 constitutes a violation of the Agreement. It asked the Grievant multiple questions related to this point. The Grievant testified that he did not know whether Directive 3/440 violated the Agreement. He also testified that he could not point to any specific provision in the Agreement that prohibited the implementation of Directive 3/440. He also agreed that, if one assumed hypothetically that the terms of Directive 3/440 are not contrary to the Agreement, the City's decision to deny his leave time would be legitimate. Further, the Grievant acknowledged that he did not have any "facts" to support the Association's position that his leave requests were improperly denied. As indicated at hearing, all of these questions relate to the ultimate question before me: whether the actions taken by the City, in reliance on the terms of Directive 3/440, constituted a violation of the Agreement. I am not willing to abdicate to the Grievant or any other witness who testified in the proceeding the responsibility to study the record, interpret the Agreement, and arrive at a conclusion as to this question.

The City asserts that it was authorized by the management rights clause at Section 3.01 of the Agreement to implement Directive 3/440 and use the terms of that policy as a basis for

its denial of the Grievant's leave requests. In so arguing, the City relies on DODGE COUNTY, Case 182 NO. 49432 MA-7952. There, the arbitrator concluded that Dodge County's implementation of a policy that established the number of employees needed on a shift was permissible under the management rights clause in the applicable collective bargaining agreement. That provision reserved to the County the right to determine "the number of employes to be employed", the right "to assign and direct employes" and the right "to schedule work". The City argues that the same conclusion can be drawn here. The management rights clause at Section 3.01 of the Agreement reserves to the City

> . . . the right to plan, direct and control the operation of the work force, determine the size and composition of the work force, to hire, to lay off, to make job assignments within the normally scheduled shift, to discipline or discharge for just cause, to establish and enforce reasonable rules of conduct, to introduce new or improved methods of operation, to determine and uniformly enforce minimum standards of performance, all of which shall be in compliance with and subject to the provisions of this Agreement.

I disagree with the City's contention for two reasons. First, the City argues that the management rights clause, as in the DODGE COUNTY case, gives the City the ability to determine how many employees are on a shift, and it suggests that it is this right that authorized the City to implement a policy such as Directive 3/440 which mandates (1) that compensatory time requests must be made no more than thirty days before the requested day off and (2) that single vacation days cannot be used to extend a five-day vacation block. It is simply not clear, however, from the evidence before me that these specific policy restrictions have a relationship to the number of employees on any given shift in the Department. That being the case, the promulgation of such rules cannot be said to fall within the scope of the City's alleged management right to make such a determination. Second, even if it can be said that the policy restrictions do relate to rights reserved to the City by Section 3.01 of the Agreement, the general right reserved to the City to direct and control the workforce is modified by the provisions in the Agreement that relate more specifically to the use of compensatory time and vacation leave. Thus, the policy provisions that relate to compensatory time and vacation usage must be evaluated in light of these more specific contractual provisions.

Section 6.05 of the Agreement, as it is set forth above, addresses the subject of compensatory time. The City's argument is that the requirement set forth in Directive 3/440 that places a thirty-day window on requests for compensatory time are permitted by Section 6.05 of the Agreement because that provision "unambiguously vests discretion in management to grant or deny requests for compensatory time off". It is true that Section 6.05 appears at certain points to give some discretion to the Department management staff relating to the use of compensatory time. The provision starts with a sentence providing that the concept of compensatory time off is generally "[s]ubject to the needs and requirements of the City". The end of that introductory paragraph functions to limit that discretion, however, by stating that

"[c]ompensatory time-off *shall* be approved provided the following requirements are met" (emphasis added). The five specific requirements that are "a" through "e" are then listed.

Subsection "a" must be analyzed, because it also appears to give a certain amount of discretion to the City with regard to compensatory time. The first sentence of 6.05(a) gives the chief, captain, detective, shift sergeant, or acting shift commander the "authority and responsibility to approve or disapprove requests for compensatory time-off". If read in isolation, this sentence could be interpreted to allocate complete discretion to the City to approve or disapprove compensatory time. The subsequent sentences, however, suggest that the first sentence has a more narrow purpose. Sentences two, three, and four of subsection "a" establish that the purpose of the first four sentences of that provision is to set out a chain of command for entertaining compensatory time off requests. Thus, rather than making the general point that the City has unfettered discretion to approve or deny compensatory time requests, the first sentence of 6.05(a) merely establishes that it is the positions identified therein that should receive such requests. The three sentences that follow provide more nuanced instruction as to who, among the Department's command staff, should be sought for approval.

