

BEFORE THE ARBITRATOR

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In the Matter of a Dispute Between  
WISCONSIN PROFESSIONAL POLICE ASSOCIATION  
and  
CITY OF EDGERTON

Case 35  
No. 72776  
MA-15272

AWARD NO. 7896

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**Appearances:**

Andrew D. Schauer, Wisconsin Professional Police Association, 660 John Nolan Drive, Suite 300, Madison, Wisconsin, appearing on behalf of Wisconsin Professional Police Association.

Nancy L. Pirkey, Buelow Vetter Buikema Olson & Vliet LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of the City of Edgerton.

**ARBITRATION AWARD**

On December 18, 2013, the Wisconsin Professional Police Association and the City of Edgerton filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a dispute pending between the parties. Following appointment, a hearing was conducted on March 6, 2014, in Edgerton, Wisconsin. A transcript of the proceedings was taken and distributed on March 14, 2014. Post-hearing briefs were filed and exchanged by May 23, 2014.

**BACKGROUND AND FACTS**

At hearing, the parties submitted a set of stipulations which included the following;

STIPULATIONS

1. The parties are parties to a Collective Bargaining Agreement (the “CBA,” [the relevant provisions of which are set forth below]) which for grievance and arbitration purposes is in full force and effect. Officer Dempsey was hired by the Employer on June 9, 1997, and is a police officer of the Employer under the CBA.
2. The parties agree that the subject of this Arbitration, Grievance 13-443 (the “Grievance”) is arbitral, make no objections as to procedure, and agree that the substance of the matter is properly before the Arbitrator.
3. Pursuant to Article 9 of the CBA, vacation time is earned on the employee’s anniversary date, which for Officer Dempsey, is the one year period from June 9, 2012 through June 8, 2013. Officer Dempsey took 5 days of vacation between June 9 and November 11, 2012. On November 11, 2012 he was placed on paid administrative leave pending an internal investigation. On December 16, 2012 Officer Dempsey was suspended for 90 working days (4-½ calendar months) and placed on unpaid status. The Grievant through Staff Attorney Andrew Schauer negotiated this resolution with Attorney Dale Pope, counsel for the City, and the matter was resolved by a Disciplinary Agreement (the “Disciplinary Agreement,” [the relevant provisions of which are set forth below]). During that negotiation, proration of vacation was never discussed by either party. Officer Dempsey served his suspension and was returned to duty on or around April 30, 2013 – roughly 6 weeks before his anniversary date. During this suspension, Dempsey continued to receive health insurance as provided under the Collective Bargaining Agreement. The parties agree that the reason for this suspension is in no way relevant to this case.
4. The underlying Grievance deals with the City’s interpretation of Article 9 of the CBA regarding vacations and the proration of vacation time due to his suspension as described in Paragraph 3, above.
5. When Officer Dempsey returned to duty at the end of April 2013, he requested to schedule 16 days of vacation time in May and was permitted to take 5 days by Chief Tom Klubertanz (“Chief Klubertanz”). Per Article 9, Section F(7) of the CBA, vacation requests need to be

submitted by the 15th day of the month preceding the month in which the request is made. As this request happened after the 15th, it was appropriately denied, and the Association does not grieve this decision.

6. On May 7, 2013, Officer Dempsey submitted a request ... to Chief Klubertanz and City Administrator Ramona Flanigan ("City Administrator Flanigan") asking that the City consider allowing a carry-over, payout or combination of carry-over and payout of this earned vacation time considering that his anniversary date was June 9, and he did not have time to use the earned vacation time he had accumulated.
7. Article 9, Section F(9) of the CBA provides that "[v]action entitlements may be carried over to the following year only upon recommendation of the Police Chief and approval of the City Administrator." The Employer has a policy whereby they will only approve 40 hours of carryover.
8. The Council did not approve additional vacation carryover for Officer Dempsey beyond 40 hours. Except for the 40 hours approved under the Employer's policy, the vacation time Officer Dempsey wanted to use was forfeited under Article 9, Section F(9) of the CBA. The Association does not here grieve this decision.
9. On September 18, 2013 Officer Dempsey submitted a memo ... to the Employer which was at some point routed to City Administrator Flanigan. In this memo, Officer Dempsey indicates how he found that his vacation bank had been significantly reduced as indicated on his pay stub for the period ending September 14, 2013 ... .
10. On October 9, 2013, Business Agent Alme and City Administrator Flanigan discussed the matter. In that conversation, Business Agent Alme indicated that if the matter could not be resolved amicably, a grievance over the proration of Dempsey's vacation would be appropriate. The parties were not able to resolve their dispute over the proration of Officer Dempsey's vacation due to this unpaid suspension.
11. On October 22, 2013 Dempsey filed the Grievance with Chief Klubertanz regarding the proration of his vacation

