

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
APPLETON PROFESSIONAL POLICE ASSOCIATION

and

CITY OF APPLETON POLICE DEPARTMENT

Case 467
No. 71613
MA-15176

Appearances:

Mr. Frederick Perillo, The Previant Law Firm, S.C., 1555 North Rivercenter Drive, #202, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Ms. Ellen Totzke, Deputy City Attorney, 100 North Appleton Street, Appleton, Wisconsin 54911-4799, appeared on behalf of the City.

ARBITRATION AWARD

On May 7, 2012 the Appleton Professional Police Association filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint a member of its staff to hear and decide a grievance pending between the Union and the City of Appleton Police Department, regarding proration of vacation benefits for two City of Appleton police officers. Following jurisdictional concurrence from the employer, the Commission appointed John Emery, a member of its staff, to hear and decide the matter. A hearing was conducted on July 31, 2012, in Appleton, Wisconsin. The hearing was transcribed. The parties submitted and exchanged briefs by September 14, 2012.

ISSUE

The parties did not stipulate to a statement of the issues. The Union regards the issue to be:

Did the City violate Article 19 of the collective bargaining agreement and the USERRA by reducing the vacation pay of Sergeant McCormick and Officer Kopesky?

If so, what is the remedy?

The City regards the issue to be:

Did the City violate the Collective Bargaining Agreement when it prorated vacation pay for officers Kopesky and McCormick, and if so, what is the appropriate remedy?

The Arbitrator adopts the statement of the issues proposed by the City.

PERTINENT CONTRACT LANGUAGE

ARTICLE 8 – VACATIONS

The vacation policy for the Police Department to be on a work week basis as follows:

- 1 work week vacation after 1 year of service.
- 2 work weeks vacation after 2 years of service.
- 3 work weeks vacation after 8 years of service.
- 4 work weeks vacation after 12 years of service.
- 5 work weeks vacation after 20 years of service.

Regular employees will be eligible for their first paid vacation as of the first anniversary date of their date of hire. After qualifying for their first vacation, employees will be eligible for future vacations as of January 1 of each calendar year.

If an employee qualifies for a 1, 2, 3 or 4 week vacation as of January 1 and completes the service necessary for an additional week of vacation later in that calendar year, such employee shall receive the additional week of vacation after their anniversary date and shall thereafter be eligible for such increased vacation as of January 1 of each succeeding calendar year.

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In case of termination, for reasons other than discharge for cause, an employee will be paid their unused vacation.

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ARTICLE 10 – LEAVES

A. Sick Leave

All Officers shall be granted sick leave with pay at the rate of 5.33 hours for each full month of service. All Officers hired after 1/1/11 shall receive 4 hours for each full month of service until January 1 following the year said employee qualifies for the Senior Police Officer by passing the Position Enhancement Program test. On January 1 following that year the employee will receive 5.33 hours for each month of service.

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D. Leave of Absence Without Pay

1. Requests for leave of absence without pay for justifiable reasons shall be made by written application on a form provided by the Human Resources Office and be submitted at least two (2) days prior to the anticipated leave.
 - a) For a leave not to exceed three (3) consecutive days, their request shall be made to and approved by the Police Chief.
 - b) For a leave in excess of three (3) consecutive days, or for a partial leave of absence, they shall make their request to the Director of Human Resources after securing the approval of the Chief.
 - c) No employee shall be granted a leave of absence without pay unless such employee makes arrangements in advance with the Director of Human Resources for payment of hospital/surgical and life insurance during the period of the absence.
 - d) Employees on a partial leave of absence shall be paid at their regular rate for actual hours worked and shall receive pro-rated fringe benefits based on actual hours worked, provided, however, that such leave shall not change the employee's seniority date.
2. A leave of absence without pay shall be granted to employees for recuperation from off-duty injury or illness, provided that the following requirements are met in addition to the requirements of item 1 above:
 - a) The leave shall be for the period of the doctor's prognosis but not to exceed one year.
 - b) The employee must use all available accumulated sick leave, vacation and compensatory time before going on such leave.
 - c) The employee must provide, in advance, a doctor's statement indicating that the employee will be able to return to regular duties within one year of the start of the leave.
3. Failure to comply with the requirements of this article shall result in disciplinary action.

