

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

WINNEBAGO COUNTY DEPUTIES' ASSOCIATION,
THE LABOR ASSOCIATION OF WISCONSIN, INC. (LAW)
and

WINNEBAGO COUNTY

Case ID: 528.0007

Case Type: MA

AWARD NO. 7952

Appearances:

Benjamin Barth and Doug Nelson, Labor Consultants, The Labor Association of Wisconsin, Inc., 11430 W. Bluemound Road, Suite 104, Wauwatosa, Wisconsin, appearing on behalf of the Association.

Michael Collard, Director of Human Resources, 112 Otter Avenue, P.O. Box 2808, Oshkosh, Wisconsin, appearing on behalf of the County.

ARBITRATION AWARD

The Winnebago County Deputies' Association, The Labor Association of Wisconsin, Inc. (LAW), and Winnebago County jointly requested that the Wisconsin Employment Relations Commission assign me to serve as arbitrator to resolve the Mark Binder vacation grievance. The Commission honored that joint request. Hearing was held in Oshkosh, Wisconsin, on May 21, 2018. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed on July 13, 2018. Having considered the evidence, arguments of the parties and the record as a whole, the undersigned issued the following Award.

ISSUE

The parties stipulated to the following issue:

Did Winnebago County violate the collective bargaining agreement when it denied Mark Binder's vacation request for November 15-17, 2018? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2016-2018 collective bargaining agreement contains the following pertinent provisions:

**ARTICLE 2
MANAGEMENT RIGHTS**

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section 111.70.

* * *

**ARTICLE 15
VACATIONS**

As hereinafter provided, all employees shall be entitled to a vacation and shall earn annual vacations.

Persons hired shall earn vacation as of January 1 of each succeeding year. Vacation earnings shall be prorated for the first partial year of service based upon the number of full months completed.

For purposes of determining future year's vacation eligibility, the first partial year of service shall be treated as a full year.

The vacation schedule shall be as follows:

Forty-eighty (*sic*) (48) hours of time off with pay after one (1) year of continuous service;

Ninety-six (96) hours of time off with pay after three (3) years of continuous service;

One hundred forty-four (144) hours of time off with pay after seven (7) years of continuous service;

One hundred ninety-two (192) hours of time off with pay after twelve (12) years of continuous service.

Two hundred forty (240) hours of time off with pay after seventeen (17) years of continuous service.

Vacation time may be used in increments of one hour or more in accordance with Department policy.

To determine the total years of continuous service, such service shall be deemed to have commenced as of the last date the employee was hired by the County provided, however, a starting date with the Sheriff's Department in a position covered by this Agreement shall be used to determine the department seniority which shall be the criterion for determining vacation selection by seniority within the bargaining unit regardless of rank.

Such service shall not be considered interrupted while the employee is on military leave, leave of absence without pay, layoff, or while the said employee is receiving weekly, temporary disability benefits pursuant to the Workers' Compensation laws of the State of Wisconsin for an injury which occurred while in the employ of Winnebago County.

If an employee has been on military leave, leave of absence without pay, layoff or receiving weekly, temporary disability benefits pursuant to the Workers' Compensation laws of the State of Wisconsin for an injury which occurred while in the employ of Winnebago County, for more than thirty (30) days during the period used to determine his annual earned vacation, he shall receive prorated vacation on the basis of one-twelfth (1/12th) of his total allowable annual vacation for each calendar month of completed service during the said annual period.

Any employee who terminates his employment, or has his employment terminated for any reason, shall be compensated for all earned vacation time unused as of the date of termination. The employee shall reimburse the County for any vacation time taken but not earned as the time of his termination.

Up to one-half of an employee's annual vacation may, if unused by December 31st of each year, be converted into pay issued in January of the subsequent year. If the employee so requests in writing by a date established by the Department, up to five (5) unused vacation days may be carried over to the subsequent year rather than being paid out. Any vacation carried over must be used by March 31st, and if not used by that date will be lost and not paid out.