time (74.25 hours). ... The Grievance was denied in writing by Chief Klubertanz on October 23, 2013. ...

12. On October 28, 2013 City Administrator Flanigan notified Business Agent Alme that further attempts would be made to resolve the dispute over Officer Dempsey's vacation. On October 28, 2013, Business Agent Alme and City Administrator Flanigan agreed to hold off on submitting the second step of the grievance until after the November 4, 2013 Council meeting. On November 4, 2013, the City did not garner the voted needed to resolve the dispute over Officer Dempsey's vacation.
13. On November 6, 2013 Business Agent Alme moved the Grievance to Step 2 of the grievance procedure by e-mail to City Administrator Flanigan. ...
14. On November 8, 2013 Administrator Flanigan denied the second step of the grievance filed on October 22, 2013. ... Also on November 8, 2013, in immediate response to receiving [Administrator Flanigan's denial of the second step of the Grievance] by e-mail, Business Agent Alme moved the Grievance to Step 3 of the grievance procedure. ...
15. On December 2, 2013 Business Agent Alme met with the Employer's City Council to discuss the Grievance per Step 3 of the grievance procedure. The Council denied the Grievance at that meeting.
16. This matter was then timely filed for Arbitration by WPPA Staff Attorney Andrew Schauer on December 17, 2013. ...

### QUESTIONS PRESENTED

1. Was the City's proration of 74.25 hours of Officer Dempsey's earned vacation time a violation of the CBA?
2. If so, what is the remedy?

### **RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

#### **ARTICLE 6 - HOLIDAYS**

All regular full-time employees covered by this Agreement shall be entitled to compensatory time off or pay (straight hourly rate) for the following named holidays in addition to all monies the employee may earn on such holiday. ...

In order to qualify for holiday pay, it is provided that the regular full time employees must work the regular work day immediately preceding or following the holiday, if said employee is requested to do so, or unless he/she is unable to work on account of proven illness or unless absence is mutually agreed to.

\* \* \*

#### **ARTICLE 9 - VACATIONS**

All regular full time employees covered by this Agreement shall be entitled to vacation as follows:

Upon completion of one (1) year – six (6) days

Upon completion of two (2) years – twelve (12) days

Regular full-time employees shall be granted an additional regular day of vacation for each year of service commencing with the third (3rd) year, up to a maximum of twenty five (25) days.

Section A. The first year of service means fifty-two (52) weeks of accumulated employment for each week of which the employee has received any wages or is absent on account of injuries received while performing City Police Service. The vacation starting period will be the employee's anniversary date.

\* \* \*

Section D. Regular full-time employees who terminate employment due to retirement shall be entitled to time off or pay for any unused vacation, in addition to any pro-rata vacation time earned since their last anniversary date. Pro-rata vacation time is computed at the rate of 1/12th the employee's last vacation entitlement times the number of months worked since their last anniversary date. Employees who resign shall be entitled to that unused portion of their current year's vacation day accrual.

...

\* \* \*

Section F. The following vacation procedure will be followed in the selection of vacations:

\* \* \*

9. All vacation entitlements must be taken by employees, and no employee shall be entitled to vacation pay in lieu of vacation. Vacation entitlements may be carried over to the following year only upon recommendation of the Police Chief and approval of the City Administrator.

\* \* \*

### **ARTICLE 11 – SICK LEAVE**

\* \* \*

Section B. Sick leave credits may be accrued as follows:

1. All regular full time City Police employees for whom vacation periods are provided shall be given sick leave with pay at the rate of one (1) day for each completed calendar month of compensated service. The term "each completed calendar month of compensated service" shall be construed to mean any calendar month in which the employee has completed thirteen (13) days of compensated service. ...

