BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF) LOCAL 127

and

CITY OF LA CROSSE

Case 352
No. 71641
MA-15182

(Morstatter Vacation Grievance)

and

Case 353
No. 71697
MA-15195

(Morstatter Overtime Grievance)

Appearances:

John Kiel, Attorney, P.O. Box 147, 3300 - 252nd Avenue, Salem, Wisconsin 53168-0147, appearing on behalf of IAFF Local 127.

Stephen Weld, Attorney, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the City of La Crosse.

ARBITRATION AWARD

The International Association of Fire Fighters (IAFF) Local 127, hereinafter referred to as the Union, and the City of La Crosse, hereinafter referred to as the City or Employer, were parties to a collective bargaining agreement that provided for final and binding arbitration of unresolved grievances. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide two grievances. Those grievances came to be denominated as the Morstatter vacation

grievance and the Morstatter overtime grievance. The undersigned was so designated. A hearing was held in La Crosse, Wisconsin on October 9, 2012. The hearing was not transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on December 18, 2012. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issues to be decided in these cases. The Union framed the issues as follows:

The Vacation Grievance

1. Did the City have just cause to refuse to reinstate and make 2010 and 2011 vacation benefits available to Thomas Morstatter?

2. Did the City violate the collective bargaining agreement and last chance agreement by refusing to reinstate and make 2010 and 2011 vacation benefits available to Thomas Morstatter?

3. If so, what is the appropriate remedy?

The Overtime Grievance

1. Did the City have just cause to unilaterally change Thomas Morstatter's position on the TeleStaff overtime list thereby denying Mr. Morstatter overtime opportunities to which he would otherwise have been entitled?

2. Did the City violate the collective bargaining agreement and last chance agreement by unilaterally changing Thomas Morstatter's position on the TeleStaff overtime list thereby denying Mr. Morstatter overtime opportunities to which he would otherwise have been entitled?

3. If so, what is the appropriate remedy?

The City framed the issues as follows:

The Vacation Grievance

Did the City violate Articles 15 or 32 of the collective bargaining agreement in its administration of the vacation picking schedule while the Grievant was on paid administrative leave?

The Overtime Grievance

Is the grievance arbitrable under the Last Chance Agreement? If so, did the City violate Articles 16 and 19 of the collective bargaining agreement when it "averaged" hours to determine the Grievant's placement on the TeleStaff Overtime System upon his return from the Leave of Absence?

I have not adopted either side's proposed issues. Based on the entire record, I find that the issues which are going to be decided herein are as follows:

The Vacation Grievance

Did the City violate the collective bargaining agreement when it did not allow Morstatter to carry over any 2010 or 2011 vacation to 2012? If so, what is the appropriate remedy?

The Overtime Grievance

Did the City violate the collective bargaining agreement when the Fire Chief unilaterally moved Morstatter from the top of the overtime eligibility list to the middle of the list after Morstatter returned to work following his 21-month LOA? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2010-2011 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 15 VACATION

Employees shall receive with pay according to the following schedule.

. . .

Time off without pay may result in pro-rated vacation accrual for the following year.

When an employee's service to the City is terminated by retirement or resignation, he/she shall receive pay for his/her unused earned vacation and prorated vacation pay for the current year of employment. However, no prorated vacation shall be paid to employees who terminate employment before reaching their first anniversary date, or who are terminated as a result of disciplinary actions.

Vacation credits shall be prorated on the basis of 1/12th of the employee's earned vacation for each month of employment calculated from his/her last anniversary date to the termination date.

The approval and scheduling of vacation shall be the responsibility of the Fire Chief; however, vacations shall be scheduled by seniority whenever possible. The vacation scheduling should be completed by the first week in December.

Due to the fact that the Fire Department needs to schedule vacations in the preceding year, the possibility exists that a first year employee may be required to take a vacation prior to their anniversary date. In this event, if the employee separates employment with the City, vacation taken prior to the employee's anniversary date will be withheld from their last paycheck.

ARTICLE 16 OVERTIME

Employees subject to this agreement shall be paid for all work over 204 hours in a 27 day work period at time and one-half.

Time not worked shall be exempt from the overtime calculations of the pay period in accordance with the Fair Labor Standards Act. However, employees subject to this agreement will be compensated at time and one-half for hours worked over and above their normal work schedule.

The 27 day work period shall be established on a date at the beginning of the work cycle nearest April 15, 1986. The "A" shift work cycle beginning January 18, 1994 shall be modified by the parties to equalize FLSA availability between all shifts.

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ARTICLE 19
RECALL/CALL IN TIME

A. Recall

In the event that an employee is recalled to duty after having left the premises they shall receive a minimum of three (3) hours pay, or pay for actual hours worked whichever is greater. Such pay shall be considered hours worked for the purposes of calculating overtime.

The above stated policy shall apply uniformly to all employees with the exception of the following titled positions: Computer Trainer, EMS Trainer and core team leaders. These positions may be paid recall time on an as worked basis provided the recall time is for a title specific meeting that is scheduled no less than 24 hours in advance. A minimum of one (1) hour pay, or pay for actual hours worked, whichever is greater, shall be paid to the affected parties. Such pay shall be considered hours worked for the purposes of calculating overtime.

B. Call In – Abutting Shift

An employee called in to work early less than three (3) hours prior to the start of their regular shift shall receive pay for actual hours worked and the three (3) hour guarantee cited above shall not apply. However, such pay shall be considered as hours worked for the purposes of calculating overtime.