BACKGROUND

The County operates a sheriff's department. The Association is the exclusive collective bargaining representative for certain sheriff's department employees, including Mark Binder.

In the fall of 2017, Sergeant Tom Makurat requested, and was granted, vacation for November 15 through 17, 2018. After that happened, Makurat moved to a different shift in a different department. Following normal practice, Makurat's previously approved time off request of November 15 through 17, 2018 moved with him to his new shift and department.

The time period just referenced is in high demand because of the Wisconsin gun deer hunting season. The transfer of Sergeant Makurat's vacation to his new schedule and department opened up an opportunity for another employee to be granted time off on those days.

Two employees in the corrections division wanted to take the vacation dates that became available when Makurat moved to a different shift and department. The two employees were Mark Binder and James Nozar. Binder started with the department in 1995 and Nozar started with the department in 2007. Previously, both Binder and Nozar had wanted to take time off on November 15 through 17, 2018, but had been blocked from doing so because Makurat had already requested, and been granted, those days off.

The person who is responsible for managing time off requests for the corrections division is Administrative Sergeant Raemy Parent. On November 22, 2017, Binder asked Parent if the dates of November 15 through 17, 2018 had become available to take off, and Parent confirmed that those dates would become available later that day after she (Parent) officially posted the changes to Makurat's schedule on the overall schedule for the corrections division.

FACTS

Employees who want time off have to submit a form known as the multi-purpose form (MPF). To do that, they complete the form and identify the dates they want off; then, they time stamp the form and put it into a locked box on Parent's desk.

Parent posted the changes to Makurat's schedule at 11:00 a.m. on November 22, 2017.

Two minutes after the changes to Makurat's schedule were posted, Binder completed a MPF requesting time off on November 15 through 17, 2018. His request for time off was time-stamped at 11:02 a.m. However, as will be noted below, Binder did not put this MPF into the locked box at that time.

Three minutes after the changes to Makurat's schedule were posted, Nozar completed an MPF also requesting time off on November 15 through 17, 2018. His request for time off was time-stamped at 11:03 a.m. This MPF was placed into the locked box.

When Binder time-stamped his MPF requesting time off on November 15 through 17, 2018 at 11:02 a.m., he did not have any paid time off available to use for November 15 through 17,

2018, because all of his 2018 vacation allotment had been approved for other vacation days. To address that situation, Binder completed a second MPF, this one requesting cancellation of previously granted time off covering October 19 through 21, 2018. This second MPF from Binder was time-stamped on November 22, 2017, at 3:27 p.m.

Binder then paperclipped his 3:27 p.m. MPF to his 11:02 a.m. MPF and put them in the locked box together sometime later that day. By paperclipping the two forms together, it was Binder's intent to cancel his already approved vacation on October 19 through 21, 2018, and use those three days of vacation instead on November 15 through 17, 2018.

The next day, Parent opened the locked box and processed the time off requests contained therein. She first considered Binder's request time-stamped 11:02 a.m. and denied that request because as of that time (i.e. 11:02 a.m. on November 22, 2017), Binder did not have any unscheduled 2018 vacation time available. When she denied Binder's request, Parent understood that Binder wanted to cancel his previously granted vacation on October 19 through 21, 2018, and use those three days of vacation on November 15 through 17, 2018. Parent next considered Nozar's request, time-stamped 11:03 a.m. Since Nozar did have unscheduled 2018 vacation time off available, Parent granted Nozar's request.

On November 30, 2017, Binder talked to Captain Christie, who is in charge of the corrections division, about his request for vacation on November 15 through 17, 2018 being denied. Christie confirmed Parent's decision to deny Binder's time off request for those dates.

The Association filed a grievance challenging the denial of Binder's time off request for November 15 through 17, 2018. The grievance was ultimately appealed to arbitration.