## **ARTICLE 16 – HEALTH & WELFARE**

As described below, the Employer shall provide a Dental Insurance Plan and Health Insurance Coverage for the employee and the employee's dependents. ... Starting with April 1, 2013, the City shall pay 100% of the lowest premium offered through the Wisconsin Department of Employee Trust Fund under the Deductible HMO Option paired with the Standard Plan or any other insurance plan or carrier selected by the City.

\* \* \*

For any contract year, the City may elect to choose the Wisconsin Department of Employee Trust Fund Traditional HMO Option – Classic Standard Plan (a non deductible plan). In the event the City makes this choice, the Employer shall pay 100% of the lowest premium offered through the Wisconsin Department of Employee Trust Fund under the Traditional HMO Option – Classic Standard Plan.

\* \* \*

Section A. The Employer shall pay the insurance premium for an employee who is absent because of illness or off-the-job injury for six months.

Section B. The Employer will continue to pay the premium for a maximum of twelve (12) months when an employee is absent due to illness or injury incurred while in the performance of his/her duty.

Section C. If an employee is granted a leave of absence and desires to have his/her insurance coverage continued, he/she must pay the Employer, prior to the leave of absence being effective, sufficient monies to pay the insurance premiums for the plan during the period of absence.

Section D. The Employer shall pay the premium for the month in which an employee is laid off and for one (1) month after.

Section E. When an employee is discharged for cause or voluntarily terminates his/her employment, the Employer shall pay the premium for the month in which such termination occurred.

Section F. When a laid-off employee is reinstated, the Employer shall pay the premium for the month in which the employee returns to work.

Section G. When an employee who has been on a leave of absence returns, the Employer shall pay the premium beginning with the month following the employee's return to work.

Section H. If an employee is laid off or pensioned off, the Employer shall agree to accept the monthly contribution from the employee and remit such contribution to the insurance carrier. ..

\* \* \*

### **ARTICLE 25 – MANAGEMENT RIGHTS**

The Association recognizes the City as the Employer and as having the right to hire employees; to demote, suspend or discharge employees for just cause; to establish and enforce reasonable work rules; to supervise and direct the work force; to schedule overtime hours of work; ...

### **ARTICLE 26 – SENIORITY**

Section 1. A newly hired employee shall serve a one (1) year probation any (sic) period. Upon completion of said probationary period, the employee shall be granted seniority rights from the date of original hire. ...

Section 2. Application of Seniority:

\* \* \*

3. Loss of Seniority. Employees shall lose their seniority for any of the following reasons:

- a. Discharge, if not reversed.
- b. Resignation
- c. Absent for two (2) consecutive scheduled workdays without notifying the City of the reason for absence and who has not (sic) legitimate reason for being absent from work, shall be considered as having resigned.



- d. Unexcused failure to return to work after the expiration of a leave of absence or period for which worker's compensation was paid.
- e. Retirement.
- f. On layoff for a continuous period of time equivalent to twelve (12) or more calendar months.

## **RELEVANT PROVISIONS OF THE DISCIPLINARY AGREEMENT**

### **DISCIPLINARY AGREEMENT**

The City of Edgerton (the "City") and its Police Department (the "Department"), Officer Eugene Dempsey ("Dempsey"), and the Wisconsin Professional Police Association (the "Association") enter into this Disciplinary Agreement (the "Agreement"). Dempsey is an employee of the City working in the Department, and is a member of the Association. The parties hereby agree as follows:

\* \* \*

- 3. Dempsey will serve a ninety (90) work-day unpaid suspension, to be served consecutively starting on December 16, 2012. The parties agree that Dempsey shall return to active duty on or around April 30, 2013. During this suspension, the City agrees that Dempsey shall be allowed to engage in gainful employment outside of the City's employment, with the permission of the Chief, which permission shall not be unreasonably denied. Upon the completion of the suspension and return to active duty, any gainful employment during the period of suspension shall be terminated. Dempsey will be subject to the "good standing" standard set forth in the Policy and Procedure Manual if he desires to obtain any other outside employment. The City agrees that it will continue to provide health insurance to Dempsey during the suspension as it provides to all of the Association's members employed by the City.

