BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SOUTH MILWAUKEE FIREFIGHTERS PROTECTIVE ASSOCIATION, LOCAL 1633,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS (IAFF)

and

CITY OF SOUTH MILWAUKEE

Case 119
No. 71996
MA-15232

(Vacation Grievance)

Appearances:

John Kiel, Attorney at Law, P.O. Box 147, 3300 - 252nd Avenue, Salem, Wisconsin 53168-0147, appearing on behalf of IAFF Local 1633.

Joseph Murphy, City Attorney, City of South Milwaukee, 2013 14th Avenue, South Milwaukee, Wisconsin 53172, appearing on behalf of the City.

ARBITRATION AWARD

The South Milwaukee Firefighters Protective Association, Local 1633, IAFF, hereinafter referred to as the Union, and the City of South Milwaukee, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement that provides 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 the vacation grievance. The undersigned was so designated. A hearing was held in South Milwaukee, Wisconsin on May 30, 2013. The hearing was transcribed. The parties filed briefs and reply briefs, whereupon the record was closed on August 2, 2013. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the City of South Milwaukee violate the collective bargaining agreement on January 8, 2013 when it unilaterally determined that Firefighters Olberding, Rhinesmith and Helmlinger were to receive two (2) days rather than six (6) days of vacation after one year of service? If so, what is the appropriate remedy?

The City framed the issue as follows:

> Did the City violate Article XVIII of the contract when it prorated the 2013 vacation of Firefighters Olberding, Rhinesmith and Helmlinger from their respective dates of hire in 2012 to December 31, 2012?

I have essentially adopted the Union's wording of the issue, but I have modified it slightly. The issue which I'm going to decide in this case is as follows:

> Did the City violate Article XVIII of the collective bargaining agreement when it decided that Firefighters Olberding, Rhinesmith and Helmlinger were to receive two 24 hour duty days of vacation in 2013? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2012-2015 collective bargaining agreement contains the following pertinent provisions:

ARTICLE VIII

HOLIDAYS

. . .

6. During the first year of employment, Floating Holidays shall be earned and taken in accordance with the following schedule:

   a. Employees hired between January 1 and April 30 shall earn and receive two (2) Floating Holidays during the remainder of the calendar year.

   b. Employees hired between May 1 and August 30 shall earn and receive one (1) Floating Holiday during the remainder of the calendar year.

   c. Employees hired after September 1 shall not receive any Floating Holidays during the remainder of the year.

. . .

ARTICLE XVIII

VACATIONS

Paid vacations for members of the Fire Department covered under the terms of this Agreement shall be hereinafter set forth:

- Two (2) weeks after one (1) year of service, (six (6) scheduled 24-hour duty days.)

- Three (3) weeks after seven (7) years of service, (nine (9) scheduled 24-hour duty days.)

- Four (4) weeks after fourteen (14) years of service, (twelve (12) scheduled 24-hour duty days.)

- Five (5) weeks after twenty (20) years of service, (fifteen (15) scheduled 24-hour duty days.)

Two people per shift shall be allowed vacation leave, excluding the combination of Lieutenant and Captain.

Earned vacations shall be based on the calendar year prior to the year of the vacation, except that earned vacations for the initial year of employment shall be pro-rated from the date of employment to December 31 of the initial year.

An employee whose earned vacation is based on the prior calendar year of employment and becomes separated from the Municipality's service for any reason shall, in addition to such employee's vacation based on the preceding year, be entitled to pro-rated vacation for the year of separation from the Municipality's service in proportion to the number of full months employed during such year.

Vacation allowance shall not accumulate from year to year.

Unused vacation pay of a deceased employee shall be payable to the surviving spouse or the estate.

After January 15 of each calendar year, each eligible employee shall specify the vacation days and periods he desires. Vacations will, so far as practical, be granted at times most desired by employees (longer service employees being

given preference as to choice) but the final right to allot vacation days and

periods is exclusively reserved to the Municipality in order to ensure the orderly operation of the department.