DISCUSSION

At issue here is whether the County violated the collective bargaining agreement when it denied Binder's vacation request for November 15 through 17, 2018. The Association contends that it did while the County disputes that assertion. Based on the following rationale, I answer that question in the negative, meaning I find that the County did not violate the collective bargaining agreement by its actions herein.

This case involves a vacation denial, so I'm first going to look at the vacation article (Article 15). That article goes into great detail about how employees earn vacation. In the context of this case though, we are not concerned with how employees earn vacation. This case involves how vacation time can be scheduled and/or used. A review of Article 15 indicates that it has just one sentence that says anything about using vacation time, and it's the sentence that says: "Vacation time may be used in increments of one hour or more in accordance with Department policy." That sentence is inapplicable here. Thus, there isn't any language in Article 15 that is determinative in resolving this dispute.

Since Article 15 does not address how vacations are granted, the next question is whether there is any document that addresses that point. There is, but it's not in the collective bargaining agreement. It's a directive issued by the sheriff's office. The directive in question - #2.04-02 - establishes uniform guidelines for requesting and granting time off. That directive sets out a multi-stage procedure by which employees make their vacation requests. Under the first stage, each employee picks his or her first two weeks of vacation in order of seniority. After this is completed, employees again have the opportunity, in order of seniority, to pick additional full weeks of vacation. After full week selections have been completed, employees have the opportunity to select half weeks of vacation, again by seniority. Picks of vacation weeks and half-weeks by seniority take place during a specified period of time in the fall of each year for vacations to be taken in the upcoming calendar year. Any requests for time off that are made after this process has closed are handled on a first-come, first-served basis, without regard for seniority.

Requests for time off are generally granted subject to two conditions: (1) the employee must have vacation time, holiday time, or compensatory time available to be scheduled; and (2) there are limits to the number of employees in various categories who can be granted time off for any day and shift. Particularly relevant in this case is the requirement that only one jail supervisor (sergeant or corporal) can take off on any shift. Court services staff are considered to be their own category subject to their own limits for time off that are separate from the general corrections employees.

Pivoting back to the collective bargaining agreement, since there is no language in Article 15 that deals with denying time off requests – which is involved here – both sides instead reference the contractual management rights article (Article 2). A review of that article indicates it does not expressly impose a requirement on the County to exercise its' management rights in a reasonable manner. However, for the purpose of discussion herein, it is assumed that it does. Building on that premise, the Association argues that the County exercised its' management rights in an unreasonable manner when it granted Nozar's request for the coveted time off period of November 15 through 17, 2018. According to the Association, Binder's request for that time off should have been granted (rather than Nozar's request).

To support that premise, the Association relies on the fact that Binder's first MPF was time-stamped a minute earlier than Nozar's. That's true; Binder's first MPF was time-stamped at 11:02 a.m. and Nozar's was time-stamped at 11:03 a.m.

It would be one thing if the facts just referenced were the only facts pertinent herein. However, there are more facts that are pertinent to this matter than just than those referenced above. What I'm referring to, of course, is the fact that when Binder time-stamped his first MPF at 11:02 a.m. on the date in question, he did not have any more 2018 vacation time available. All of his 2018 vacation time had previously been approved for other time off. To address that, Binder asked (via his second MPF time-stamped at 3:27 p.m. that he clipped to his first MPF) that some of his previously granted time off be cancelled, thereby freeing up vacation time for him to use on the November 15 through 17, 2018 dates.

