

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
ASHWAUBENON PUBLIC SAFETY OFFICERS' ASSOCIATION
and

VILLAGE OF ASHWAUBENON

Case IDs: 532.0003 and 532.0006

Case Types: MA

(Shawn Wright Grievance and Sick Leave Annual Payout Grievance)

Award No. 7967

Appearances:

Aaron Halstead, Hawks Quindel S.C., Attorneys at Law, 409 E. Main Street, P.O. Box 2155, Madison, Wisconsin 53701, appearing on behalf of the Association.

Tony Wachewicz, Village Attorney, 2155 Holmgren Way, Ashwaubenon, Wisconsin 54304, appearing on behalf of the Village.

ARBITRATION AWARD

The Ashwaubenon Public Safety Officers' Association, hereinafter referred to as the Association, and the Village of Ashwaubenon, hereinafter referred to as the Village or Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances arising thereunder. The Association made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the above-captioned grievances. The undersigned was so designated. A hearing was held on October 15, 2020 via Zoom. The hearing was transcribed. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on December 23, 2020. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award

ISSUES

At the hearing, the parties did not stipulate to the issues to be decided.

The Association framed the issues as follows:

1. Whether the Village violated the 2014-19 CBA and past practice when it changed the hourly rate used to pay out accrued retirement benefits to PSO Shawn Wright; and
2. Whether the Village violated the 2014-19 CBA and past practice when, in January 2020, it changed the hourly rate at which it paid PSOs who had not used all of their sick time in 2019 and who therefore earned additional hours under Article XVI, Section G of the CBA.

The Village framed the issue as follows:

Did the Village violate the parties' CBA when it calculated Officer Shawn Wright and officers' sick leave accrual based upon their annual salaries' hourly rate?

I have adopted the Association's proposed issues. Thus, the issues proposed by the Association will be decided in this case.

PERTINENT CONTRACT PROVISIONS

The parties' collective bargaining agreement (hereinafter CBA) applicable here is dated January 1, 2014 through December 31, 2019. Its cover page denominates it as a "4 year agreement with a 2 – year extension." That CBA contains provisions entitled Sick Leave (Article XVI), Vacation Leave (Article XVII) and Compensatory Leave (Article XIX). None of those provisions are reproduced here. Instead, some contract language is cited later in this Award.

BACKGROUND

Unlike virtually every municipality in the state of Wisconsin, the Village of Ashwaubenon operates a Public Safety Department. This department provides law enforcement, firefighting, and paramedic/EMT services to the community. The employees in the department are known as Public Safety Officers (PSOs). The Association represents the PSOs. Most of the PSOs work a "firefighter-type" work schedule, consisting of a 24-hour shift on and two 24-hour shifts off, rotating throughout the year. The PSOs who work 24-hour shifts are scheduled for road patrol for their first eight hours, where they perform traditional police functions. They spend their remaining 16 hours waiting for fire or paramedic/EMT calls for service.

PSOs are classified as either Line employees or Day employees. A Line employee works 24-hour shifts, one day on and two days off, for a total of 2,920 hours per year. A Day employee ordinarily works eight-hour days, five days per week, for a total of 2,080 hours per year.

Line employees and Day employees accrue sick leave hours at different rates. Line employees accrue sick leave hours at a rate of 216 hours per year. Day employees accrue sick leave hours at a rate of either 154.29 hours per year or 152.98 hours per year, depending on the employee's schedule. Line employees are permitted to bank more unused sick leave hours than

Day employees. The maximum allowed accumulation of sick hours for Line employees is 2160 hours. The maximum allowed accumulation of sick hours for Day employees is 1542.80 hours or 1530 hours.

When a PSO retires, the Village pays out the officer's accrued sick leave, vacation time, and compensatory time.

Further, in January of each year, the Village grants additional vacation days to each PSO who did not use all sick time during the previous calendar year. The number of vacation days credited to a PSO depends on whether he or she is a Line or Day employee, but in either case, at the PSO's option, "that employee shall enjoy the additional days of vacation or pay" as defined in Article XVI, Section G.