## **RELEVANT PROVISIONS OF THE CITY OF EDGERTON PERSONNEL POLICIES AND PROCEDURES MANUAL**

## 5.8 *Paid Vacations*

### **Leave Eligibility**

Annual vacation leave for all employees, except current employees who currently accrue vacation on January 1, shall be earned and be made available based on anniversary date based on the following:

\* \* \*

Vacation leave balances not used prior to year end or the anniversary date shall be forfeited unless the City Administrator approves a carryover of said benefits. No more than 40 hours may be carried over non-cumulative. A request for carry over must be in writing and include a schedule of when the leave will be used within one month of the extension.

\* \* \*

Employees that accumulate 50 or more hours of no pay leave time within a calendar year will have their paid vacation time adjusted on January 1 of the following year. The adjustment will be calculated by the percentage of no pay time taken based on a 2,080 hour work year or prorated if the employee is a part-time employee.

### **DISCUSSION**

Article 9 outlines vacation entitlement. An employee is entitled to vacation “[u]pon completion of one (1) year ...” for the first year with a parallel provision applicable to the second year. Vacation beyond two years is generated “... for each year of service commencing with the third (3rd) year, up to a ... .”

Section A of the vacation provision defines that the first year of service means: “fifty-two (52) weeks of accumulated employment for each week of which the employee has received any wages or is absent on account of injuries received while performing City Police Service.”

The Union contends that entitlement to vacation beyond the first year requires no actual compensable service or time missed due to a work-related injury. In the view of the Union such a requirement is limited to the first year of service. The City believes the definition is appropriately applied to all references to service. The contract does require a year of service to earn vacation days. If the Union is correct, the term service, as applied to years 2 through 25 is not defined.

The question raised in this proceeding is how much vacation, if any, did the Grievant earn while on suspension.

The parties use the term “year of service” in defining how an employee accrues vacation. On its face, the term service conjures up an image of active performance of work. What makes this term ambiguous is the context. Section A defines the first year of service. It is an odd sentence if the parties intended the definition to be applicable to all service as used in the vacations article.

The collective bargaining agreement addresses other potentially implicated benefits with a more precise specificity. To qualify for holiday pay an individual must “work the regular work day immediately preceding or following the holiday.” Sick leave is awarded for “each completed calendar month of compensated service.” To qualify an employee must complete thirteen (13) days of compensated service. Seniority is measured from the “date of original hire.” There are circumstances which cause a loss of seniority which are contractually articulated and not relevant to this proceeding.

Each of these provisions addresses how the respective benefits are handled during a protracted suspension. Each operates in a different manner. None shed light on the vacation accrual dispute.

The discipline agreement is generally silent as to the application of benefits to Dempsey during the period of suspension. The single exception is the specific provision of health insurance. Article 16 addresses health insurance. The article provides health insurance for “the employee.” There is no dispute that Dempsey remained an employee through the period of suspension. His ability to obtain outside employment during the period of suspension was regulated by the City’s Policy and Procedure Manual.

The parties took pains to indicate that health insurance would be provided during the period of suspension. They did so though there is little ambiguity that Dempsey was entitled to health insurance so long as he maintained his employee status. The health insurance article is less ambiguous than is the vacation article. I understand it is also more important.

The City has a policy and procedures manual. It is intended to be applicable to all employees, though it defers to the terms of a collective bargaining agreement where applicable. The manual provides, in essence, that employees who accumulate fifty (50) or more hours of no pay time will have their vacation prorated. This provision drove the City decision in this matter.

Taken together, I believe the collective bargaining agreement and the policy and procedure manual support the City. I think the most reasonable reading of the collective bargaining agreement is that service is required to accrue vacation. I agree that service is not defined. I do believe it means more than employee status without performance of work or being on paid or injury status. The policy and procedure manual provides a definition. All parties were on notice of the manual and its definitions.

The definition is compatible with the requirement that vacation is awarded for service. It is also compatible with the inference of service for vacation earned beyond year one. It reasonably addresses the definition of service beyond one year, and is consistent with all provisions of the collective bargaining agreement.

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin, this 1st day of October 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Arbitrator