BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

THE LABOR ASSOCIATION OF WISCONSIN, INC.

Case 431
No. 69850
MA-14767

Appearances:

Anna Pepelnjak, Attorney, for Winnebago County.

Benjamin M. Barth, Staff Representative, for the Labor Association of Wisconsin, Inc.

ARBITRATION AWARD

I was selected to arbitrate a grievance filed by the Labor Association of Wisconsin, Inc. and its local, the Winnebago County Professional Dispatchers' Association, Local 501, against Winnebago County. The grievance alleges that the County violated the collective bargaining agreement (CBA) at issue [1] and past practice by denying the Grievant's request to change an approved paid vacation day to a paid Sick Leave Control Incentive Program (SLIP) day. Hearing was held in Oshkosh, Wisconsin on August 27, 2010. There is no stenographic or other transcript of the proceedings. The parties filed post-hearing briefs, both of which were received on October 12, 2010.

ISSUE

The parties were unable to agree on a statement of the issue; however, they did submit their proposed statements in writing and expressly authorized me to state the issue after considering their proposals.

The Association proposes the following statement of the issues:

[1] The CBA at issue is entitled, "AGREEMENT between WINNEBAGO COUNTY and PUBLIC SAFETY PROFESSIONAL DISPATCHERS' ASSOCIATION 2007-2008-2009."

1. Did the Employer violate the expressed or implied terms and conditions of the collective bargaining agreement and/or past practice when it denied the request of Brian Smith to change his vacation day on January 30, 2010 to a Sick Leave Incentive day (SLIP)?

2. If so, what is the appropriate remedy?

. . .

The County proposes the following statement of the issues:

1. Did Winnebago County violate Article 3 of the collective bargaining agreement between Winnebago County and the Professional Dispatchers' Association, Local 501, "Management Rights", by refusing to permit the grievant, M. Brian Smith, to change his originally-requested form of paid time off for January 30, 2010, from vacation to a "SLIP" day?

   Answer: No.

2. Was the January 6, 2010 memo issued by Administrative Captain Cherilyn Eischen prohibiting dispatchers from changing their originally-requested form of paid time off to a different form of paid time off effective as of the date of issuance?

   Answer: Yes.

. . .

I find the issues are appropriately stated as follows:

1. Did the County violate any terms of the CBA when, on January 6, 2010, it denied the Grievant's request to change a paid vacation day that had been approved for January 30, 2010, to a SLIP day? [2]

2. If so, what is the appropriate remedy?

[2] The Association relies solely on the alleged, extra-contractual past practice of allowing employees to change one type of approved paid time off to another prior to the occurrence of the time off to support its argument. Accordingly, a sub-issue – one addressed in the "Analysis" section below – is whether there indeed was such a past practice.

BACKGROUND

Grievant's Work Experience and Incidents of Changing Type of Paid Time Off

The Grievant has been employed by Winnebago County as a Dispatcher for over 15 years, and, as such, is in the bargaining unit covered by the CBA. The Dispatchers work in the Communications Center of the Winnebago County Sheriff's Department. For approximately 3 of his 15+ years of employment with the County, the Grievant served as the "Dispatcher in Charge". In that capacity, he served in part as a scheduler for his fellow Dispatchers. His scheduling tasks included addressing Dispatchers' requests to change various types of approved time off to other types, prior to the occurrence of the approved time off. [3] Until approximately July 14, 2009, either the Dispatcher in Charge, or, according to the Grievant, Communications Manager Kathy Biggar, handled such requests to change types of approved time off. However, as of approximately July 14, 2009, the Dispatcher-in-Charge was eliminated.