In between the years 1999 and 2010, when PSOs retired, the Village paid out their accrued and vested sick time, vacation time and compensatory time at an hourly rate. That rate was calculated by dividing the officer's annual salary at the time of retirement by 2080 hours, regardless of whether the officer was a Line employee or a Day employee. The Village did this for 12 PSOs who retired in that time frame: Langan, Gruen, Raupach, Manthe, McNulty, Molloy, Wiczorek, Madson, Skorczewski, Buntrock, Manahan and Bani. At the time all of these payouts were made, the language in Article XVI, Section E said the following:

An employee who retires under the rules of the Wisconsin Retirement System shall be eligible to receive credit for the dollar value of accrued sick leave, as defined below, to an escrow account for the purpose of paying for healthcare costs after retirement, according to the following schedule, or a cash equivalent payout.

<u>Years of Continuous Employment with the Village</u>	<u>Percent of Payment of Unused Accumulated Sick Leave All Employees</u>
10 years	50%
20 years	60%

In late 2011, when the parties were negotiating a successor CBA, then Village Manager Swanson (who also represented the Village in labor negotiations) raised the topic of Day employees becoming Line employees just before the time of their retirement. When this happened, the Day employee (whose sick leave would otherwise be capped at 1542.80 hours or 1530 hours) would instead receive up to a maximum of 2160 hours of sick leave because that was the maximum allowed accumulation for Line employees. Swanson told the Association's negotiators that she viewed this end-of-career Day to Line position switch as a "loophole" that she wanted to close. She then proposed new language that she thought would stop that perceived problem. The language which the Village proposed stated: "Retirement pay out to be calculated based upon hours accrued

during the various schedules – for example 20 year career and 15 year career A shift and the 5 years as school liaison would be calculated using 75% on 24 hour accrual and 25% on 8 hour accrual.”

The Association’s counter proposal incorporated Swanson’s proposal, but exempted existing Day employees from the Village’s proposal, meaning that then-current Day employees would be allowed to post into a Line position at the time of retirement and receive payout of up to 2160 hours of sick leave.

The Village and the Association eventually reached a tentative agreement for the 2012-2013 CBA. The tentative agreement stated in pertinent part:

Retirement pay out to be calculated based upon hours accrued during the various schedules – for example 20 year career and 15 year career A shift and the 5 years as school liaison would be calculated using 75 % on 24 hour accrual and 25% on 8 hour accrual. Officers Penza, Ness, Cali and Lawler would be grandfathered and calculated under the current system.

The parties’ placed this new contract language in Article XVI, Section E of their 2012-2013 CBA. After doing that, the new contract language said:

An employee who retires under the rules of the Wisconsin Retirement System shall be eligible to receive credit for the dollar value of accrued sick leave, as defined below, to an escrow account for the purpose of paying for healthcare costs after retirement, according to the following schedule, or a cash equivalent payout. Retirement payouts shall be calculated based upon length of service in each shift accrual method. For example, if the employee works 20 years with 15 years on a 24 hour shift accrual method and 5 years on an 8 hour accrual method, 75% of the payment is based upon the 24 hour shift accrual and 25% is based upon the 8 hour accrual method. The prorated service calculation shall not apply to Officers Penza, Ness, Cali and Lawler upon their retirement.

Years of Continuous Employment with the Village	Percent of Payment of Unused Accumulated Sick Leave All Employees
10 years	50%
20 years	60%

The underlined language is the new language which was inserted and the language which is not underlined was existing contract language. (*Note:* The new language was not underlined in the CBA; it is underlined here simply to emphasize the new language).

The Association’s president at the time this language was negotiated, who was also on the Association’s bargaining team (Michael Haines) testified that at no time during those negotiations did Swanson ever indicate that the Village was seeking to change the **hourly rate** at which sick

time or other accrued leave benefits would be paid out at the time of a PSO's retirement. According to Haines, the parties "[n]ever talked about pay rate." Rather, the negotiation and subsequent language in Article XVI, Section E "had everything to do with the conversion of hours." Haines' testimony was not contradicted by any Village witness.