Vacation leave shall not accrue while an employee is on an approved leave of absence, in excess of seven (7) consecutive 24-hour duty days.

BACKGROUND

The City of South Milwaukee operates a Fire Department. The Union is the exclusive collective bargaining representative for certain employees in the Fire Department.

The parties have had a series of collective bargaining agreements which go back to at least 1970. In 1971, the vacation provision in the collective bargaining agreement provided thus:

5. The vacation schedule shall be as follows:

A. Two (2) weeks after one (1) year
Three (3) weeks after nine (9) years
Four (4) weeks after fifteen (15) years
Five (5) weeks after twenty-five (25) years

B. 1. After the first year of employment, earned vacations shall be based on the calendar year prior to the year of vacation, except that earned vacations for the initial year of employment shall be computed from the anniversary date of employment.

In the parties' 1972-73 collective bargaining agreement, the words "of service" were added behind the years referenced in Section A of the chart noted above. Throughout the remainder of the 1970's, the section identified as "B.1" from the parties' 1971 collective bargaining agreement did not change.

The record indicates that the parties interpreted that section (i.e. the section denominated as "B.1" in the parties' 1971 collective bargaining agreement) to mean that newly-hired employees received no vacation for the first 12 months of employment and then received 2 weeks (i.e. 6 24-hour days) of vacation to be used from the anniversary of their hiring date to the end of that year. Thereafter, the employee would receive 2 weeks of vacation as of January 1 of each following year.

In 1980, the parties changed the provision denominated in their 1971 collective bargaining agreement as "B.1". The new language which was inserted in its place provided thus:

> Earned vacations shall be based on the calendar year prior to the year of vacation, except that earned vacations for the initial year of employment shall be pro-rated from the date of employment to December 31 of the initial year.

This paragraph was not changed in any subsequent collective bargaining agreement, although its placement went from being the second paragraph in the vacation section to the third paragraph (where it is currently found in the parties' 2012-2015 collective bargaining agreement). Thus, the above-referenced paragraph which was added to the vacation provision in 1980 has not been changed since then.

The record further indicates that after this change was made to the contract language, no change was made to the previously-referenced method of how vacation time was calculated for new employees. Thus, from 1980 forward, newly-hired employees received no vacation for the first 12 months of employment and then received 2 weeks (i.e. 6 24-hour days) of vacation to be used from the anniversary of their hiring date to the end of that year. Thereafter, the employee would receive 2 weeks of vacation as of January 1 of each following year. Specifically, that happened to firefighters John Imig, Kurt Egner and Brian Bieganske. Imig was hired in March of 1977. Between his hire date in March of 1977 and December 31, 1977, he received no vacation. Then between January 1978 and his anniversary date in March of 1978, he received no vacation. On his anniversary date in March of 1978, Imig received six (6) vacation days available for use in 1978. Egner was hired in November of 2004. Between his hire date in November, 2004 and December 31, 2004, he received no vacation. Then between January, 2004 and his anniversary date in November, 2004, he received no vacation. On his anniversary date in November, 2005, Egner received six vacation days for his use between November, 2005 and December, 2005. Brian Bieganske was hired in February of 2006. Between his hire date in February of 2006 and December 31, 2006, he received no vacation. Then, between January, 2007 and his anniversary date in February, 2007, he received no vacation. On his anniversary date in February, 2007, Bieganske received six vacation days for his use in 2007.

. . .

The record further indicates that in bargaining at least the last four collective bargaining agreements, the City never told the Union that it believed the contract's vacation language had been misinterpreted or misapplied, or that the City intended to terminate the way in which the vacation language of the contract was applied.

FACTS

The three firefighters involved herein – Olberding, Rhinesmith and Helmlinger – were hired by the City on August 25, 26 and 27, 2012 respectively.

When the 2013 vacation schedule was initially prepared, the three employees referenced above (i.e. Olberding, Rhinesmith and Helmlinger) were initially listed to receive six days of vacation (i.e. two weeks).