The last sentence in subsection 6.05(a) also must be analyzed, as it appears to allocate discretion to the City related to compensatory time usage. That sentence states the following:

> The Mayor or Chief of Police, Captain of Police, Detective or Sergeant shall have the right to deny or cancel compensatory time-off already approved in the event of an emergency or other justifiable occurrence, including but not limited to the manning requirements of the department.

The City would argue that this sentence gives it the discretion to implement a policy such as Directive 3/440 for the general purpose of tending to the "manning requirements" of the Department. The issue of minimum manning is not before me, and there is no evidence on the record related to that issue. With regard to the ability to approve or deny the use of compensatory time, any discretion that this sentence gives to the City appears to be limited to "the event of an emergency or other justifiable occurrence". Because the thirty-day policy in Directive 3/440 places an across-the-board limit on the use of compensatory time, regardless of the circumstance, it seems to go beyond the limited discretion afforded to the City in this provision. Indeed, on one of the particular dates on which Dornak was denied the opportunity to use compensatory time, another officer's compensatory time request was authorized because it was made in compliance with the thirty-day requirement. That fact suggests that the City was not using Directive 3/440 to address a special circumstance as authorized by the Agreement.

Given the above, I am not persuaded that the discretion afforded to the City in Section 6.05 permitted it to implement the thirty-day policy with regard to compensatory time in the form of Directive 3/440 and to deny Dornaks' request on that basis. I am also not persuaded

that the Agreement, standing alone, allows the City to impose such a requirement. On its face, the only time restriction set forth with regard to the use of compensatory time appears in Section 6.05(a), wherein it is required that such requests must be made at least twenty-four hours in advance of the shift on which it is intended to be used. The City's unilaterally implemented thirty-day requirement adds a restriction that is in conflict with the Agreement.

The second subject to be addressed in this case is whether the City appropriately denied the Grievant's vacation requests. As stated, the City denied the Grievant's request for vacation days under the theory that a five-day vacation block cannot be extended with the addition of a single vacation day. The City asserts that Directive 3/440 supports this decision. The problem with this purported basis is the same as that discussed above in relation to the Grievant's attempt to use compensatory time. Section 11.02 of the Agreement sets forth a specific system for the selection and use of vacation days. In doing so, it gives Department officers who are entitled to more than two vacation weeks the option of using their final week as single days rather than a five-day block. This section does not expressly or impliedly include any restriction against using one of these single days to extend a vacation block. The City's attempt to impose such a restriction on the use of the vacation benefit, with or without the aid of Directive 3/440, constitutes a violation of the Agreement.

Given the foregoing, it is unnecessary to address the past practice arguments raised by the parties. I also decline to specifically address the City's argument that the Association should have been required to challenge Directive 3/440 through a petition for declaratory ruling or at the bargaining table. The Association's position is that the City's denial of the Grievant's leave requests was a violation of the Agreement. Insofar as the grievance process, as it is described in Article V of the Agreement, is available to resolve disputes pertaining to the "interpretation, application or enforcement" of the terms of the Agreement, the Association's use of that process to challenge the City's actions here was appropriate.

The days on which the Grievant would like to have been off work came and went long before the parties assembled for a hearing in this matter. Presumably related to this fact, the Association requests that the Grievant be compensated at the rate of time-and-one-half for the hours he was required to work on August 4, November 1, and November 2 due to the employer's denial of his leave requests. Although I have sustained the grievance, this award does not provide for that remedy. The record indicates and it seems obvious that the Grievant would not have received time-and-one-half pay had he been granted leave time for those days. The record suggests that the Grievant did suffer some inconvenience from having to rearrange his vacation schedule, but there is no indication that he incurred any monetary loss. The Association has not made any argument suggesting that a monetarily punitive remedy would be justified under these circumstances. Given the facts presented by this case, there is no remedy.

On the basis of the above and foregoing, the undersigned makes the following

AWARD

The grievance is sustained.

Dated at Madison, Wisconsin, this 22nd day of July, 2010.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

DLC/gjc
7600