After the language quoted above was included in the parties' 2012-2013 CBA, it was not changed in the parties' 2014-2017 CBA. In late 2013, the parties signed a successor CBA, covering 2014-2017. As just noted, that CBA did not change the sick leave language in Article XVI, Section E. In May 2016, the parties signed a two-year extension of the 2014-2017 CBA. The 2014-2019 extension agreement contains the same language:

An employee who retires under the rules of the Wisconsin Retirement System shall be eligible to receive credit for the dollar value of accrued sick leave, as defined below, to an escrow account for the purpose of paying for healthcare costs after retirement, according to the following schedule, or a cash equivalent payout. Retirement payouts shall be calculated based upon length of service in each shift accrual method. For example, if the employee works 20 years with 15 years on a 24 hour shift accrual method and 5 years on an 8 hour accrual method, 75% of the payment is based upon the 24 hour shift accrual and 25% is based upon the 8 hour accrual method. The prorated service calculation shall not apply to Officers Penza, Ness, Cali and Lawler upon their retirement.

<u>Years of Continuous Employment with the Village</u>	<u>Percent of Payment of Unused Accumulated Sick Leave All Employees</u>
10 years	50%
20 years	60%

As has already been noted, when PSOs retired in the decade from 1999 to 2010, the Village paid out all their accrued and vested sick time, compensatory time, and vacation time at the same hourly rate for all retiring PSOs, regardless of whether the officer was a Line employee or a Day employee. That rate was calculated by dividing the officer's annual salary at the time of retirement by 2080 hours.

After the contract language in Article XVI, Section E changed in 2012, the Village did not change how it paid out leave to PSOs at retirement. Specifically, it continued to pay out all their accrued and vested sick time, compensatory time and vacation time at the same hourly rate for all retiring PSOs, regardless of whether the officer was a Line employee or a Day employee. That rate was calculated by dividing the officer's annual salary at the time of retirement by 2080 hours. This pattern continued through the decade. The record shows that between 2012 and 2017, five PSOs retired and one was terminated. For each of these officers, the Village paid out their accrued and vested sick leave, vacation time, and compensatory time at an hourly rate equal to the officer's annual salary at retirement (or other separation from employment) divided by 2080 hours,

regardless of whether the retiring officer was a Line employee or Day employee. The PSOs who retired (or were terminated) in this timeframe were as follows:

Tom Benike was terminated on May 21, 2012. He was a Line employee for all of his employment. The Village paid out his sick leave, vacation pay, and compensatory time at the same hourly rate, \$34.32.

Kris Vervaeren retired on December 31, 2014. He was a Line employee for all of his employment. The Village paid out his sick leave, vacation pay, and compensatory time at the same hourly rate, \$42.78.

David Mather retired on December 15, 2015. He was a Line employee for all of his employment. The Village paid out his sick leave, vacation pay, and compensatory time at the same hourly rate, \$35.23.

Mark Thiry retired on June 4, 2016. He was a Line Employee for all of his employment. The Village paid out his sick leave, vacation pay, and compensatory time at the same hourly rate, \$44.30.

Kevin Larson retired on July 1, 2016. He was both a Line employee and a Day employee during his employment with the Village. In an email to Officer Larson, Swanson told PSO Larson “your hourly rate is \$33.86” and paid out his sick leave, vacation pay, and compensatory time at the same hourly rate, \$33.90, without any differentiation between hours accrued as a Day employee and a Line employee. (*Note: The record does not explain why there is a four-cent difference between these two numbers.*)

Donald Penza retired on June 1, 2017. He was one of the PSOs grandfathered in the parties’ 2012 agreement. The Village paid out his sick leave, vacation pay and compensatory time at the same hourly rate, \$36.25.

As noted above, in all six of these instances between 2012 and 2017, the Village paid out the retiring PSOs accrued leave benefits (whether sick time, vacation time and compensatory time) at an hourly rate derived by dividing the officer’s annual wage by 2080 hours as it had been doing since the year 1999. Thus, for about 20 years, when a PSO retired, the Village did not make a distinction with respect to the hourly rate that was dependent on whether the PSO had served as a Line or a Day employee. All PSOs had their annual wage divided by 2080 hours. That changed when Luke Pasterski retired in 2019.