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ARTICLE 19 – MILITARY LEAVE

Police Officers having permanent status and who are duly enrolled members of the National Guard, the State Guard, the Officers Reserve Corps, the Enlisted Reserve Corps, the Naval Reserve, the Naval Reserve Corps, the Marine Corps Reserve or any other reserve component of the military or naval forces of the United States or the State of Wisconsin now or hereafter organized or constituted under Federal Law, are entitled to leaves of absence without loss of time to enable them to attend military or naval schools, field camps of instruction and naval exercises which have been duly ordered held, but not to exceed fifteen (15) days, excluding Sundays and holidays, in the calendar year in which so ordered and held. All military leave, including active duty shall be governed by USERRA.

The difference in pay between military pay during time of attendance and the employee's regular pay during the same period shall be paid by the City.

The leave granted is in addition to all other leaves.

RELEVANT CITY POLICIES

CITY OF APPLETON POLICY

FMLA (Family Medical Leave Act)

I. PURPOSE

To outline the conditions that permit an employee to request time off for a period as prescribed by law with no loss of benefits or accumulated service if the employee returns to work. This policy will also serve to document employee rights and responsibilities.

. . .

- G. **Intermittent Leave:** Under the Wisconsin FMLA provision, intermittent leave may be taken as long as it does not unduly disrupt the department's operations. Departments must notify Human Resources before approving such a request.

Under the Federal FMLA provision, intermittent leave may be taken for a birth or placement of a child for adoption, foster care or military family leave. Employees may take leave intermittently or on a reduced leave schedule with prior approval by the Department Director or Human Resources. When FMLA is taken to care for a sick family member or for an employee's own serious health condition, leave may be taken intermittently or on a reduced leave schedule when medically necessary.

- H. **Substitution:** Under the Wisconsin FMLA, employees have the ability to substitute leave.

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During the first 30 days of unpaid leave, an employee will continue to accrue all benefits provided by City policies and collective bargaining agreements. Benefits other than health care coverage will cease to accrue beyond 30 days of unpaid leave.

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CITY OF APPLETON POLICY

MILITARY LEAVE

I. PURPOSE

To outline for employees who are members of the military forces of the United States of America, either on active duty, in the Reserves or members of the National Guard their responsibilities and rights as City of Appleton employees, as well as the procedures for compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA).

II. POLICY

It is the policy of the City of Appleton to allow military leave to all employees who temporarily leave the service of the City to join the military forces of the United States. Such leave will be without pay for all regular full-time, seasonal, temporary and grant-funded non-represented employees. Regular full-time employees will be granted a leave of absence from his/her position without loss of pay for a period not to exceed two consecutive calendar weeks in any calendar year. The City will pay such an employee for time lost in the amount equaling the difference between the military pay and his/her normal City pay.

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1. A person who is reemployed under USERRA is entitled to the seniority and other rights and benefits determined by seniority that the person had upon commencing uniformed service and any additional seniority and rights and benefits he or she would have attained if continuously employed. A person who is absent by reason of uniformed service shall be deemed to be on leave of absence from the City and is entitled to such other rights and benefits not determined by seniority as generally provided by the

City to employees on leave of absence having similar seniority, status and pay who are also on leave of absence, as provided under the contract or policy in effect during the Service member's absence because of uniformed service. The individual may be required to pay the employee cost, if any, of any funded benefit continued to the same extent other employees on leave of absence are required to pay.

RELEVANT PROVISIONS OF THE UNITED STATES CODE

Title 38, United States Code

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CHAPTER 43 – EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

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§ 4301. Purposes; sense of Congress

(a) The purposes of this chapter are –

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(3) to prohibit discrimination against persons because of their service in the uniformed services.

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§ 4302. Relation to other law

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that establishes a right or benefit that is more beneficial to or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice or other matter that reduces, limits or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

§ 4303. Definitions

For the purposes of this chapter -

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- (2) The term “benefit”, “benefit of employment”, or “rights and benefits” means the terms, conditions, or privileges of employment, including any advantage, . . .vacations, . . .

. . .

- (12) The term “seniority” means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity.

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SUBCHAPTER II – EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS, PROHIBITIONS

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

- (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

. . .

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

- (a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.
- (b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be -

- (A) deemed to be on furlough or leave of absence while performing such service; and
- (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice or plan in effect at the commencement of such service or established while such person performs such service.

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SUBCHAPTER III – PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION

§ 4323. Enforcement of rights with respect to a State or private employer

- (a) Action for relief – (1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as opposed to an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is [reasonably] satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

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- (d) Remedies - (1) In any action under this section, the court may award relief as follows:
 - (A) The court may require the employer to comply with the provisions of this chapter.
 - (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

- (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

RELEVANT CODE OF FEDERAL REGULATION PROVISIONS

Subpart D – Rights, Benefits and Obligations of Persons Absent from Employment Due to Service in the Uniformed Services

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§1002.211 Does USERRA require the employer to use a seniority system?

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

- (a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
- (b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and
- (c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.

§1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.

BACKGROUND

Sergeant William McCormick and Officer Nathaniel Kopesky are employed as police officers by the City of Appleton. They are members of a collective bargaining unit represented by the Appleton Professional Police Association. The Association has a collective bargaining agreement in effect with the City of Appleton. Relevant provisions of that agreement are set forth below.

The facts giving rise to this dispute arose on, or about, May 6, 2011 when McCormick and Kopesky were called to active Military duty. The two men were directed to report to basic training commencing May 24, 2011. McCormick took 9 paid leave days surrounding his 56 unpaid days of military leave. He took 2-3 weekends prior to his leave, and one weekend upon his return. McCormick's unpaid leave ran from May 27 – September 13, 2011.

Kopesky took no paid days before leaving for basic training, and took 3 paid military leave days upon his return in October, 2011.

McCormick and Kopesky were absent from work during the entirety of their respective leaves. There was no intermittent return to work.

Each man received a letter informing him as to how the leave would be handled. The following are relevant excerpts from those letters:

This letter is to outline for you, in writing, how the City will handle your benefits and reemployment as a result of your military leave.

. . .

Health and Dental Benefits: Your group Health and Dental benefits will continue through May 31, 2011. As of June 1, 2011, you will be offered

COBRA continuation for the lesser of the twenty-four (24) month period beginning June 1, 2011 or the date on which you are required to apply for or return to a position of employment as specified in the policy, and fail to do so. You will be responsible for the full cost of the premium if you decide to continue coverage during your leave. Upon reemployment, you will be reinstated on your group health and dental plan without any waiting period or evidence of insurability. Any injury or illness caused or aggravated by the performance of your duties for/or in the military may be excluded from coverage.

Life Insurance: Your life insurance benefits will cease during your military leave. Upon your successful reemployment, your life insurance will be reinstated.

Wisconsin Retirement: Upon your successful reemployment, the City will make whole any required contributions to the Wisconsin Retirement System that would have been made for you had you been at work instead of on Military Leave.

Post Employment Health Plan:

Upon your return to City employment, the City will make whole your post employment health plan for the period you were on military leave.

Vacation: Future vacation entitlements will continue as if you were working during the period that you were on military leave however, vacation benefits will not accrue during your military leave and will not be cumulative. For 2012, your vacation will be prorated based on your time worked in 2011.

PTO: Your PTO days for 2011 will be pro-rated based on your time worked in 2011.

Sick Leave: Your sick leave balance will be frozen and will remain available when you return to work. You will not continue to accrue sick leave into your account while on military leave.

Pay Adjustments: Your salary will be adjusted by any approved cost of living adjustment for each year you are on military leave.

Anniversary Date: Your anniversary date (original hire date) will remain unchanged by your military leave.

Holidays: Your 2011 Holiday pay-out will be prorated based on completed months of service.

Deferred Compensation: Your deferred compensation will cease during your leave and can be started again upon your reemployment.

Seniority: Your seniority date will remain unchanged by your military leave.

. . .

Key to this dispute is the provision that indicates that “For 2012, your vacation will be prorated based on your time worked in 2011.”

A form titled “Military Leave of Absence Request” accompanied the letter. It detailed the duration of the requested leave, indicated how much time would be taken in paid, and unpaid status, and was signed by the employee, the supervisor, the department head, and the human resources director.

During the course of basic training, both men received instruction that caused them to believe that their vacation should not have been prorated.

On or about, January 12, 2012, each man received notification that his vacation would be prorated for 2012. On, or about, January 30, 2012 a grievance was filed. The grievance was denied on April 18, 2012 and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the City of Appleton has reduced the vacation pay owed to the two officers because of their absence due to their reserve commitments. This reduction is alleged to be unlawful for three reasons. First, under the collective bargaining agreement there is no bona fide work requirement to earn vacation; the benefit is therefore a “perquisite of seniority” and the veterans are automatically entitled to the full vacation amount by virtue of their seniority alone. Second, because the leave is paid, federal regulations explicitly require the vesting of vacation benefits for the employees. Finally, even if vacation were not a perquisite of seniority under this contract, the city grants vacation without reduction to employees on leave of absence for reasons other than military commitments. The USERRA specifically prohibits such discrimination.

The Union notes that Article 19 of the collective bargaining agreement requires the City to comply with USERRA.

It is the view of the Union that because Appleton provides vacation credit to employees on FMLA or non FMLA leaves it must treat veterans no worse.

The Union argues that vacation is a perquisite of seniority under the collective bargaining agreement, and by law, must be afforded vacation accrual during the military absence. It is the view of the Union that there exists no work requirement to earn vacation under the terms of the collective bargaining agreement. The Union attacks contractual limits on the leave and/or benefit as barred by law.

It is the view of the Union that for a variety of reasons Article 10 cannot reduce the benefits provided in the more specific military leave provision. Additionally, the Union contends that every provision of Article 10 is unlawful as applied to a veteran. Rather, USERRA requires the City to provide veterans with any benefit provided other employees on any other types of absence. The Union points to the record relative to other employees who took leaves and suffered no vacation accrual reductions and argues that the City is not permitted to discriminate against the veterans.

The City

The City does not contest that leaves under FMLA are handled differently from those under military leave. The laws and underlying policies are alleged to be different.

The City maintains it has acted consistently with Article 10 of the collective bargaining agreement. The contract distinguishes between leaves for non-medical reasons and leaves for medical reasons. It is the view of the City that both the contract and City policy require pro-ration of benefits for extended unpaid leave.

The City draws a distinction between vacation accrual and vacation use. The city contends that: “while the entitlement is based on years of service, the Union presented no testimony that the City failed to count the time spent in military service towards the accrual rate of vacation entitlement. The use of their vacation was pro-rated in accordance with its provisions just as they would be for any other officer taking a leave of absence.”

It is the view of the City that USERRA generally treats accrual of vacation leave as a non-seniority benefit which is required to be provided only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

With one exception, which the City corrected, the FMLA examples offered by the Union do not exceed the 12 week annual cap for FMLA leaves.

DISCUSSION

The Union offered testimony relative to certain employees who have taken leaves without pay without having vacation prorated the subsequent year. The Union introduced testimony that police officer Bradley L. took 72 unpaid leave days and 20 additional family leave days for a total of 92 unpaid days in 2010. The next year he was given his full complement of vacation days. When the Union filed this grievance and brought this example to the attention of management, Mr. L. had his vacation prorated.