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ARTICLE 21 RESERVATION OF RIGHTS

The City retains all of the rights, powers, and the authority exercised or had by it prior to the time that the Union became the Collective Bargaining Representative of the employees here represented except as specifically limited by express provisions of this agreement. The powers, rights and/or authority herein claimed by the City are not to be exercised in a manner that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent or purposes of this agreement. It is, therefore, agreed that except as otherwise specifically provided herein, the Management of the City of La Crosse Fire Department and the direction of the work force, including but not limited to the right to hire, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to establish and implement new job descriptions, subject to impact bargaining, to subcontract work, except of emergency medical services and fire protection service work that has historically been performed by members of the bargaining unit, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in management.

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ARTICLE 32 – ENTIRE AGREEMENT

This agreement shall remain in full force and effect commencing on the first day of January, 2010, and terminating on the December 31, 2011, and is subject to the approval of the Common Council of the City of La Crosse before becoming effective.

It is understood and agreed that all expenditures or compensation to be paid to employees in accordance with this agreement must meet the requirements and procedures required by law.

The City agrees to a wage reopener if during the life of this contract it is required to take over the ambulance service for the City of La Crosse.

BACKGROUND

The City of La Crosse operates a Fire Department. The Union is the exclusive collective bargaining representative for certain employees in the Fire Department. Thomas Morstatter is in the bargaining unit and thus is represented by the Union. Morstatter has been with the Fire Department for about 15 years.

Morstatter was on paid leave for 21 months from July 10, 2010 to April 15, 2012. This was the longest paid leave of absence in the Department's history. The two grievances involved herein arose out of that extended, paid absence.

Morstatter's leave was triggered by an off-duty domestic incident which resulted in his arrest. His absence was originally treated as FMLA leave. In November, 2010, the leave was converted to paid administrative leave so that the City could conduct a disciplinary investigation concerning Morstatter's conduct on July 10, 2010 and his interactions with law enforcement personnel.

On March 12, 2012, the City, Union and Morstatter entered into a six-page Last Chance Agreement (hereinafter LCA) that set out the terms and conditions for Morstatter's return to employment status following his 21-month Leave of Absence (hereinafter LOA). Section 1 of the LCA said that Morstatter was to serve a 30-day unpaid suspension. It provided thus:

> 1. Mr. Morstatter shall serve on days assigned by the Chief, a thirty consecutive calendar day unpaid suspension, which will equal ten regular work shifts depending on when the suspension begins, and not to exceed 240 regularly scheduled hours of work and shall not start later than April 15, 2012. Mr. Morstatter may use vacation days or one full personal business day (24 hours) for up to six shifts of the unpaid suspension work shifts.

Section 10 of the LCA included a full "discharge and release" of the City. It provided in pertinent part:

> 10. In consideration of the obligations and promises under this Agreement, and except as otherwise provided in this Agreement or not permissible by law, Employee does hereby fully and forever discharge and release the City, which includes all past and present employees, officials, agents, representatives, insurers, and attorneys, from any and all actions, causes of action, claims, demands, damages (including but not limited to punitive damages), costs, expenses, attorneys' fees, and compensation on account of, or in any way growing out of any and all known and unknown damage resulting to or to result from any action by the City. . .

That same section further provided:

> . . . The parties understand and agree Employee waives any right to and shall not accept or recover any monetary damages or any other damages or anything of value from the City as a result of filing a lawsuit, charge, claim, or action or for participating in any investigation or proceeding, or for any related claim, action or judgment against the City. . .

The final sentence in Section 10 provided thus:

> This Section shall have no effect on and shall not apply to any claim by Employee pursuant to Wisconsin's worker's compensation laws or Wisconsin's unemployment compensation laws or a grievance involving Mr. Morstatter pertaining to whether he may carryover of unused vacation from year to year.

While the section just noted excluded a vacation grievance (as well as worker's compensation and unemployment compensation claims) from the release, there is no exclusion in the LCA (in either Section 10 or elsewhere) for an overtime grievance.

FACTS

Firefighters accrue vacation on an anniversary year basis, but take it on a calendar-year basis.

In 2010, Morstatter was eligible for nine vacation days. When his LOA began in July of that year, he had already used six of the nine days. That meant he had three days left to use before the year 2010 ended. His three remaining vacation days were listed as his vacation days on the Department's 2010 vacation schedule.

In 2011, Morstatter was eligible for 12 vacation days. In late 2010, when the 2011 Department vacation schedule was being prepared, Morstatter was contacted at home while he was on his LOA and asked to indicate his 2011 vacation preferences. He "picked" his 12 2011 vacation days (anticipating that he would return to work sometime in 2011). His "picks" were placed on the Department's 2011 vacation schedule.

In 2012, Morstatter was eligible for 12 vacation days. In late 2011, when the 2012 Department vacation schedule was being prepared, Morstatter was contacted at home while he was on his LOA and asked to indicate his 2012 vacation preferences. He "picked" his 12 2012 vacation days (anticipating that he would return to work sometime in 2012). His "picks" were placed on the Department's 2012 vacation schedule. Morstatter used his 2012 vacation to cover his suspension.