Pasterski, who was formerly a member of the bargaining unit, retired in the spring of 2019 as a supervisory employee. A PSO who is promoted to, and later retires in a management position has the right to payout of all unused sick, vacation or compensatory time accrued as a bargaining unit member. When the Village paid out Pasterski’s vested sick, vacation, and compensatory time hours at the time of his retirement, it did not pay them out at an hourly rate equal to his annual salary divided by 2080; rather, for the first time, it used an hourly rate for the sick and vacation hours that was dependent on the officer’s annual work hours (in Pasterski’s case 2920 hours since

he was a Line employee). Doing this resulted in Pasterski's payout being substantially less than what Pasterski was expecting. Pasterski disagreed with his payout and contended that his hourly rate should be determined – as it had in all prior PSO retirements for the past 20 years – by dividing his final annual salary by 2080 hours regardless of whether the retiree was a Line employee or a Day employee. Thus, Pasterski objected to Swanson's decision to not pay out his accrued sick leave, vacation time, and compensatory time at the same hourly rate, as it had for all other preceding retirees. Pasterski's objection to his proposed payout eventually made its way to the Village Board. As part of his appeal, Pasterski submitted a letter in support of his view that the Village had treated him unfairly vis a vis those PSOs who had retired previously, and had their hourly rate determined by having their final annual salary divided by 2080 hours. In his letter, Pasterski averred that Swanson:

changed the formula on how the benefits are calculated based on what she thought our true hourly rate was, this was done without negotiations or communication with anyone or notification of such. The Village has been paying out benefits using the same formula, using the hourly rate for sick time, vacation and comp time, for the past 20 years and for approximately 30 retirees. I always understood that the Village would pay out my benefits at the regular hourly rate, following the longstanding past practice

On March 26, 2019, the Village met in a closed session to discuss Pasterski's objections. When the Board received Pasterski's letter objecting to Swanson's decision, no one verified whether he had accurately described the Village's past practice of paying retiring officers' PTO benefits at a rate equal to their annual salary divided by 2080 hours. Swanson told the Board that using 2080 hours to calculate retirement payouts - as the Village had been doing - was a mistake that had not been discovered till Pasterski's retirement. The Board ultimately voted 3-2 to reject Pasterski's objection and to adopt Swanson's change to retirement payouts. The minutes from the Board's closed session meeting describe "present contracts, past pay-out practices and position comparables," as the topics that were discussed before the vote was taken. Prior to this vote, the Village Board had never taken a vote to decide the hourly rate at which a retiring PSO's benefits would be paid out. Since Pasterski was not a member of the bargaining unit, the Association could not grieve this action.

FACTS

On August 2, 2019, a member of the bargaining unit – Shawn Wright – retired. When he did, the Village paid out his accrued sick leave, vacation time and compensatory time the way it had calculated Pasterski's payout. During his employment with the Village, Wright worked 108.9 months as a Line employee and 18.2 months as a Day employee. When Wright used sick leave, vacation time, and compensatory time as a Line employee, the Village compensated him at an hourly rate equal to his annual salary divided by 2,080. At retirement though, the Village paid out Wright's accrued and vested sick leave, vacation time, and compensatory time as follows:

Category	Hours	Vested Percentage	Vested Hours	Hourly Rate	Payout Amount
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Sick Time – 8 Hr	1.84	50%	0.92	\$37.53	\$34.53
Sick Time – 24 Hr	15.42	50%	7.71	\$26.73	\$206.09
Vacation Accrual	182.00	100%	182.00	\$26.73	\$4,864.86
2019 Vacation	-	100%	-	\$26.73	-
Comp Time	-	100%	-	\$26.73	-
Holiday Pay Offset					-\$3,137.82
Total					\$1,967.66

When the Village paid out Wright’s retirement benefits the way it had paid out Pasterski’s retirement benefits (i.e. by dividing his salary by 2920 hours instead of 2080 hours) it did not communicate with the Association about its newly adopted retirement payout method. Additionally, the Village did not seek to negotiate the change with the Association.

After Wright’s August 2019 retirement, the Village also applied its newly adopted retirement payout method to the payment of vacation time PSOs are eligible to elect under Article XVI, Section G of the 2014-19 CBA. Under that clause of the CBA, PSOs who have not used all of their available sick time in a calendar year have the option to convert some of those unused sick hours to additional vacation days, which they may either use (by taking additional days off) or convert to vacation days that are then paid out as wages. The Village makes these annual payments in January of each year to those PSOs who elect to take the converted sick-to-vacation hours as cash. In January 2020, for the first time, the Village paid Line employees’ converted sick time at the same, lower hourly rate it had applied to a portion of PSO Wright’s sick time benefits at the time of his retirement. Before reducing the hourly rate of these annual payments to bargaining unit members on January 1, 2020, the Village did not communicate with the Association about this change. Additionally, the Village did not seek to negotiate the change with the Association.

The Association subsequently filed two grievances concerning the matters referenced above. In one, the Association alleges that the Village used an improper hourly rate to pay PSO Wright for the categories of PTO described as “Sick Time - 24 Hr” and “Vacation Accrual” in his retirement payout. In the other, the Association alleges that the Village used that same improper rate in January 2020 when making the annual payouts under Article XVI, Section G to a bargaining unit member who opted to receive pay rather than time off for unused 2019 sick time. Per the agreement of the parties, the grievances were consolidated for the purpose of hearing and decision.

DISCUSSION

During their employment, both Line and Day employees accrue various benefits that can be paid out at retirement. The amount of accrued benefits that employees get at retirement is not in dispute here. Instead, the only disputed issue is the rate of pay used to calculate the retiree’s final payout amount. The Association contends that the PSO involved here (Wright, who was a Line employee) should be paid at an hourly rate which divided his annual salary by 2080 hours.

The Village disagrees, and contends that his annual salary should be divided by 2920 hours (which is the number it used) because doing that reflects his “actual hourly rate”. For the reasons set forth below, I find that the number 2080 should have been used in determining Wright’s payouts, not 2920.

It would be one thing if this was the very first time a PSO had retired and the parties were faced with the question of how to calculate the hourly rate for a retiree’s final payout amount. If that was the situation here, the undersigned might have found the Village’s number persuasive. However, that is not the factual situation present here and that is crucial to the ultimate outcome. The factual situation present here is this: over the course of two decades and multiple CBAs prior to August 2019, when PSOs retired, the Village used a certain formula to pay out their accrued and unused leave balances for three categories of PTO (paid time off), namely, sick leave, vacation time and compensatory time. In the 17 retirements referenced in the record that occurred between 1999 and 2017, the Village had paid out the retiree’s leave balances at an hourly rate derived by dividing the retiring officer’s final annual salary by 2080 hours, regardless of what position he or she held during his or her employment or at the time of retirement. Further, in January of each year, pursuant to a schedule set forth in Article XVI, Section G, of the CBA, the Village has always paid vacation hours accrued under Article XVI, Section G, pursuant to that same formula (i.e. using the figure of 2080 hours) regardless whether the previous year’s sick leave was accrued as a Day employee or a Line employee.

In 2019 and 2020, the Village changed these consistent and uninterrupted pay practices. Here is what happened. When PSO Wright retired in August 2019, the Village paid his accrued sick leave and vacation time balances by dividing his final salary by 2920 hours. As noted above, the Village previously had paid retiring PSO’s benefits at an hourly rate calculated by dividing their salary by 2080 hours. Then, in January 2020, the Village used this same lower hourly rate (i.e., dividing salary by 2920 hours) when it paid PSOs who had opted to take cash payments for the sick time they had earned in 2019 under Article XVI, Section G, of the 2014-2019 CBA.

The Village admits that it used a different number (i.e. 2920) in those situations than it had used previously (i.e. 2080), but claims that doing that did not violate the CBA. The Village makes the following arguments to support this contention. First, it contends that the contract language is not silent on the matter involved here as the Association claims, but rather is clear and unambiguous as it relates to the hourly rates to be used herein. Building on that premise, it avers that the arbitrator can decide this case without reviewing the alleged past practice. Second, it disputes the existence of a practice. Third, in the alternative, if there was a practice prior to 2011, the intent of the Village’s bargaining proposal during the negotiations for the 2012-2013 CBA was to change the rate applicable to retirement payouts of sick and vacation time accrued during a Line employee’s shifts. Fourth, the Village contends it inadvertently failed to implement that allegedly agreed upon change over the course of all retirements occurring between 2012 and August 2017. Fifth, the Village contends that after not implementing that new language for more than eight years, it could still implement it when Wright retired, as well as change the hourly rate applicable to the annual payouts under Article XVI, Section G. Finally, in their opening statement, the Village justified its position, and blamed the Association for the circumstances that gave rise to this arbitration by opining:

We're here today essentially because of the Union's view of their entitlements. They believe they are entitled to what's essentially a golden parachute of being paid out at an inflated hourly rate of pay because it's the way things have always been done, which really at the end of the day satisfies the typical public-sector stereotype: It's that way because that's the way it's always been done.

Transcript, page 21.

All these arguments are subsumed into my discussion.

I'm going to start by reviewing the two contract provisions that the Villages relies on: Articles III and XVI, Section E. Article III provides that Line employees work a 24 hour shift and have an average work week of 56 hours while the Day employees work an 8.5 hour shift and have a 40 hour workweek. When those numbers are annualized, Line employees work 2920 hours per year while Day employees work 2080 hours per year. Next, the Village notes that while Line and Day employees work different hours, they are paid the same annual salary. The Village then divides their annual salary from Appendix A by the annual hours required for their position (i.e. 2920 for a Line employee and 2080 for a Day employee) to get what it calls the employee's "actual hourly rate." After doing that, the Village notes that the actual hourly rate for a Day employee is higher than the actual hourly rate for a Line employee because a Day employee works fewer hours per year than a Line employee. As the Village sees it, it is clear and unambiguous that Article III mandates that this "actual hourly rate" be used to calculate an employee's accrued hours at retirement. Then, applying that rate to the facts involved here, the Village avers that since Wright was a Line employee, his hourly rate was to be calculated by dividing his final salary by 2920 hours (which is what it did). The Village also contends that Article XVI, Section E supports that conclusion too. It avers in its reply brief that "the language, formula and example" in that provision makes it clear and unambiguous that a Line employee has their retirement payout calculated by dividing their salary by 2920 hours.

I find otherwise, meaning I find that that language is not clear and unambiguous in that regard. Here's why. Neither of the contract provisions just reviewed say what the Village proffered they said. Specifically, neither provision explicitly says that when Line employees retire, their hourly rate for purposes of paying out their unused PTO is calculated by dividing their salary by 2920 hours, and when Day employees retire, their hourly rate for purpose of paying out their unused PTO is calculated by dividing their salary by 2080 hours. I therefore find that neither of the provisions referenced by the Village definitively addresses the question of which number is to be used to calculate the amount of PTO to be paid out to PSOs at retirement. If either provision did definitively say what the Village just proffered, I suspect I would not be writing this Award.

While I just addressed Articles III and XVI, Section E above, I've also reviewed the rest of the sick leave article, the vacation leave article and the compensatory leave article to see if they address the matter involved here. They do not. I therefore find that this CBA is ambiguous on how

accrued benefits are to be paid out to PSOs at retirement. None of the contract provisions just reviewed clearly and definitively say whether a retiring PSO's salary is to be divided by 2920 hours or 2080 hours to determine their hourly rate. That is also the case regarding the rate that PSOs opting for cash payments under Article XVI, Section G, are to be paid each January.