On January 8, 2013, Fire Chief Joseph Knitter issued a memo concerning the vacation picks for new hires Olberding, Rhinesmith and Helmlinger. It provided thus:

> Date: January 8, 2013
>
> To: Captains Czajkowski & Dorangrichia
> Lieutenants Lang, McCoy & Boschke
> Firefighters Olberding, Rhinesmith & Helmlinger
>
> Re: Vacation Picks – New Hires
>
> A question has been brought to me regarding the vacations of Firefighters Olberding, Rhinesmith and Helmlinger. According to the bargaining agreement between the City and Local 1633 (see below), the vacation that they are eligible for this year (initial year of employment) is pro-rated from the date of employment (August 25, 26 & 27, 2012, respectively) to December 31 of the initial year (2012). For each of them, this would equate to 1/3 (four months served – End of August through December 31st) of the two week (6 days) allotment or two (2) days.

The memo then went on to quote a portion of Article XVIII, and specifically highlighted the third paragraph of that provision.

The effect of this decision was that firefighters Olberding, Rhinesmith and Helmlinger received two days of vacation in 2013, not six.

The Union objected to the Chief's decision and filed a grievance challenging that action. The grievance was processed through the contractual grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Union

It's the Union's view that the City violated the collective bargaining agreement when it unilaterally determined that Firefighters Olberding, Rhinesmith and Helmlinger were to receive two days rather than six days of vacation after one year of service. It elaborates as follows.

First, the Union contends that its claim that Firefighters Olberding, Rhinesmith and

Helmlinger are entitled to six days of vacation is supported by the first paragraph of

Article XVIII. Specifically, the Union relies on the first portion of the vacation chart which provides for two weeks vacation "after one (1) year of service." The Union reads that provision to say, in plain terms, that after one year of service, the employee shall receive six duty days (i.e. 2 weeks) of vacation.

Turning now to the second part of the third paragraph in the vacation provision (i.e. the contract language which the City relies on which says "except that earned vacations for the initial year of employment shall be prorated from the date of employment to December 31 of the initial year"), the Union disputes the Employer's contention that that phrase requires proration of the two weeks otherwise available to the three affected firefighters. Here's why. According to the Union, the clause just referenced does not speak to vacations after one year of service. The Union avers that what happens after the initial year, that is what happens after one year of service, is defined in the first paragraph of the vacation provision which states that employees shall receive "Two (2) weeks after one (1) year of service, (six (6) scheduled 24-hour duty days.)" The Union argues that this distinction between the initial year and every year thereafter is made clear within the clause where the word "except" is used to break the clause in two. The Union maintains that it's clear that the drafters intended that vacation for the initial year of employment was to be treated differently than the years that followed. That's because the clause defines the "initial year" as the time from the date of employment to December 31 of that year. Applying that language to the instant facts, the Union submits that the initial year of employment of Firefighters Olberding, Rhinesmith and Helmlinger is between August 25, 26 and 27, 2012 and December 31, 2012. As the Union sees it, proration should not be applied to the vacation period that occurs after August 2013 or, for that matter, after December 31, 2012.

The Union submits that to the extent there was a mistake in the way this language was historically applied, it has been during the initial year of employment when the new hires did not receive a prorated vacation for the initial year of employment. It notes in this regard that Firefighters Imig, Egner and Bieganski did not receive a prorated vacation during their initial year of employment; instead, they simply received six (6) days of vacation after one year of service. To the extent that this was a mistake - with the mistake being denying new hires a prorated vacation during their initial year of employment – this has provided the City a windfall which has gone on for decades. The Union argues that just because employees have not received vacation during their initial year of employment doesn't mean the contract didn't entitle employees to earn and use a prorated vacation in their initial year. According to the Union, this past mistake should not "open the door to allow the City to take even more."