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The City has had a "use it or lose it" vacation policy in place since 2003. This policy limits the carryover of unused vacation into the next calendar year. It also places a cap of two weeks on any approved vacation carryover and a March 31st deadline for use of the carried over vacation. There has been no challenge to the City's administration of this policy in the decade that it has been in place.

Given the existence of that policy, the general rule for both City and Fire Department employees alike is that employees are supposed to use their vacation in the calendar year in which it is earned. Thus, vacation carryover is the exception to that general rule. Every year, a letter is sent to department heads which lists the employees who have vacation balances that are to be used before the end of the calendar year.

There is nothing automatic about carrying over unused vacation from one year to the next. Employees who seek an exception (meaning they seek to carry over unused vacation from one year to the next) have to first apply in writing and offer detailed documentation to justify the vacation carryover. The standard which employees have to meet is the "legitimate business necessity" standard. Then, their request for an exception has to be granted by both their department head and the Director of Human Resources. The final step of the process is that the Mayor has to approve the request to carry over the unused vacation.

Due to the restrictions on vacation carryover just noted, vacation carryover is not common. The record shows that in 2010, only two members of the Fire Department were authorized to carry over vacation to 2011. In 2011, only one member of the Fire Department received approval for vacation carryover.

Morstatter did not make a written request to carryover his three "unused" 2010 vacation days to 2011, nor was approval for carryover ever granted to do so. Similarly, in

2011, Morstatter did not make a written request to carryover any "unused" 2011 vacation days to 2012, nor was approval for carryover ever granted to do so.

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The topic now shifts from vacations to overtime.

In the latter part of 2010, while Morstatter was on his LOA, the parties implemented a different overtime system which changed the manner in which overtime opportunities were accounted for and awarded. This new system is known as the TeleStaff overtime system. Broadly speaking, the Department went from a paper recordkeeping system for recording overtime hours for 24-hour shifts referred to as "workbacks" to a computerized system that records hours in "buckets". Under this new system, overtime eligibility is based on the total hours in each individual's bucket. A firefighter with less total hours in his or her bucket would receive the first opportunity to accept or reject an overtime assignment. When the transition was made from the old overtime system to the new overtime system, the decision was made to have "full" buckets based on the employee's prior year's overtime hours. Like all bargaining unit employees, Morstatter's name was placed on the TeleStaff overtime eligibility list in 2010. When that happened, his 48 hours of 2009 overtime resulted in his being placed somewhere in the middle of the overtime list. Thus, Morstatter had 48 hours in his bucket when he started on his LOA in 2010. During his LOA, he did not participate in the TeleStaff Attendance System as he was not eligible to work overtime.

When Morstatter returned to duty in 2012, the Fire Chief faced the question of where Morstatter should be placed on the overtime eligibility list. While one option was to leave Morstatter's 2009 (pre-LOA) number of 48 hours status quo, the Chief felt that was problematic.

Here's why. While time stood still, so to speak, for Morstatter while he was on his LOA, it did not for the other employees in the bargaining unit. They worked overtime, filled their respective buckets with hours, and moved down the overtime list. Since Morstatter was not at work, he had to be replaced, as the Department had minimum staffing standards. Additionally, during Morstatter's LOA, there was a hiring freeze in the Department. Together, these factors (plus retirements) created numerous overtime opportunities for bargaining unit employees. In an attempt to quantify how much overtime was worked, the Fire Chief estimated that during the 21-month time period of Morstatter's LOA, active employees saw their overtime buckets increase "probably 10-fold".

As a result, when Morstatter returned to work in 2012, his total overtime hours were lower than any other firefighter in the Department (with the exception of probationary firefighters). In a manner of speaking, Morstatter had "floated to the top" of the overtime eligibility list while on his LOA. Because he had the least amount of overtime hours, that meant he would get called first for overtime work assignments prior to other bargaining unit

employees. The Fire Chief considered Morstatter's placement at the top of the overtime eligibility list inequitable because he felt that placement rewarded Morstatter for the off-duty misconduct that led to his 21 month LOA. Said another way, the Chief felt that being at the top of the overtime list improperly rewarded Morstatter for not working for 21 months. Because of that, the Chief also considered placing Morstatter at the bottom of the overtime eligibility list, but decided against it to avoid the perception that Morstatter was being penalized. After considering these two options (i.e. leaving him at the top of the list or moving him to the bottom of the list), the Chief ultimately opted for a third option. It was to place Morstatter in the middle of the overtime list. He did this by averaging all the overtime hours worked in the Department and assigning Morstatter that number. As a result of that action, the Chief unilaterally moved Morstatter from the top of the overtime eligibility list to the middle of the overtime list. The Chief testified that his goal in moving Morstatter from the top to the middle of the overtime list was to create equity with other members of the Department in terms of overtime opportunities in the future.

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On March 23, 2012, the Union filed a grievance that came to be denominated as the Morstatter vacation grievance. That grievance contended that Morstatter lost vacation benefits during the period that he was on his LOA. Specifically, it asks that Morstatter be credited with three days of 2010 "unused" vacation and 12 days of 2011 "unused" vacation. On June 6, 2012, the Union filed a grievance that came to be denominated as the Morstatter overtime grievance. That grievance contends that Morstatter's status on the (TeleStaff) overtime list should have been based on his 2009 (pre-LOA) overtime hours, and that he should not have been moved from the top to the middle of the overtime list (as he was). Neither grievance raised a just cause claim or component, nor did the Union raise such a claim or component when the grievance was being processed. Both grievances were appealed to arbitration.