I find it was not unreasonable for the County to decline to bootstrap Binder's second MPF to his first MPF. Here's why. Processing each MPF separately in order of the time-stamp ensures consistent application of the first come, first served system that applies to this type of vacation request under the County's multi-stage vacation selection procedure. Binder's first MPF (i.e. the one time-stamped at 11:02 a.m.) was not complete at that time (meaning at 11:02 a.m.) or capable of being granted at that time because he had no 2018 vacation time available to use. Said another way, Binder's vacation request time-stamped at 11:02 a.m. was not capable of being granted until some of his previously granted 2018 vacation time was cancelled. To accomplish that, Binder filed a second MPF which asked for that to occur (i.e. to cancel some previously granted 2018 vacation time.) The time-stamp on that second MPF was 3:27 p.m. One way of putting it is that Binder's vacation request time-stamped at 11:02 a.m. was not a clean request because he did not have 2018 vacation time still available as of 11:02 a.m. on that date to be used. In contrast though, Nozar's time off request was clean at the time he time-stamped it (i.e. 11:03 a.m.) because he had 2018 vacation time still available to be used. Under these circumstances then, I find that Nozar's time off request time-stamped at 11:03 a.m. controls because his request was complete at that time. Binder's time off request time-stamped at 11:02 a.m. was not completed though until the cancellation of previously granted vacation time occurred. What the Association essentially wants me to do here is to treat both of Binder's MPFs as one document rather than as two documents. I could do that if the two MPFs had identical time-stamps. However, they don't. There is more than a four-hour time difference between the two time-stamps. That being so, Binder's second MPF (i.e. the one time-stamped at 3:27 p.m.) cannot be bootstrapped to Binder's first MPF (i.e. the one time-stamped at 11:02 a.m.) so as to make the first time-stamp apply to the second MPF. Doing that would make the time-stamp on the second MPF meaningless. I decline to do that.

Next, I address the following Association arguments.

First, the Association notes that Binder has more seniority than Nozar. However, seniority is not a factor here. While seniority is involved in the initial vacation selection process, this case instead falls under the first come, first served process which applies to later vacation picks.

Second, the Association contends that Binder's first MPF should have been granted because at the time of his request (i.e. November 22, 2017), he had not actually used any of his 2018 vacation. That's true; he had not. However, if the County allowed employees to have any number of vacation days approved for the future, as long as the vacation benefit had not yet been actually used, it could lead to a system where employees would sign up for as much vacation as they wanted, and then decide which days they would actually use much later. There is no evidence in the record that the County has previously allowed that to happen.

Third, both at the hearing and in its initial brief, the Association spent considerable time addressing Deputy Jason Freeman's transfer from the court services division to the corrections division. The Association obviously sees that matter as having relevance here. I don't. In my view, Deputy Freeman's vacation picks had no impact on Binder's vacation request. Binder is a supervisor – while Freeman is not – and only one jail supervisor (either corporal or sergeant) can take off on any shift.

Fourth, in its initial brief, the Association speculates that Nozar might not have had 2018 vacation time available when he made his request for the vacation time at issue. The problem with this claim is that there is nothing in the record to support it. That being so, this claim simply was not proven.

Finally, the Association avers that the County has made exceptions to Directive #2.04-02 in the past for employees, so it should have done that here for Binder. In addressing this claim, it is noted initially that none of the “exceptions” noted in the Association’s reply brief (i.e. weddings, family vacations, and family functions) are part of this record. Even if they had been referenced at the hearing though, the fact that “exceptions” have been granted in the past does not mean that the County was contractually obligated (via a past practice) to make an exception here for Binder. Had the County granted an exception here for Binder (meaning given him the dates off in question), the result to the County would have been a zero sum gain because Binder’s gain would have been equivalent to Nozar’s loss.

* * *

In my view, this case can be summarized thus: The County had two employees in the sheriff’s department who both wanted to take vacation at the same time. The County could not give them both that time off though; instead, just one employee could get it. Per its management rights, the County granted Nozar’s request for that time off because he had 2018 vacation time available when he made that request. In short, his vacation request was complete at the time it was made. In contrast though, Binder’s request was not complete at the time it was made. By that I mean that his request could not be granted until other already granted vacation was cancelled. Under these circumstances, the County’s decision to grant Nozar’s request for the coveted vacation period and deny Binder’s request for the same vacation period, was not an unreasonable exercise of its management rights.

In light of the above, it is my

AWARD

That Winnebago County did not violate the collective bargaining agreement when it denied Marl Binder’s vacation request for November 15 through 17, 2018. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of August, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator