

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**RUSSELL R. BECKMAN**

and

**CITY OF KENOSHA**

Case 227  
No. 70305  
MA-14937

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**Appearances:**

**Mr. Russell R. Beckman**, 8744 33<sup>rd</sup> Avenue, Kenosha Wisconsin 53142, on his own behalf.

Buelow, Vetter, Buikema, Olson & Vliet, LLC, by **Attorney Daniel G. Vliet**, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, on behalf of the City.

**ARBITRATION AWARD**

The City of Kenosha has a collective bargaining agreement with the Kenosha Professional Police Association (herein the Association) in effect from January 1, 2010 through December 31, 2012, which covers all regular employees of the Kenosha Police Department in the classifications of Detective, Traffic Officer, Court Officer, Police Canine Specialist and Police Officer. At all pertinent times, Russell R. Beckman (herein the Grievant) was a Detective with the Department and a member of the bargaining unit. The provisions of the contractual grievance procedure permit grievances to be advanced by either an employee or the Association. On November 1, 2010, Beckman filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the City's denial of his request to carryover unused vacation and holiday leave into the following year. The undersigned was selected to hear the dispute from a panel of WERC arbitrators and a hearing was conducted on January 12, 2011. The parties filed briefs on January 21, 2011, whereupon the record was closed.

**ISSUES**

The parties stipulated to the following statement of the issues:

Did the City violate the collective bargaining agreement when it denied the Grievant's request to carryover vacation time?

If so, what is the appropriate remedy?

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE I - MANAGEMENT RIGHTS**

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4. This Agreement shall be subject and subordinate in all respects, wherever the same may be applicable therein, to the general rules and regulations of the Department of Police, Kenosha, Wisconsin, all of which are in effect on the effective date of this Agreement and contained in Appendix "B" attached hereto.

**ARTICLE X - PAID HOLIDAYS**

The following holidays shall be considered paid holidays: New Year's Day, Martin Luther King Day, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas, Christmas Eve, New Year's Eve and Good Friday. These holidays are paid holidays whether they fall on an employee's workday or day off. New Year's, Easter, Independence Day, Labor Day, Thanksgiving and Christmas shall be incorporated into the day off schedule of each employee working the 4-2 and 5-2 work schedule. Christmas Eve, New Year's Eve, Memorial Day and Good Friday and Martin Luther King Day shall be compensated for in the following manner: Each employee be granted a working day off after the holiday has passed, except that as to Memorial Day, every employee who is a veteran of the Armed Services shall be entitled to this day off, but in the event this day falls on an employee's scheduled workday and said employee cannot be spared for this day off and said employee does not wish to have this day off, the employee shall be compensated one (1) day off at a later date.

Each employee shall be eligible for one (1) floating holiday per year in addition to the above holidays. Such floating holiday may be used at such time as may be approved by the Chief of Police or his designee consistent with the needs of the department.

Employees shall not be permitted to carry more than ninety-six (96) hours of accumulated holiday time off beyond December 31 of each year. However, employees with more than eighty (80) hours of accumulated time as of December 31, 1977, shall be permitted to carry the additional amount in a separate holiday time account which will not be subject to this ninety-six (96) hour limitation.

**ARTICLE XI - VACATIONS**

**Section 1. Annual Leave.** Employees who have completed the required number of years of continuous service shall earn annual leave for each month of employment during which they work at least half of their scheduled workdays in accordance with the following tables based on anniversary dates of employment. For purposes of this Section, time paid for shall be considered time worked.

<b><u>Continuous Years of Service</u></b>	<b><u>Days per Year</u></b>	<b><u>How Accumulated</u></b>
<b>Less than one</b>	<b>6</b>	<b>½ day per month</b>
<b>One but less than 10</b>	<b>14</b>	<b>1 day per month except for 1½ days for April, June, August &amp; October</b>
<b>10 but less than 20</b>	<b>21</b>	<b>1¾ days per month</b>
<b>20 or more</b>	<b>26</b>	<b>2 days per month except for 2½ days for April, June, August &amp; October</b>

On January 1 of each year, employees shall be credited with their full annual leave accumulation for that year based upon the above table. It is mutually understood and agreed that such accumulation is an advance credit and any employee who leaves the service of the CITY during a year for any reason, except death, shall have his/her vacation accumulation prorated for that year and that any such employee who has used more leave than the prorated amount shall be liable to pay the CITY, in cash, for all such additional time off. It is further mutually agreed that the CITY is authorized to deduct such payment from the employee's paycheck if necessary.

**Section 2.** The vacation periods shall be selected with the highest classification seniority selecting first and then proceed in this manner to the lowest seniority member in each classification.

Vacation selections shall be made from January 1 to April 1 of each year. Vacation days can be used one (1) day at a time in accordance with prior procedure. All vacations shall be scheduled taking into consideration the needs of the department.

**Section 3.** Continuous service shall not include any period of layoff or unpaid leave of absence except military leave, if required by law.

## **APPENDIX B**

### **General Rules And Regulations Of The Department Of Police**

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#### **RULES AND REGULATIONS COVERING SICKNESS IN THE FAMILY, HOLIDAY LEAVE, COMPENSATORY TIME, FUNERAL LEAVE, LEAVES OF ABSENCE, EDUCATION LEAVE AND MILITARY LEAVE.**

##### **POLICY**

The Kenosha Police Department will grant leaves and process leave requests with due regard for the efficient operation of the department, the best interests of the personnel, and in conformance with the procedures set forth in the employee contract where applicable.

##### **Rules and Regulations**

##### **Covering Annual Leave Picks**

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14. If any Police personnel, including civilians, want to request a carryover of annual leave, they must submit their request, in writing on the attached form prior to September 1<sup>st</sup> of each year. The form is to be submitted to the Commanding Officer, who will forward it to the Chief of Police with a recommendation to concur or deny the request. The Chief of Police will make his decision and will forward his recommendation to the office of the Mayor for final action. Permission to carry over annual leave will only be granted in extenuating or emergency situations.

##### **STIPULATIONS**

The parties stipulated to the following issues of fact:

1. The Kenosha Professional Police Association is the exclusive bargaining agent for the Kenosha Police Department employees.
2. Annual leave, as used in the contract, is synonymous with vacation.
3. Holidays are a separate form of leave from annual leave.

## **BACKGROUND**

Russell Beckman, the Grievant herein, has been an employee of the Kenosha Police Department, and a member of the bargaining unit representing its sworn employees, since 1983. Since 1995, Beckman has been a Detective on the Kenosha Police Force. As an employee with over 20 years' service, Beckman qualifies for 26 days of annual leave. He also receives eleven scheduled paid holidays and one paid floating holiday annually.

On April 15, 2010, Beckman was placed on paid administrative leave by the Department pending an investigation into alleged misconduct. He remained on paid administrative for the remainder of 2010. While on leave he was subject to a number of conditions, such as being available on an hour's notice, notifying the Department if he intended to leave town and being always available by phone, but was not scheduled to work. At the time he was placed on administrative leave, Beckman had requested twelve days of annual leave in November and December. On August 18, 2010, Beckman made a request to his supervisor, Lt. Eric Larsen, to allow him to carry over eleven days, or 88 hours, of paid holiday and to allow him to cancel his scheduled vacation and carry over twenty-three days, or 184 hours, of annual leave into 2011. Carry over of unused holidays is permitted under Article X of the contract. Further, paragraph 14 under the rules governing annual leave picks allows employees to request carry over of unused annual leave, which may be granted in extenuating or emergency situations. If carry over is not granted, however, annual leave must be used in the year earned or it is forfeited. Lt. Larsen forwarded the request to Chief John Morrissey. Chief Morrissey determined that the request should be denied, on the basis that Beckman had ample time to use his annual leave, had he chosen to do so and that carryover of holiday leave was not allowed under the contract. The Chief notified Beckman of his decision on August 20 and forwarded his recommendation on to the Mayor, who denied Beckman's request.