As part of its contract interpretation argument, the Union notes that the City cautions the arbitrator against redrafting the contract. However, as the Union sees it, that's exactly what the City is inviting the arbitrator to do. According to the Union, to sustain the City's position the arbitrator would, in effect, have to rewrite the first paragraph of the vacation provision so that it says:

> Paid vacations for members of the Fire Department covered under the terms of this Agreement shall be hereinafter set forth:
>
> - ~~Two (2) weeks~~ <u>Prorated vacation</u> after one (1) year of service, ~~(six (6)~~ <u>Prorated</u> scheduled 24-hour duty days.)
>
> - Two (2) weeks after one ~~(1) year~~ <u>two (2) years of service</u>, (six (6) scheduled 24-hour duty days.)

or rewrite the second part of the third paragraph so that it says:

> Earned vacations shall be based on the calendar year prior to the year of the vacation. ~~except~~ <u>The initial</u> earned vacation~~s for the initial year of employment~~ shall be pro-rated from the date of employment to December 31 of the initial year.

The problem with that, of course, is that this is neither what the contract says nor what it requires.

Next, the Union contends that if the contract is found to be ambiguous, then the arbitrator can look to past practice for help in resolving this contract interpretation question. The Union asserts that in this case, there's an applicable past practice that's been applied for more than 30 years that "squarely and solidly binds the parties to the reading of the contract proposed by the Union." It further notes that during the last four contract negotiations, the City never told the Union that it believed the contract's vacation language had been misinterpreted or misapplied, or informed the Union that it intended to terminate the way in which the vacation language of the contract was applied.

The Union also relies on the (explicit) Maintenance of Standards clause and the (implicit) duty of good faith and fair dealing to support its claim that Firefighters Olberding, Rhinesmith and Helmlinger are entitled to six days of vacation in 2013 (not two days as proposed by the Employer).

As a remedy for the Employer's breach of the collective bargaining agreement, the Union asks the arbitrator to award Firefighters Olberding, Rhinesmith and Helmlinger six (6) scheduled 24-hour duty days of vacation for 2013, "in addition to any other vacation time to which they would be otherwise entitled."

<u>City</u>

The City contends that it did not violate Article XVIII of the contract when it prorated the 2013 vacation of Firefighters Olberding, Rhinesmith and Helmlinger from their respective dates of hire to December 31, 2012. It elaborates as follows.

The City begins its argument by reviewing some basic principles of contract interpretation. First, it posits that where the terms of the contract are not ambiguous, the contract as written is enforced. Second, it avers that it is only if the terms are ambiguous that extrinsic evidence of intent is consulted. Third, it posits that the terms of the contract are to be construed in the context in which they appear. Said another way, contracts are to be construed as a whole. Fourth, it avers that contracts are to be construed to avoid absurd results. Fifth, the Employer opines that arbitrators are not supposed to redraft an agreement.

Having made those preliminary observations about contract construction, the Employer addresses the portion of the contract that it believes is applicable here. According to the Employer, it's the second portion of the third paragraph of the vacation provision, particularly the phrase "except that earned vacations for the initial year of employment shall be pro-rated from the date of employment to December 31 of the initial year." As the Employer sees it, that phrase is not ambiguous. Said another way, the Employer maintains it is clear and unambiguous. Building on that, the City asks the arbitrator to apply that provision as written. The Employer contends that that phrase requires a proration of the two weeks vacation otherwise available to the three affected employees, and that the proration be from the date of hire to December 31 of the initial year. The City avers that is precisely what it did here. Specifically, it prorated the vacations of each of the three firefighters to be taken in 2013 from their date of hire (in August of 2012) to December 31 of 2012 based on the two weeks which a full year of employment would provide (i.e. two weeks = 6 duty days multiplied by 4/12 = two days). The City argues that "there is nothing in the contract terms which suggests that the vacation earned by new employees is to be taken during the initial calendar year but this is precisely what the Union has suggested."