Documented instances of such requests to change types of approved time off include the following:

DATE OF TIME OFF	DISPATCHER	REQUESTED CHANGE
03/07/09	Holmes	Cancel 1.25 holiday hours and instead take 8.25 vacation hours
05/15/09	Voelkel Fox	Cancel 8.25 vacation hours and instead take 1.25 overtime hours converted to comp time
07/03/09	Holmes	Cancel 8.25 vacation hours and instead take 2 holiday hours
07/10/09	Rasmussen	Cancel 8.25 vacation hours and instead take 2 holiday hours

The Grievant was not the Dispatcher In Charge when these requests were made and approved. He has made such requests himself, and while serving as the Dispatcher in Charge, he was aware of others' requests to change types of approved time off.

Captain Eischen's Experience and SOP's

Cherilyn Eischen is employed as a Deputy Sheriff of the Winnebago County Sheriff's Office. As an Administrative Captain since May of 2008, she oversees the Communications

[3] Types of paid time off include holidays, vacation, overtime converted to comp time, and SLIP days.

Center. Prior to working there, she had worked in every division of the Winnebago Sheriff's Office as either a line officer or supervisor.

Eischen's experience familiarized her with the standard operating procedures (SOP's) for the Corrections and Patrol divisions. Included in these SOP's was a restriction that any time off granted but later canceled or changed could not be resubmitted until after 96 hours of the cancelation request. In addition, after a request for time off was granted but a subsequent change to the request was sought, only the *type* of time off originally granted could be used for subsequent re-submissions for time off on the same day. These restrictions, however, are not in the SOP's for the Communications Division.

Events Leading to Filing of Grievance

On December 15, 2009, the Grievant submitted a written request for 8.25 hours of vacation time to be taken on January 30, 2010. This request was granted by the Grievant's supervisor, Kathy Biggar, no later than December 18, 2009. However, on January 6, 2010, the Grievant submitted a written request effectively to change the approved 8.25 hours of vacation time on January 30, 2010, to 8.25 hours of SLIP time.

Also on January 6, 2010, Captain Eischen issued a memo to all Dispatchers regarding changing time off that stated:

> Any time off that was granted, then subsequently requested to be cancelled or changed, must be resubmitted on a time off slip and time stamped. The same date(s) cannot be re-submitted until after 96 hours of the cancellation request.
>
> In addition, once time off has been granted, the **original type of paid time off must be utilized** for any subsequent re-submissions (Ex: cancel a day of **vacation**, wait 96-hours and the date is still available, re-submission must be **vacation** time).

(Emphasis in original).[4] The Grievant's request to change vacation time on January 30, 2010 to SLIP time was not granted.

Additional facts are set forth below where appropriate.

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[4] The Grievant contends that this memo was not posted or provided to the Dispatchers until after his shift had begun on January 6, 2010. His shift on that day ran from 2:00 p.m. to 10:15 p.m. Captain Eischen, however, maintains that she issued the memo sometime during the morning of January 6, immediately after a discussion she had with Kathy Biggar. More specifically, according to Eischen, Biggar had informed her that one of her Dispatchers had changed the same time off three times within a few days. Eischen then inquired how this could happen, given that there was an SOP that prohibited the changes. At that point, according to Eischen, she checked the SOP's governing the Communications Center and discovered that the restrictions later expressed in the memo were not contained in the applicable SOP's. She thus drafted the memo and had Ms. Biggar post it that morning. Ultimately, the sequence of these events is not dispositive and I thus need not decide which testimony is more credible.

ANALYSIS

1. Whether There Was a Past Practice of Allowing Dispatchers to Change the Type of Approved Paid Time Off

The Association does not identify any express term of the CBA that the County violated. Instead, its argument focuses on the County's purported past practice of allowing Dispatchers to change the type of approved paid time off to another type prior to the date for which the time off was requested. Accordingly, the viability of the Association's position first depends on whether the past practice existed. To determine as much, it is helpful to identify 1) what must be shown generally to establish a binding past practice; and 2) whether the proof in this case comports with the required showing.

A. The Requirements of a Binding Past Practice

The parties agree that

> In the absence of a written agreement, 'past practice', to be binding on both Parties must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.

Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 608 (Alan Miles Ruben, Ed., 6th Ed. 2003), citing CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954).[5] Moreover, Elkouri emphasizes that "strong proof of its existence ordinarily will be required." Id. at 607.

B. Whether the Requirements of Past Practice Have Been Established

Applying these requirements to this matter, I do not find that "strong proof" supports them. The proof offered in support of an established past practice includes four documented examples of accepted requests to change the type of approved time off; the Grievant's testimony that he has made such requests; his testimony that he has witnessed others make such requests; and his testimony that Kathy Biggar sometimes has handled such requests. Nevertheless, the documented examples – only four – all predate the discontinuation of the Dispatcher In Charge. Thus, a Dispatcher In Charge (other than the Grievant) or Kathy Biggar likely handled these four requests, which were made within a time period of only approximately four months. The probative value of this proof is questionable, therefore, regarding whether Biggar and management in general were aware of these documented incidents – or, more specifically, whether the incidents were "clearly enunciated" and "readily ascertainable" to them. In addition, under the circumstances, the four months during which the incidents occurred is a dubiously limited rather than "reasonable period" to readily ascertain "a fixed and established practice accepted by both parties." Further undermining any

[5] Both parties expressly recognize these criteria in their briefs.

conclusion that the alleged past practice was fixed, established and mutually accepted was Winnebago County Human Resource Director Karon Kraft's testimony that although the practice occurred, "it was unknown to management". Moreover, Captain Eischen was unaware of the practice until January 6, 2010, the date she issued the memo prohibiting, among other things, Dispatchers from changing one type of paid time off to another.

While I do give some weight to the Grievant's general testimony that he has changed the type of approved paid time that he originally had requested and that he is aware of others having done so, the probative value of this testimony is limited by its lack of supporting documentation and specificity.

In sum, the quantum of evidence the Association offered does not meet the "strong proof" threshold of an established past practice.

II. The Inapplicability of the Status Quo Doctrine

The Association also argues that "mandatory subjects of bargaining cannot be unilaterally modif[ied] or deleted without bargaining or arbitrating the change", that numerous Commission cases support this proposition, and that the County violated the Status Quo doctrine. (Assoc. Br. 9).

While these principles are clearly applicable in Complaint cases alleging prohibited practices based on an employer's violation of the statutory duty to bargain in good faith, [6] they are less applicable in the context of a grievance arbitration, which involves contractual interpretation.

Moreover, although the Association's statement of the issue refers to "implied terms and conditions of the collective bargaining agreement", it offers no argument to support the theory that a past practice, even if established, must be construed as an implied term of the CBA. Lacking supporting argument, any such assertion is deemed abandoned.

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[6] See, for example, LOCAL 1310/ED MCGEORGE V. CITY OF EAU CLAIRE, DEC. NO. 29346 (WERC, 12/02):

> It is well settled that during a contract hiatus, absent a valid defense, a municipal employer violates its duty to bargain (and thus commits a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats.) if it takes unilateral action as to a mandatory subject of bargaining in a manner inconsistent with its rights under the status quo. ST. CROIX FALLS SCHOOL DIST. V. WERC, 186 Wis. 2D 671 (Ct. App. 1994); JEFFERSON COUNTY V. WERC, 187 Wis. 2D 647 (Ct. App. 1994); MAYVILLE SCHOOL DISTRICT V. WERC, 192 Wis 2D 379 (Ct. App. 1995); RACINE EDUCATION ASSOCIATION V. WERC, 214 Wis. 2D 352 (Ct. App. 1997).

CONCLUSION

For all of the foregoing reasons, I conclude that the County did not violate any terms of the CBA when, on January 6, 2010, it denied the Grievant's request to change a paid vacation day that had been approved for January 30, 2010, to a SLIP day. Accordingly, the grievance is dismissed.

Dated at Madison, Wisconsin, this 14th day of January, 2011.

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Arbitrator

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