After the mayor's denial of his request, Beckman filed a grievance claiming that the denial violated the contract. In advancing the grievance, Beckman took the position that being on administrative leave is analogous to an employee being on sick leave or worker's compensation. Historically, the City has found such employees to be eligible for carryover of annual leave on the basis of extenuating circumstances. The grievance was pursued by the Association on Beckman's behalf through the Step 3 hearing before the City Administrator, who denied the grievance on September 20, 2010. The Association decided not to advance the grievance to arbitration, but authorized Beckman to do so on his own behalf. Accordingly, an arbitration hearing was held on January 12, 2011, with Beckman acting as his own representative. At the hearing, the City withdrew its objection to the carryover of holiday leave, but maintained its position regarding annual leave. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

## **POSITIONS OF THE PARTIES**

### **The Grievant**

The Grievant maintains that the City's denial of his request is an arbitrary and unwarranted seizure of his property. The Grievant cites JACKSON COUNTY, MA-10891 (Emery, 6/00) for the proposition that vacation benefits are a form of deferred compensation and should not be forfeited unless required by the contract. There is no language in this contract requiring the forfeiture of the Grievant's vacation benefits, so the City's action is without support. Further, there is no language in the contract referring to administrative leave whatsoever and the language in paragraph 14 of the rules regarding annual leave actually supports the Grievant's request.

The City relies on past practice to support its action, but this reliance is misplaced. There is a practice of the City taking employees' unused vacation at the end of the year, but none of those cases involved employees placed on administrative leave, therefore this is a case of first impression, which was acknowledged by the City Administrator in his decision at the Step 3 hearing. The fact that this has never happened before also subverts the City's argument based on an existing past practice.

Paragraph 14 of the rules regarding administrative leave provides that "permission to carry over annual leave will only be granted in extenuating or emergency situations." The Grievant submits that this situation constitutes extenuating circumstances. This is a unique situation, which by definition makes it extenuating. Chief Morrissey testified that he only grants carry over in cases of extended sick leave, workers compensation leave, or other major extenuating circumstances. There is also an acknowledged practice of allowing retiring officers to carry over their unused annual leave into the following year, which reveals that there are circumstances beyond sick leave and workers compensation where carryover is allowed.

There is also no evidence of any employee on administrative leave ever using annual leave while on administrative leave. This is largely because there is no rational reason to use annual leave when the employee is already on paid leave. Despite the City's actions, it may not compel the Grievant to take earned annual leave at the same time he was on paid leave ordered by the City. The City attempts to distinguish this case by arguing that the Grievant is responsible for being placed on administrative leave, but that involves a separate disciplinary proceeding where just cause for discipline must yet be established. The City has the burden of establishing its case for discipline and until it does so it has no right to seize the Grievant's accrued leave benefits.

### **The City**

The City asserts that the arbitration must be limited to the specific issue presented in the grievance. *STONE CONTAINER CORP.*, 76 LA 450 (1981); *LANGLADE COUNTY*, MA-8934 (Gallagher, 1995). This is because raising new issues at the hearing is fundamentally unfair to

the opposing party. Here, the Grievant raised for the first time at the hearing the issue of additional leave hours carried over from 2009 to 2010. The arbitrator stated at the hearing that he would not consider the Grievant's additional claims. The City maintains that any attempt by the Grievant to assert these additional claims should be denied. It is also the Grievant's burden to prove his claims and he has failed to do so.

The carryover of vacation is governed by the Department's work rules and regulations. The Grievant may argue that the language of paragraph 14 is ambiguous or does not apply, but that ignores the clear language and Department practice. Paragraph 14 explains what an employee must do to carry over annual leave, which the Grievant followed. The Chief, however, recommended denying the request because there were not extenuating or emergency circumstances. The Chief's clear testimony was to the effect that he only grants carryover where the employee is physically unable to use the leave due to a workers compensation injury or a non-work related injury or illness. On the other hand, the Chief was also clear that he has denied carryover when the employee has the time to take the leave before the end of the year. The evidence is clear that the Grievant could have used his leave before the end of the year. He even cancelled 12 days of vacation in August which, if he had taken it, would have left him only 11 more days to take off before the end of the year. Moreover, he gave no explanation for not using his vacation other than he did not want to. This does not constitute extenuating or mitigating circumstances.