POSITIONS OF THE PARTIES

Union

It's the Union's position that the City improperly denied vacation and overtime benefits to Morstatter following his return to work from his LOA. It elaborates as follows.

With regard to the vacation grievance, the Union contends that Morstatter should be allowed to carry over his "unused" 2010 and 2011 vacation to 2012. Here's why.

First, it argues that while Morstatter was on his paid LOA, he remained in continuous service and thus earned his vacation benefits per Article 15. Said another way, he continued his status as an employee. It notes in this regard that his anniversary date did not change, nor did his seniority. It also asserts that vacation is based on continuous service, not hours

worked. Building on all the foregoing, the Union asserts that Morstatter is contractually entitled to his vacation. It disputes the City's contention that Morstatter did not accrue vacation during his LOA. The Union avers that Morstatter would have enjoyed the contractual vacation benefits but for the LOA to which he was subjected (by the Fire Chief).

Second, the Union maintains that by denying Morstatter the right to carry over his "unused" 2010 and 2011 vacation to 2012, that forced Morstatter "to share in the cost of the City's decision to place him on paid administrative leave while the City went about the business of conducting its disciplinary investigation." The Union sees that as unfair. Additionally, it maintains that the City forced Morstatter to schedule his vacation, but then turned around and denied him the use of his vacation time. The Union further submits that if "the City intended to release Morstatter from the investigation and its attendant conditions during his vacation picks, it was the City's responsibility to make that clear to Morstatter." As the Union sees it, the City never did that.

Third, the Union contends that the City's reliance on its "use it or lose it" vacation policy is misplaced in this particular case. Here's why. The Union asserts that in this particular case, it was not up to Morstatter to request a carryover of his "unused" vacation; rather, the Chief should have done it. Thus, according to the Union, it was the Chief's responsibility to request a carryover of Morstatter's "unused" vacation. To support that premise, it cites various memos which the Human Resource Director sent to Department heads informing them that it was their responsibility to ensure that employees use the vacation time in the year in which it is earned, unless "extenuating circumstances" exist. The Union argues that in Morstatter's case, there were "extenuating circumstances". The "extenuating circumstances" were that the Fire Chief placed Morstatter on paid LOA in order to conduct an internal investigation into the events of July 10, 2010. The Union believes that being on LOA is just the kind of "extenuating circumstances" that made it impossible for Morstatter to use his vacation. The Union also avers that in his letter dated November 1, 2010, the Fire Chief imposed "restrictions" on Morstatter that encumbered his ability to use his vacation. Building on the premise that the Chief imposed "restrictions" on Morstatter, the Union maintains that Morstatter never had an "unencumbered" ability to use his vacation (while he was on his LOA).

Fourth, the Union submits that the City's argument that Morstatter used vacation during his LOA should be rejected. According to the Union, a paid LOA does not amount to a de facto vacation. Further, as the Union sees it, the City "has been rather liberal in allowing employees to carry over" unused vacation. To support that premise, it asserts that 25 City employees were allowed to carry over their 2010 vacation to 2011. The Union further notes that in the Fire Department, Captain Mueller was allowed to carry over some vacation because of shoulder surgery. The Union avers that the City did not show "why Morstatter's grievance should fail", while Mueller's request for carry over was approved. Building on the foregoing, the Union argues that the City's decision to deny Morstatter the carryover of vacation is arbitrary, capricious and discriminatory, and lacks a rational basis.

Finally, the Union contends that the denial of vacation carryover is a form of discipline that lacks just cause. According to the Union, by not allowing Morstatter to carryover his "unused" vacation to 2012, the City is, in effect, imposing an additional level of discipline on Morstatter (beyond what it has already imposed). Said another way, the City is enhancing the discipline it has already imposed. The Union asserts that whether the arbitrator applies the "most basic" two prong analysis or the "more comprehensive" *Daugherty* standard to determine just cause, "the City's decision to enhance the discipline of Morstatter must fail."

Turning now to the overtime grievance, the Union first responds to the Employer's arbitrability argument that the overtime grievance is not arbitrable under the LCA. It acknowledges at the outset that there's no provision comparable to the vacation grievance exclusion in the LCA. In other words, there is no provision that excludes an overtime grievance in the LCA. However, the Union contends that the reason there is no exclusion is because "the overtime grievance violation" had not occurred at the time the LCA was executed. It avers that since "the facts giving rise to the overtime grievance occurred after the LCA was signed", the discharge and release language on which the City relies does not apply to the overtime grievance.

Next, the Union addresses the merits of the overtime grievance. It contends that the City violated the collective bargaining agreement, the "TeleStaff Agreement", and the LCA when the Fire Chief unilaterally moved Morstatter from the top of the overtime eligibility list to the middle. According to the Union, that change deprived Morstatter of "overtime opportunities he would otherwise have enjoyed." Thus, it's the Union's view that Morstatter's existing bucket list hours should not have been changed (when he returned to work in 2012). In other words, Morstatter should have kept his 2009 (pre-LOA) number of 48. The Union further contends that moving Morstatter down the overtime list from the top to the middle was an arbitrary and capricious act by the Chief which should not have occurred. The Union also argues that denying Morstatter overtime opportunities was an additional form of discipline. Building on that premise, the Union contends that it constitutes a penalty not contemplated under the terms of the LCA. That being so, the Union maintains that the enhanced discipline not only violates the LCA itself, but also violates the just cause provision of the collective bargaining agreement.