Police officer Andy M. took 30 days of unpaid family leave in 2004. He was given his full allocation of vacation the next year.

Police officer Jackie M. took 30 days unpaid family leave in 2004. She received her full complement of vacation days in 2005.

Police officer Kelly G. took 19 days unpaid in 2004 and received a full complement of vacation in 2005. In 2007 G. took 14 unpaid days with no subsequent reduction of vacation for 2008.

The City offered evidence that Police officer Dustin Y. had his vacation prorated following his active service in 2007. The City offered further evidence that Police officer Chad L. had his vacation prorated following his active service in 2007. Neither officer Y. nor officer L. filed a grievance over the vacation proration. Both filed complaints with the Department of Labor and both received non prosecution letters.

The City also introduced evidence of an employee of the Department of Public Works who took a military leave in 2004 and a second military leave in 2007. That employee had his vacation prorated the subsequent year. It appears from this record that all City employees who took unpaid military leaves received the same letter, and were all subject to the proration of vacation leave the subsequent year.

Article 8 of the contract regulates vacation eligibility and use. It establishes a schedule of vacation accrual which is tied to the number of years' service. The term service is not defined. These parties disagree as to whether or not service includes a work requirement.

Article 10 addresses leaves. Article 10 (D) establishes and defines Leave of Absence Without Pay. The Article speaks in broad, generic terms. Par. 1 has a number of provisions which specify how to apply for a leave and the approval process. None of this is meaningfully applicable to the military leave which is the subject of this proceeding. The City points to par. 1(d) to support its proration of vacation accrual/use.

Par. 1(d) uses the term partial leave. The term is not defined. However, Webster's Seventh New Collegiate Dictionary defines it as "...of or relating to a part rather than the whole...". It hardly seems to describe a complete leave of absence that occurred over a 3½ month period. It more resembles the Intermittent leave described in the City FMLA Policy. If a partial leave is one which permits an employee to work part time or on a reduced basis, the pro-ration of benefits makes sense, and can be calculated as the leave progresses.

The City FMLA Policy addresses unpaid leave, and provides that the first 30 days of unpaid leave results in a full accrual of benefits. This provision relating to unpaid leave appears to address the situation of an employee who is taking an unpaid leave of absence which extends beyond 30 days.

Article 19 – Military Leave appears to specifically address the leaves in dispute. Most of the provisions of this Article appear to address relatively short term commitments to military service. The Article uses terms such as schools, field camps of instruction, and naval exercises, but not to exceed 15 days. In the context of the Article, 15 days must be a reference to the amount of paid time available under the Article. In that context it makes sense. The City is committed to paying up to 15 days for leave related to Military service. Both grievants took advantage of this benefit. Read in this way Article 19 is consistent with the City Policy relating to Military Leave.

There are only two provisions of Article 19 applicable to longer term military leave. The last sentence in the first paragraph reads "All military leave, including active duty shall be governed by USERRA." The second applicable provision is the last paragraph of the Article: "The leave granted is in addition to all other leaves."

The leaves that have generated this dispute were calls to active military duty. USERRA is the law of the land regardless of the terms of the collective bargaining agreement. By its terms it supersedes inconsistent local law or contract. The collective bargaining provision which provides that active duty is governed by USERRA has meaning only to the extent that it incorporates USERRA into the agreement for purposes of defining the rights of a police officer who is called to active duty. For purposes of this dispute USERRA has been incorporated into the collective bargaining agreement and is enforceable through this agreement.

Sec. 4316 USERRA provides that someone returning from military leave is entitled to the seniority based benefits they left with and also the benefits they would have accrued had they remained continuously employed. If vacation accrual is a seniority based benefit McCormick and Kopesky would have accrued a full complement of vacation during the period in question. The Federal Code, Sec. 1002.213, confirms this to be the case. There is no record reference to any continuously employed employee who was denied vacation accrual. If vacation accrual is regarded as a seniority based benefit, S. 4316 mandates that the grievants receive vacation accrual during their military leave.