In the event the arbitrator finds the language of paragraph 14 to be ambiguous, the City's action is also supported by past practice. In order for a past practice to be binding it must meet three criteria: 1) it must be unequivocal, 2) it must be clearly enunciated and acted upon and 3) it must be readily ascertainable over time as a fixed and established practice accepted by both parties. The practice of limiting carryover to situations of illness or injury has been unequivocally followed since at least 2003 and, prior to that, had a use or lose it policy going back to the 1980s. The practice was also clearly enunciated and acted upon. The Chief clearly explained his reasons in his memo to the Mayor on August 20, 2010, which was consistent with how similar requests had been dealt with in the past. The Grievant was on administrative leave, but was required to inform the Department of his whereabouts and remain available for duty. He was not injured or ill or otherwise unable to use his annual leave. As with other employees who could have used their leave by the end of the year, but chose not to, he lost his leave because he failed to use it. The practice was also readily ascertainable over time as a fixed and established practice accepted by both parties. The record shows that this practice has been in effect for years, the Union had knowledge of it and its acceptance of it may be established by the surrounding circumstances. The Union has never challenged the policy, therefore, it may be assumed the Union has acquiesced in it.

Finally, had the Grievant not been on administrative leave he would have been required to take his vacation the same as any other officer. The question is why should his being on administrative leave change his circumstances? Would it have made a difference if the Chief had ordered him to report for duty? He is attempting to take advantage of the situation and double dip. This should not be allowed.

## DISCUSSION

The essential question before the arbitrator in this case is whether the City had the right to deny the Grievant the ability to carry over his unused annual leave, earned in 2010, into 2011. The facts are largely undisputed. Beckman was on paid administrative leave for the last 9½ months of 2010. As such, he was receiving his regular pay, but was not required to report for duty, although he was required to remain available for duty pursuant to the terms of the administrative leave order. As of August 18, 2010, Beckman had 23 days (184 hours) of unused annual leave for 2010 and requested that he be allowed to carry it over into 2011. His request was denied, resulting in this grievance.

Beckman acknowledges that the ability to request carry over of annual leave is set forth in, and governed by, paragraph 14 of the Rules and Regulations of the Kenosha Police Department, which provides:

In any Police personnel, including civilians, want to request a carryover of annual leave, they must submit their request, in writing on the attached form prior to September 1<sup>st</sup> of each year. The form is to be submitted to the Commanding Officer, who will forward it to the Chief of Police with a recommendation to concur or deny the request. The Chief of Police will make his decision and will forward his recommendation to the office of the Mayor for final action. Permission to carry over annual leave will only be granted in extenuating or emergency situations.

He asserts, furthermore, that his status as being on administrative leave qualifies as “extenuating circumstances” as that language is used in paragraph 14. Thus, it is his position that his request to carryover his annual leave should have been granted and the fact that it was not constitutes a violation of the contract. He further maintains that he has a property right in his accrued leave which may not be seized by the City unless authorized by clear language in the contract, citing JACKSON COUNTY, MA-10891 (Emery, 6/00).

The City demurs. In his recommendation to not allow the carryover, Chief Morrissey implicitly found that Beckman’s status did not qualify and, further, that he had adequate opportunity to use his annual leave had he chosen to do so. In accepting the Chief’s recommendation, the Mayor agreed. The City argues that the clear language of paragraph 14 gives management the discretion to determine when carryover is warranted. It further asserts that historically carryover has only been permitted when an employee has been unable to use his or her annual leave due to an extended illness or injury. It is conceded by both parties that this is a case of first impression as to how the language is to be applied to an employee on administrative leave.

I note at the outset that the language does not provide for an automatic right of carryover upon a timely request being made. In the first place, once a request is made, the Chief is to make a recommendation as to whether or not it should be granted. Clearly this



means that the Chief is in a position to weigh the relevant factors and make an independent determination. The Mayor, then, may accept the Chief's recommendation, or not, in another exercise of discretion. Finally, the last sentence reveals that permission is to be granted only in extenuating or emergency situations. This language limits the scope of this benefit and, again, since no definition is provided, leaves it to management to determine what constitutes extenuating or emergency situations.