As for a remedy, the Union seeks the following. In the vacation grievance, the Union seeks to have Morstatter's "unused" 2010 and 2011 vacation days carried over to 2012. In the overtime grievance, the Union seeks to have Morstatter restored to the top of the overtime eligibility list. Then, he should be awarded "an amount equal to the overtime he would have received but for the Chief's unilateral movement of Morstatter down the TeleStaff list." The Union contends that contrary to the City's contention, "this sum can be calculated in a manner similar to that used to move Morstatter down the list." Finally, with respect to both grievances, the Union also seeks an unspecified general make-whole order. It further asks the arbitrator to retain jurisdiction over both grievances for purposes of effectuating the remedy.

City

The City's position is that Morstatter was not improperly denied vacation and overtime benefits as alleged by the Union. In the City's view, its actions did not violate either the collective bargaining agreement or the LCA. It elaborates as follows.

With regard to the vacation grievance, the City disputes the Union's assertion that Morstatter should be allowed to carry over his "unused" 2010 and 2011 vacation to 2012. Here's why.

First, the City emphasizes that while Morstatter was on his 21-month LOA that ran from July 2010 to March of 2012, he was on paid status for that entire time period. As the City sees it, he was on paid vacation for 21 months. Given his pay status for that time period, the City believes Morstatter was not entitled to take vacation – on top of that – when he returned to work in 2012. Said another way, the City feels that it is "being asked to provide vacation time and pay in addition to fully paid leave time." It objects to that.

Second, the City maintains that Morstatter selected his vacation "picks" for 2010, 2011 and 2012. In other words, he "picked" his allocated vacation time for those years. As the City sees it, Morstatter exercised his vacation rights for those years. In response to the Union's contention that the Chief prohibited Morstatter from using his selected vacation days or constrained him from travel on those days, the City disputes that contention. It argues that the Chief never told Morstatter "that he was prohibited from using his selected vacation days as anything other than vacation days." It notes in this regard that in his letter to Morstatter dated November 1, 2010, the Chief told Morstatter that "should you have. . .any questions related to your . . .benefits, then you are to contact me. . ." The City avers that Morstatter "never asked for clarification of his availability for call-ins on the days he picked as vacation days until the time of the Last Chance Agreement discussions." Building on all the foregoing, the City maintains that Morstatter was not entitled to carry over any 2010 or 2011 vacation into 2012.

Third, the City argues that its actions here were consistent with the City's "use it or lose it" vacation policy. Before the City delves into the details of that policy though, it notes that the Reservation of Rights provision (Article 21) gives the City the right to make reasonable work rules. According to the City, that contractual provision gives the City the authority to limit the carryover of vacation into the next calendar year. Next, the City notes that its vacation carryover rules were established in 2003 without challenge. It further notes that there has been no challenge to the City or Fire Department's determination of that rule since it has been in place. Having given that background, the City now delves into the specifics of its "use it or lose it" vacation policy. It avers at the outset that "vacation carryover is the exception to that rule." Building on that premise, the City emphasizes that carryover of unused vacation from one year to the next is not automatic. It maintains that employees who want to carryover unused vacation time have to do two things: they have to

apply in writing and get the Chief's written approval, and they have to meet the "legitimate business necessity" threshold. The City notes that in 2010, just two members of the Fire Department were allowed to carryover vacation to 2011 and in 2011, just one member of the Department was allowed to carryover vacation to 2012. Having given that background on the City's "use it or lose it" vacation policy, the City next delves into the specifics of the facts involved here. It emphasizes that while Morstatter was on his LOA, he never made a request to carry over any of his "unused" 2010 or 2011 vacation into the next calendar year. It asserts that had he made a request to carry over any vacation, "the Department had a framework in place to address any such request." Also, since he made no written request, "whatever rationale he might have offered is speculative." Given the foregoing, it's the City's view that Morstatter did not comply with the known requirements for carrying over "unused" vacation into the next calendar year. As for Morstatter's "apparent assumption that his leave status automatically altered the vacation scheduling protocol", the City argues there is no basis in the collective bargaining agreement to justify that assumption.

Finally, the City avers that the Union's "remedy" request would produce adverse results, including violating the collective bargaining agreement, unbudgeted costs, and "double pay" for not working.

Turning now to the overtime grievance, the City first raises an arbitrability argument. Specifically, it contends that the LCA prohibits the arbitrator's consideration of the overtime grievance. It elaborates as follows. For background purposes, the City notes that the parties entered into a LCA that established the rules for Morstatter's return to employment status following his 21-month LOA. It also notes that Section 10 of the LOA includes a "discharge and release" provision. It further notes that Section 10 covered "any and all leaves and unknown damage" and precluded Morstatter from recovering "anything of value from the City." Finally, the City notes that Section 10 excluded the vacation grievance (as well as worker's compensation and unemployment compensation claims) from the release, but made no similar exclusion for an overtime grievance. According to the City, the LCA language just referenced makes it clear that the overtime grievance (whereby Morstatter is attempting to improve his position on the overtime list) is precluded by the LCA. It further opines that "the fact that the parties specifically exempted the vacation grievance, and not the overtime grievance, reveals that there was a mutual understanding that no other grievances arising out of the 21-month LOA were permitted." To support that notion, it cites the arbitral principle that to express one thing is to exclude another. It also argues that even though the issue of overtime placement did not surface until after the LCA was signed, Morstatter waived his right to challenge the reasonableness of his placement on the overtime list.

Assuming *arguendo* that the overtime grievance is found arbitrable, the City argues that the collective bargaining agreement does not address the distribution of overtime among employees. It contends that neither Article 16 (Overtime) nor Article 19 (Recall/Call-In Time), the two articles cited in the grievance, contain language setting out how overtime is assigned or distributed. Building on that, the City maintains that there is nothing in the

collective bargaining agreement regarding whether there is or is not an overtime eligibility list, whether the Department uses the TeleStaff Overtime System, how a firefighter is originally placed on the overtime eligibility list, and how an employee moves up and down the overtime eligibility list. The City contends that in the absence of a contract clause to the contrary, the Reservation of Rights provision (Article 21) controls, and the allocation of overtime is a management prerogative.

Building on that last premise, the City asserts that the Fire Chief's actions herein, specifically his movement of Morstatter from the top of the eligibility list to the middle, were consistent with the City's authority under the Reservation of Rights provision. For the purpose of context, the City emphasizes that Morstatter "floated to the top" of the overtime eligibility list while on his LOA. According to the City, the Fire Chief felt it was inequitable for Morstatter to be at the top of the overtime list when he returned from his LOA – and thus be eligible for a majority of overtime assignments – as a result of not working during his lengthy paid LOA. The City put it this way in its brief: "The Chief, fearing an even more adverse reaction from other firefighters to Morstatter's return if he took all the overtime" therefore chose to average Morstatter's hours with the other firefighters. The City cites the Chief's testimony from the hearing that his goal in moving Morstatter to the middle of the overtime list was to create equity with other members of the Department in terms of overtime opportunities in the future. The City maintains that the Association did not establish that the Chief's decision to move Morstatter from the top of the list to the middle was arbitrary, capricious or an abuse of discretion. Accordingly, the Employer maintains no contract violation was shown.

Finally, with regard to the Union's requested remedy, the City contends that the Union's make-whole request is impossible to calculate. If the arbitrator determines that Morstatter should receive an adjustment to his placement on the overtime list, the City suggests a prospective, not retrospective, remedy.

DISCUSSION

I've decided to comment at the outset on what the scope of this decision is going to be. First, both sides referenced the LCA in their proposed issues. The Union asks me to decide, in both grievances, whether the City violated the LCA by its actions herein. In other words, the Union asks me to use the LCA as a basis, independent of the collective bargaining agreement, to find a substantive violation. I'm not going to use the LCA as a basis for my decision on the merits. Here's why. I don't find the LCA to be helpful in resolving the merits of either the vacation or the overtime grievance. That being so, I'm going to base my decision on just the collective bargaining agreement (and not on the LCA). Additionally, the City asks me to decide whether the overtime grievance is arbitrable under the LCA. According to the City, it is not. I'm going to duck that call and not rule on that matter. I'll explain why later. Second, while the Union didn't reference the "TeleStaff Agreement" in its proposed issue in the overtime case, in its brief it alleged that the City's actions in that matter violated the "TeleStaff Agreement". To the extent that the Union seeks a ruling from me on whether the

City's actions in the overtime matter violated the "TeleStaff Agreement", I'm not going to rule on that, either. My reason for this call is simple: the "TeleStaff Agreement" is not part of the record before me. It's not even an exhibit. Third, the Union wants me to address, in both grievances, whether the City's actions constituted a form of discipline. As the Union sees it, the City's actions toward Morstatter in both situations constituted an additional level of discipline beyond what was referenced and imposed in the LCA. To the extent that the Union saw a just cause element to both grievances, it was incumbent upon the Union to raise that claim either in the grievance or, at a minimum, prior to the hearing. However, it did not do so. Specifically, neither grievance raised a just cause claim or component, nor did the Union raise such a claim or component when the grievance was being processed. That's problematic. Instead, what the Union did was expand both grievances at the hearing to include a just cause claim or component. Expanding the scope of a grievance at the hearing to add a brand new claim is viewed by arbitrators with disfavor. That's because a party – typically the employer – is not supposed to be blindsided with a new claim at the hearing. Consistent with that view, I'm not going to address any just cause claims/components in my discussion herein.

Having just noted what I'm not addressing, the focus turns to what I am addressing. The two grievances involved herein arose out of Morstatter's lengthy LOA. After he returned to work, the Union filed two grievances contending Morstatter was improperly denied certain vacation and overtime benefits. While the specific questions to be answered will be identified in detail below, the broad question is whether Morstatter was improperly denied those benefits. The Union answers that question in the affirmative, while the City answers it in the negative. I answer that question in the negative, meaning I find that the City did not violate the collective bargaining agreement by its actions relative to Morstatter.

I'll address the vacation grievance first.

<u>The Vacation Grievance</u>

This grievance contends that Morstatter should be allowed to carry over his "unused" 2010 and 2011 vacation to 2012. Specifically, he seeks to carry over three days of 2010 vacation and 12 days of 2011 vacation to 2012. I find there are two problems with that contention.

Here's the first one. Morstatter was on paid leave for 21 months between July 2010 and March 2012. Two things about his LOA are noteworthy. First, Morstatter was on leave for a long, long time. It was the longest paid LOA in the Department's history. Second, Morstatter was paid for that entire time period. While some employees who go on a LOA - such as an employee drawing worker's compensation - might get paid less than their regular pay check, that was not the situation here. In this case, Morstatter drew his regular pay check for that entire 21 month period. During that time period, he performed no work for the City, but his regular paychecks kept coming in anyway.

Not surprisingly, since Morstatter was paid for that entire 21 month time period, it's the Employer's view that he was on paid vacation for that entire period. Given his pay status for that time period, the City believes Morstatter was not entitled – on top of that pay – to take any "unused" 2010 or 2011 vacation when he returned to work in 2012. The Union disagrees.

It would be one thing if the record showed that Morstatter was somehow constrained from either leaving the City on his 2010 or 2011 vacation days, or was somehow precluded from using his vacation days as he saw fit. If the record showed that, then I could accept the Union's premise that Morstatter was entitled to use his "unused" 2010 or 2011 vacation days when he returned to work from his LOA in 2012. However, the record does not show that. What the record does show is that the City solicited vacation "picks" from Morstatter for 2010, 2011 and 2012 and he complied. After that happened, Morstatter's vacation days were placed on the Department's vacation schedule. When Morstatter's vacation days rolled around, he was officially on vacation for those days in the same fashion as other firefighters were on their vacation days (meaning he did not need to apprise the City of his whereabouts on his vacation days or be available for call-ins). Said another way, Morstatter's vacation days were treated the same as off-duty days. While the Chief's letter which placed Morstatter on administrative leave stated that Morstatter was required to be "available for callback to the Department during your regularly scheduled shifts", that directive did not apply to Morstatter's vacation days. That's because off-duty time – including vacation – is not a regular work shift. Therefore, nothing in the record shows that the Chief somehow precluded or prohibited Morstatter from using his vacation days as he saw fit, or somehow denied him the use of his vacation time on the vacation days that he "picked". Similarly, nothing in the record shows that the Chief somehow interrupted, cancelled, or made it impossible for Morstatter to travel on the vacation days that he "picked". Since Morstatter was not constrained by the Chief from traveling on his vacation days or using his vacation days as anything other than vacation days, I find that Morstatter "used" the 2010 and 2011 vacation days that he "picked". As a result, there were no "unused" 2010 or 2011 vacation days which could be carried over to 2012.

Even if I'm wrong about that call, there's another reason why Morstatter doesn't get to have any 2010 or 2011 vacation carried over to 2012. It's this. The City's actions herein were consistent with the City's "use it or lose it" vacation policy. That policy, which has been in place for a decade, limits the carryover of unused vacation into the next calendar year. Given the existence of that policy, the general rule is that employees are supposed to use their vacation in the year in which it is earned. Thus, vacation carryover is the exception – not the rule. Employees who want to carryover unused vacation hours have to follow a very specific protocol. First, they have to apply in writing. Second, they have to satisfy the "legitimate business necessity" standard which the City has set for authorization to be granted. Third, the request has to be granted by three different City officials. The record shows that City employees know they have to jump through all these hoops to carry over any unused vacation to the next year. Even when they do carry over leave into the next year, it has to be used by March 31st.

Here, though, Morstatter did not even satisfy the first step. Specifically, while he was on his LOA, he never applied in writing to carryover any of his "unused" 2010 or 2011 vacation into the next calendar year. Had he done so, then the focus would shift to the question of whether Morstatter satisfied the "legitimate business necessity" standard. While the Union argues that Morstatter's LOA should have satisfied that standard, the Union's argument misses the mark because the first prerequisite has to be satisfied before the second can be reviewed. As previously noted though, that didn't happen here because Morstatter never even applied in writing to carry over any of his "unused" 2010 or 2011 vacation into the next calendar year. Thus, he did not comply with the vacation carryover protocol.

Not surprisingly, the Union makes several arguments aimed at excusing Morstatter's non-compliance with the vacation carryover protocol. First, it implies that Morstatter assumed that his LOA status altered the (normal) vacation carryover protocol. If that was his assumption, he was wrong. There's nothing in the carryover policy or the vacation contract language that justifies such an assumption. Second, the Union argues that the Chief should have made the carryover request on Morstatter's behalf because Morstatter was on his LOA. It would be one thing if the record showed that the Chief had done this for other employees. However, the record does not show that. Consequently, it's the employee's responsibility to apply for the carryover in all circumstances (including when an employee is on a LOA). Third, the Union makes a disparate treatment argument in that Fire Department employee Mueller had his unused vacation carried over from one year to the next, while Morstatter did not. However, there's a logical, non-discriminatory reason for that. It's this: Mueller made a written request to carryover some unused vacation. As already noted, though, Morstatter did not make such a written request. Thus, Mueller followed the carryover protocol while Morstatter did not. Based on the above, no legitimate reason was offered which excuses Morstatter's non-compliance with the vacation carryover protocol.

In light of the above, it is held that Morstatter was not contractually entitled to carryover any 2010 or 2011 vacation to 2012. Accordingly, the vacation grievance is denied.

The Overtime Grievance

This grievance contends that Morstatter's status on the overtime list should have been based on his pre-LOA overtime hours, and that he should not have been moved from the top to the middle of the overtime list (as he was).

Arbitrability

Inasmuch as the City has raised an arbitrability objection to this grievance, it will be addressed first.