Next, the Employer addresses the Union's argument that the Union's reading of the contract is consistent with the way vacations have historically been given to firefighters during their first year of employment. The Employer contends that the Union's "past practice construction" is not a reasonable construction of the words of the contract and therefore does not create any ambiguity. As the Employer sees it, under the Union past practice construction, the words "prorated from the date of employment to December 31 of the initial year" mean nothing. According to the Employer, these words cannot be reconciled with a calculation which is based on the anniversary date of employment and involves no proration whatsoever. Said another way, the existing past practice cannot be reconciled with the contract language. Building on that, the Employer asserts that a construction which renders the words of the contract meaningless surplusage is not a reasonable construction. The Employer also characterizes the Union's interpretation of the contract provision (which the Employer relies on) as "tortured". According to the Employer, the Union's strategy is to make the language appear ambiguous, which then opens "the door to considering the past practice", so that "the contract might be construed to require the continuation of the past practice." The Employer asks the arbitrator to reject the Union's "tortured" reading of the contract provision "that vacation is earned in the calendar year of hire and used in the calendar year of hire." The Employer avers that "all vacations are 'earned vacations' taken in the calendar year after they

are earned."

As part of its contract interpretation argument, the City also relies on the fourth paragraph in the vacation article. It notes that that paragraph provides that when an employee terminates employment with the City, the employee receives both the vacation from their prior year's service and "prorated" vacation for the year of separation. The City avers that the parties have had no difficulty interpreting this provision and applying it to the numerous retirements that have occurred in the department.

Finally, in response to the Union's argument about the maintenance of standards clause, it's the City's view that the arbitrator need not rely on the maintenance of standards clause to decide this case.

In sum then, it's the City's view that it correctly calculated the 2013 vacations for the three firefighters involved. As the Employer sees it, it did so "based on the terms of the contract." Those terms are not ambiguous and the contract should be applied as written. The City therefore asks that the grievance be denied.

DISCUSSION

At issue here is the amount of vacation three relatively new firefighters are to receive in 2013. According to the Union, they are they are contractually entitled to receive six 24-hour days (i.e. an amount which corresponds to two weeks of vacation) in 2013. The City disputes that assertion and gave them each two 24-hour days of vacation in 2013. Based on the following rationale, I find that the three employees are contractually entitled to six 24-hour days of vacation in 2013.

Both sides rely on different portions of the vacation provision to buttress their position. In the discussion which follows, I'll address the contract language cited by the parties. In the course of addressing that language, I'll also review how that contract language has historically been applied.

I'll first address the portion of the vacation provision which the Union relies on. It relies on the first bullet point in the vacation chart found in the first paragraph of the vacation provision. It provides thus:

> Paid vacation for members of the Fire Department . . .shall be hereinafter set forth:
>
> - Two (2) weeks after one (1) year of service (six (6) scheduled 24-hour duty days).

As the Union sees it, that language means that "after one (1) year of service" (i.e. after the employee passes their first anniversary date), they "shall" receive six 24 hour duty days (i.e. two weeks) of vacation. The Union asserts that after the three employees reach their one-year

anniversary date in August, 2013, they will have completed the requisite time (i.e. one year of

service) so as to qualify for the first level of vacation specified on the vacation chart (i.e. six 24-hour days of vacation).

The Union's contention that that portion of the vacation provision applies here is, on its face, rational and reasonable. That's because that language addresses the very situation which is involved herein. In making that statement, what I'm referring to is this: in this case, we are trying to determine how much vacation time the affected employees are entitled to receive after their initial year of employment (i.e. after one year of service). The contract language just quoted expressly speaks to what happens after the initial year of employment and provides in plain terms that after one year of service, the employee "shall" receive six 24-hour duty days (i.e. two weeks) of vacation. The use of the term "shall" in that sentence leaves no room for deviation.

For at least the last 30 years, that's the way vacation time was calculated for new employees after their initial year of employment. Specifically, the record shows that after new employees worked for an entire year and reached their one-year anniversary date, they got six 24-hour duty days of vacation (i.e. two weeks), which they could use from the anniversary of their hiring date to the end of the year. Thereafter, the employee would receive 2 weeks of vacation as of January 1 of each following year. The foregoing establishes that the first bullet point of the vacation chart has historically been applied as the Union proposes it to be applied here.

Given that interpretation and historical application of the first bullet point in the vacation chart, my preliminary finding is that the three employees involved herein are contractually entitled to receive six 24-hour duty days of vacation in 2013 after they reach their anniversary date in 2013. The reason I used the word "preliminary" in the previous sentence is because I still have to address the contract language which the City relies on.