Having determined that the City has discretion to grant or deny carryover requests, the question then becomes one of whether the City abused its discretion in denying Beckman's request. In order to prove abuse of discretion, Beckman must establish that the City's action was arbitrary, capricious, or discriminatory. In order to do so he must essentially show that the City's action had no rational basis. In my view, Beckman has failed to meet this burden. Chief Morrissey testified that employees have been granted permission to carryover annual leave only when they are unable to use it during the year due to illness or injury. There is no history of this situation ever arising in the past where the employee in question is under administrative leave. The Chief distinguished this situation on the basis that, unlike a circumstance of illness or injury, Beckman was not unable to use his annual leave, he simply chose not to. Additionally, even after Beckman had been informed of the Mayor's decision there was sufficient time for him to use his annual leave before the end of the year. Whether or not Beckman agrees with the City's rationale, there is a logical basis for it. Despite the fact that Beckman was on administrative leave, there was no bar to his using his annual leave, if he chose to do so. This, to me, is not analogous to the situation of an employee who is on extended leave due to an illness or injury and cannot receive the benefit of his annual leave. Rather, this is a situation where the employee thought that, as long as he was being paid for not working already, he would bank his annual leave and use it at a later time. Indeed, Beckman concedes as much in his brief, where he states;

“One of the reasons why employees on paid administrative leave do not take vacation, holiday, or sick leave is the fact that it simply defies logic to do so. Almost every individual's actions are motivated by economic gain.”

Beckman brief at 6

Beckman points out that there is no evidence in the record of any employee using vacation while on administrative leave. This may be so, but the record is equally bare of any evidence that an employee on administrative leave has ever been permitted to carry over vacation, which is more to the point, in my view. He also asserts that, because his administrative leave status was involuntary, the City may not require him to use his vacation before it has established just cause for discipline in the underlying case. This line of argument also misses the point that, whatever the reasons for his being on administrative leave, there was no bar to his using his vacation during the year any more than there would have been had he been working. Indeed, he had even greater flexibility because he could schedule vacation without considering the force needs of the Department or the vacation preferences of the other officers. He appears to be of the view, however, that if the City places an employee on paid administrative leave it must not only pay the employee while on leave, but it must also pay the additional cost of

allowing that employee to carryover over unused annual leave to be used or cashed out at a later time. There is, however, nothing in the contract or past practice of the parties that supports this proposition.

Beckman further asserts a property interest in his accrued annual leave, which he claims the City wrongfully appropriated. He cites this arbitrator for the proposition that vacation benefits are a form of deferred income which should not be subject to forfeiture unless required by contract. JACKSON COUNTY, MA-10891 (Emery, 6/00) In my view, JACKSON COUNTY is distinguishable on its facts. There, an employee on administrative leave made a decision to retire and informed the employer he wanted to use up his accrued vacation and comp time until it was exhausted. The employer, however, cancelled his accrued vacation benefits, citing contract language that held accrued vacation benefits to be forfeited if an employee retires with less than two weeks notice. The issue was whether the employee had given sufficient notice to entitle him to receive his accrued vacation and I ruled that he had, finding that his retirement was not intended to take effect until his vacation had been used up. Here, the facts are demonstrably different. The contract language makes a grant of carryover of benefits discretionary with the employer and the Grievant knew as early as August 20 that the City intended to deny his request. He could have used his remaining 23 days of annual leave at any point during the remainder of the year, but chose not to do so for the above stated reasons. In fact, he even cancelled vacation days that had already been scheduled because he didn't want to waste them while he was on administrative leave. The City did not, therefore, deprive Beckman of a property interest. Rather, it put him on notice that his annual leave could not be carried over, but would have to be used by the end of the year and it did so in sufficient time for him to use the remainder of his leave. In this regard he was treated no differently than he would have had he requested carry over if he had been working and no differently than any other scheduled officer. The City, therefore, had a rational basis for its decision to deny Beckman's carryover request and it was not arbitrary, capricious, or discriminatory.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

**AWARD**

The City did not violate the collective bargaining agreement when it denied the Grievant's request to carryover vacation time. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 20th day of April, 2011.

John R. Emery /s/

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John R. Emery, Arbitrator

JRE/gjc

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