The City contends that this grievance is barred because it is covered by the general release provision contained in the LCA and there is no exception made for an overtime

grievance (the way an exception was made for the vacation grievance). However, I've decided to presume for the sake of discussion that no arbitrability impediment exist to my deciding the merits of this grievance. Consequently, my decision is not going to be based on the Employer's arbitrability objection. My reason for making this call will become apparent at the end of my discussion.

Merits

The focus now turns to the merits of the grievance.

The grievance contends that the Chief's moving of Morstatter from the top of the overtime list to the middle violated Article 16 (Overtime) and Article 19 (Recall/Call In Time). However, a review of those two relatively short articles reveals that neither provision contain any language setting out how overtime is assigned or distributed. Given the absence of such language, it can fairly be surmised that those articles do not address the following topics which pertain to this grievance: 1) whether there is or is not an overtime eligibility list; 2) whether the Department uses the TeleStaff Overtime System; 3) how a firefighter is originally placed on the overtime eligibility list; and 4) how an employee moves up and down the overtime eligibility list.

The reason the foregoing points are important is because in this case, the Union is claiming that the Chief's moving of Morstatter from the top of the overtime list to the middle violated a procedure that has no contractual basis.

Since neither Article 16 nor 19 say anything about whether an employee's placement on the overtime eligibility list can ever be changed, I'm going to look elsewhere in the collective bargaining agreement to see if another contract provision is applicable and provides any guidance to help me decide that question (i.e. whether an employee's placement on the overtime eligibility list can ever be changed). There is; it's the contractual management rights clause. In this contract, that clause is called the Reservation of Rights clause (Article 21). That clause says that the Employer "retains all the rights. . .exercised or had by it. . .except as specifically limited by express provisions of this agreement." Among other things, management retains "the right to determine the methods, processes, and manner of performing work." In my view, that language is broad enough to make the allocation of overtime a management prerogative, subject to a caveat which will be identified in the next paragraph.

Not surprisingly, the City relies on the portion of the Reservation of Rights clause just quoted to justify changing Morstatter's place on the overtime eligibility list. When an employer action is not contrary to an express provision of the collective bargaining agreement, and the employer relies on the management rights clause to justify that action, arbitrators often review that action via an arbitrary and capricious standard. I will do so here as well.

The following facts are relevant to making that call.

The record shows that when the new TeleStaff system was implemented, employees were placed on the list based on their 2009 overtime hours. When that was done, Morstatter was placed in about the middle of the overtime list.

After the new system was implemented, employees began to work a lot of overtime for a number of reasons that need not be identified here. When the employees worked overtime, they went down the overtime ladder as their overtime buckets filled up.

Everyone except Morstatter that is. While he was on his 21-month LOA, he didn't work at all, much less work any overtime. As a result, his overtime hours stayed at his 2009 level while all of his co-workers filled up their overtime buckets and they went down the overtime list. In a manner of speaking, this caused Morstatter to "float to the top" of the overtime eligibility list. As a result, the situation was that when Morstatter returned to work in 2012 after his LOA, he was at the top of the overtime eligibility list.

The Chief felt it was inequitable for Morstatter to be at the top of the overtime list when he returned from his LOA – and thus be eligible for a majority of overtime assignments – as a result of not working during his lengthy paid LOA. The Chief feared an adverse reaction from other firefighters to Morstatter's return if he took all the overtime. The Chief therefore decided to move Morstatter from the top of the overtime list to the middle. He effectuated this by averaging all of the firefighters' overtime hours and coming up with a number. Then, Morstatter was assigned that number so that he ended up squarely in the middle of the overtime list. The Chief's stated goal in doing this (i.e. moving Morstatter from the top of the overtime list to the middle of the overtime list) was to create equity with other members of the Department in terms of overtime opportunities in the future.

Given the foregoing, the question to be answered is whether the Chief's actions were arbitrary, capricious, or an abuse of discretion. I find they were not. Simply put, there is no objective basis in the record for me to find that the Chief's decision to move Morstatter from the top of the overtime list to the middle was for any reason other than what the Chief identified. Additionally, I find that the Chief's decision was neither arbitrary nor capricious. As a result, the Chief's decision to move Morstatter on the overtime list passes muster under an arbitrary and capricious standard. Accordingly, the overtime grievance is denied.

One final comment. In so finding, I'm well aware that one of the Union's concerns with the Chief's moving Morstatter down the overtime list is the precedent this establishes so that the Chief could do so again in a completely different factual situation. That's a legitimate concern. To address that concern, I've decided to note that my finding herein does not stand for the proposition that the Chief can move employees up and down the overtime eligibility list at will. Instead, my finding stands only for the proposition that in this one particular instance where there were very unique facts (namely, where an employee returned to work following a 21-month paid LOA and, as a result, he had floated to the top of the overtime eligibility list)

was it permissible for the Chief to unilaterally move the employee on the overtime eligibility list.

In light of the above, it is my

AWARD

The Vacation Grievance

That the City did not violate the collective bargaining agreement when it did not allow Morstatter to carryover any 2010 or 2011 vacation to 2012. Therefore, the grievance is denied.

The Overtime Grievance

That the City did not violate the collective bargaining agreement when the Fire Chief unilaterally moved Morstatter from the top of the overtime eligibility list to the middle of the list after Morstatter returned to work following his 21-month LOA. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 8th day of February, 2013.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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