S. 4316 (A) and (B) address those benefits not determined by seniority. Under that provision employees returning from a military leave of absence are entitled to the benefits generally provided by the employer to employees having similar seniority, status and pay who are on leave of absence. The evidence in this matter consisted of leaves taken by police officers. They occupy the same status and receive the same pay as do the grievants. Seniority is not a relevant consideration in this matter in that the pro-ration is applied across the board to vacation accrual. That is to say, employees with more or less seniority would have suffered the same vacation pro-ration.

The record reflects the consistent vacation pro-ration for all military leave. The City argues that it has applied its military leave consistently, and that appears to be the case. The record also reflects that there was no pro-ration of vacation benefits for any other leave taken. For employees Andy M., Jackie M. and Kelly G. the leaves were less than 30 days and the lack of pro-ration is explained by the City FMLA policy set forth above. The policy explains why the individuals noted did not suffer a pro-ration of vacation. It does not explain why the individuals on military leave did not receive full accrual for 30 days.

This leaves the curious case of Bradley L. Mr. L. took a good deal of the year as unpaid leave. His leave far exceeded the 30 days referred to in the City Policy. He was given his full complement of vacation in 2011. It was not until this matter arose that the City looked back to correct what it alleged to have been a mistake. The merits of that dispute are pending in another forum.

If the City is right and the Bradley L. matter was a mistake we are left with a record that indicates that FMLA leaves are subject to a rule where the first 30 days of unpaid leave are not prorated. The rule suggests that leave beyond 30 days would be prorated but there is no experience to test the application of that rule. Mr. L., corrected, would then support the position of the City that other than the first 30 days of FMLA leave, leaves of absence without pay result in vacation proration.

If the Union is right, and the only reason Bradley L. was adjusted was the presence of this grievance, we are left with a scenario where the only unpaid leaves of absence subject to vacation proration are military leaves of absence. It is possible that FMLA leaves in excess of 30 days would result in pro-ration, but there are no examples of that being applied.

My review of the record finds no support for the City. Had the Union not brought the Bradley L. matter to the attention of City management, there is no indication that the matter would have been reviewed and adjusted. As of the filing of the grievance, the record reflected that the only unpaid leaves that resulted in pro-ration of vacation leave were military leaves.

The City FMLA rule and this record indicate that employees who take an unpaid FMLA leave accrue full vacation leave for 30 days. Employees on military leave do not. The City is right that the two leaves derive from different statutes and have different philosophical

underpinnings. That said, S. 4316 requires the employer to provide the same benefits as are provided to relevant others. The federal code does not draw the distinction relied upon by the City. At a minimum, I believe the law requires the City to provide full accrual of benefits for the first 30 days of unpaid military leave. The only evidence of how the employer has applied vacation proration beyond the 30 unpaid leave day point, in non-military leave circumstances, is Bradley L. I am unwilling to treat the Bradley L. situation as establishing that the City prorates vacation for extended unpaid leave. If anything, it argues to the contrary.

In my view, if vacation accrual is regarded as a non-seniority based benefit, the grievants are entitled to a full accrual during the term of their military leave since the City generally provides that benefit to employees on leave of absence.

The City contends that it has applied the military leave vacation accrual benefit consistently. The record supports that contention. However, I do not regard that to be a valid defense to this claim because the application of the benefit is less than that provided under other circumstances.

AWARD

The City violated the Collective Bargaining Agreement when it prorated vacation pay for officers Kopesky and McCormick. The City is directed to credit each of the grievants with the full accrual of vacation benefits for the period of their respective leaves of absence.

Dated at Fond du Lac, Wisconsin, this 6th day of February, 2013.

John R. Emery /s/

John R. Emery, Arbitrator