The City essentially ignores the portion of the vacation provision referenced above and instead relies on a different portion of the vacation provision. Since the parties dispute which portion of the vacation provision applies here, I've decided to make some preliminary comments about how I interpret contracts. Sometimes, there's just a single portion of the contract that applies to a given situation. Other times though, several contract provisions apply. When that happens - and several contract provisions apply to a given situation – my job as arbitrator is to either find which provision is most applicable, or to reconcile the provisions in a way that gives meaning to them all. Thus, my goal is to try to make a contractual interpretation that gives full effect to all the relevant contract language.

The City relies on the second part of the third paragraph in the vacation provision. Specifically, the City hangs their hat, so to speak, on the part which says "except that earned vacations for the initial year of employment shall be pro-rated from the date of employment to December 31 of the initial year". As the Employer sees it, that phrase requires proration of the two weeks otherwise available to the three affected firefighters in 2013, and that the

proration be from the date of hire to December 31 of the initial year (i.e. 2012).

In addressing this contention, I'm going to begin by citing the entire third paragraph of the vacation provision. It provides thus:

> Earned vacations shall be based on the calendar year prior to the year of the vacation, except that earned vacations for the initial year of employment shall be pro-rated from the date of employment to December 31 of the initial year.

I read this paragraph to make a distinction between "earned vacations" for the "initial year of employment" and "earned vacations" for years other than the "initial year of employment." I call this latter category earned vacations in general.

I'm going to start my discussion with the latter category (i.e. earned vacations after the "initial year of employment".) The first part of the paragraph quoted above essentially says that vacations for employees after the initial year of employment are based on the "calendar year prior". When the numbers from the first paragraph of the vacation provision (i.e. the vacation chart) are extrapolated, here's how this works. After seven years of service, an employee will get three weeks of vacation which the employee will take in year eight. Likewise, after 14 years of service, an employee will get four weeks of vacation which the employee will take in year 15. Likewise, after 20 years of service, an employee will get five weeks of vacation which the employee will take in year 21.

The second part of the third paragraph of the vacation provision then goes on to recognize that the "calendar year" basis of vacation (which is referenced in the first part of the sentence) does not apply to the "initial year" of employment. Vacations for the "initial year" are pro-rated. In other words, during the "initial year" of employment, the vacation of newly-hired employees is set apart from those whose vacations are based on the calendar year prior. It does this when it uses the word "except". That word breaks the clause in two and treats the initial year differently than all other calendar years that follow. Thus, vacation during the initial year of employment is not based on the prior year.

The focus now turns to what I consider the focal point of this contract dispute: when the words after "except" are applied to the facts involved here, does the pro-rating referenced in this sentence apply to 2012 or 2013? I find it applies to 2012. Here's why. While the "initial year of employment" for Firefighters Olberding, Rhinesmith and Helmlinger would seemingly run for 12 months (meaning 12 months from the date they were hired), it doesn't. That's because the above-quoted contract language expressly says that the "initial year of employment" ends on "December 31 of the initial year". By identifying December 31 as the cutoff date, the "initial year" does not necessarily run for a full 12 months (as the term "year" is commonly used and understood). It could be that an employee's "initial year of employment" is shorter than 12 months. That's the situation here because the three employees were hired in August. Thus, their "initial year of employment" lasted just five calendar months until December 31, 2012. To emphasize the point, the result would be the same even if an employee was hired in, say, mid-December. That employee's "initial year of

employment" would end just a few weeks later on December 31. Accordingly, then, the

"initial year" in the above-quoted contract language refers to the calendar year in which the employee is hired.

In the context of this case, that means that the pro-rating referenced in the above-quoted contract language applies to the vacation period that occurred from the employees' date of hire in August, 2012 to December 31, 2012. Thus, the pro-rating is limited in this case to 2012. That's not what the City did, though. What the City did was pro-rate the employees' 2013 vacation so that the employees got just two 24-hour duty days of vacation in 2013. By doing that, the City improperly pro-rated the employees' 2013 vacation. Once again, the City could have pro-rated the employees' vacation in 2012, but it didn't do that. While the City never explicitly says so, its position necessarily requires that the three employees won't get two full weeks of vacation until their second year of employment in 2014. The problem with that contention is that the first bullet point in the vacation chart says that employees get two weeks of vacation after one year of service, not after two years of service. Thus, the City's action here of giving the employees just two days of vacation in 2013 lacks a contractual basis.

The City argues that a reading whereby "vacation is earned in the calendar year of hire and used in the calendar year of hire" is tortured. I find otherwise for the following reasons. When one looks at the contract as a whole, it shows that the parties intended that newly-hired employees were to earn and use time off in their first year of employment. Consider, for example, the Holiday provision (Article VIII). In paragraph 6 of that provision, it provides that bargaining unit members are entitled to earn and use floating holidays during their first year of employment. If it is reasonable for bargaining unit members to earn and use floating holidays during their first year of employment, it is just as reasonable to construe the contract to allow bargaining unit members to earn and use vacations during their first year of employment.

While the language addressed above contemplates that employees are to receive a pro-rated vacation during their initial year of employment measured from the date of employment to December 31 of the initial year, that's not how the language has historically been applied. The record shows in this regard that new employees have not received any pro-rated vacation during their initial year of employment measured from the date of employment to December 31 of the initial year. Additionally, they did not receive any vacation during their first twelve months of employment. Instead, employees simply got six 24-hour days of vacation after they hit their one-year anniversary date. The fact that employees have not historically received any pro-rated vacation during their initial year of employment doesn't mean that the contract doesn't entitle employees to earn and use a pro-rated vacation in their initial year of employment. As previously noted, that's exactly what the contract says is to occur. I leave it to the parties to sort out how they are going to deal with that matter prospectively.

. . .

As was noted earlier, my "preliminary" finding – before I addressed the contract

language which the City relied on – was that the first bullet point in the vacation chart provided

that the three employees involved herein are contractually entitled to receive six 24-hour duty days of vacation in 2013 after they complete their anniversary date in 2013. That "preliminary" finding has not been altered by a review of the language which the City relies on, so it therefore becomes my final finding.

. . .

Having reached that conclusion, it's my view that I don't need to address the Union's alternative arguments concerning the maintenance of standards clause and the (implicit) duty of good faith and fair dealing. Accordingly, no further comments will be made about those contentions.

. . .

In light of the above, I find that the City violated Article XVIII of the collective bargaining agreement when it decided that Firefighters Olberding, Rhinesmith and Helmlinger were entitled to just two 24-hour duty days of vacation in 2013. They were instead contractually entitled to six 24-hour duty days of vacation in 2013 after they reached their first anniversary date. In order to remedy this contractual violation, the City shall give the three employees six 24-hour days of vacation in 2013. That is the sole remedy ordered herein. I am expressly denying the Union's request for "any other vacation time to which they would be otherwise entitled". I interpret that request as referring to the pro-rated vacation which the employees did not receive in their "initial year of employment" (i.e. in 2012). While these three employees did not receive any pro-rated vacation in 2012 (i.e. their "initial year of employment"), that interpretation – while mistaken – was nonetheless consistent with the way the parties applied that language for 30 years until this case was litigated. Given that historic application, I am not awarding any pro-rated vacation to the employees for 2012.

Accordingly, I issue the following

AWARD

That the City violated Article XVIII of the collective bargaining agreement when it decided that Firefighters Olberding, Rhinesmith and Helmlinger were to receive two 24-hour duty days of vacation in 2013. They were instead contractually entitled to receive six 24-hour duty days of vacation in 2013. In order to remedy this contractual violation, the City shall give those three employees six 24-hour duty days of vacation in 2013.

Dated at Madison, Wisconsin, this 4th day of October, 2013.

Raleigh Jones /s/

Raleigh Jones, Arbitrator
REJ/gjc