When a CBA is found to be ambiguous on something, arbitrators routinely look beyond the CBA itself for guidance in determining its meaning. Oftentimes, they consider the parties' past practice. In the labor relations community, the term past practice refers to a pattern of prior conduct that has been consistently undertaken in recurring situations which has evolved into an understanding that the conduct involved is the appropriate course of action. Thus, past practice is a form of evidence commonly used by arbitrators to help them interpret ambiguous contract language. The rationale underlying its use is that the manner in which the parties have applied their agreement in the past provides reliable evidence of its meaning.

The next question is whether the record evidence establishes the existence of a past practice. In their briefs, both sides cite the following standard for determining whether something qualifies as a past practice: it must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Since both parties' used that same standard, that is what I will apply here.

While the Village contends that the way benefits were paid out to retiring PSOs prior to 2017 – where their hourly rate was calculated by dividing their final salary by 2080 hours – does not qualify as a past practice under the standard just noted, I disagree, and find that it does. First, the pay practices in question were unequivocal, both as to retiree pay and the annual payout of sick time converted to vacation pay. Payouts of sick and vacation hours to all retirees (and the one employee fired) during the period 1999 to 2017 – that is, both prior to and following the execution of the 2012-2013 agreement – were at the same hourly rate as the payout of accrued compensatory time, regardless of whether the retiring employee had served as a Day employee, a Line employee, or in both capacities during his career. At all times before January 2020, the Village had also calculated vacation time due to eligible PSOs, under Article XVI, Section G by this same method, namely, division of the officer's annual salary by 2080.

Second, the pay practices in question were clearly enunciated and acted upon. While these pay practices may not have been enunciated in the sense of being reduced to writing, the Village's regular and repeated payments to retiring officers, and to PSOs in January of each year, most certainly were articulated in the dollar amounts reflected in each such officer's paychecks. Additionally, the officers certainly acted upon their understandings each time they gave notice of their retirement or opted for cash payments under Article XVI, Section G.

Third, there is no question that the pay practices on which the Association relies in these grievances – which occurred over the course of two decades – are readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Not only are the 17 retirement payout documents exhibits in the record, but the Village admits that its actions constituted changes to the Village's longstanding pay practices.

The Association therefore established that prior to 2017, there was a clearly understood practice concerning how payouts were made to PSOs at retirement. It was this: the Village paid out their accrued and unused PTO at an hourly rate calculated by dividing the employee's final salary by 2080 hours, both as to payments at the time of an officer's retirement and when officers opted for cash payments of vacation time under Article XVI, Section G.

The focus now turns to the Village's main theory of the case. According to the Village, even if there was previously a practice of using 2080 hours as the basis to determine the hourly rate, it should not be enforced anymore because 1) its November 2011 contract proposal - which was ultimately adopted in bargaining and incorporated into the 2012-2013 CBA - was intended to reduce the hourly rate at which the Village paid out accrued sick leave hours to retiring PSOs, but that 2) the Village failed to implement this new purportedly agreed-upon reduction in the hourly rate until 2019, due to repeated oversights on its part. I reject both contentions for the following reasons.

I'm going to address the parties' 2011 bargaining history first. As was noted in the Background section, prior to 2011, what was happening was that Day employees were posting into a Line employee position just before retiring, and in the process, getting a larger payout of sick leave hours. Swanson viewed that as a loophole which she wanted to eliminate. The Village then made the following bargaining proposal to close that perceived loophole:

Retirement pay out to be calculated based upon hours accrued during the various schedules – for example 20 year career and 15 year career A shift and the 5 years as school liaison would be calculated using 75 % on 24 hour accrual and 25% on 8 hour accrual.

Emphasis added.

With the exception of incorporating the Association's counter proposal, which grandfathered-in the then-current Day employees, the Village's proposal was adopted as the successor language to Article XVI, Section E, in the 2012-2013 CBA. It's the Village's position that this new language created a new "proportional conversion formula to equalize each employee's **salary and hourly rate**" (Village Initial Brief, page 9) *Emphasis added.* The Association disagrees, and notes that nowhere in the proposal does it say that there will be a change to the **hourly rate** at which Line employees would be paid for accrued sick and vacation time when they retired. I concur with the Association's reading of the sentence. In my view, the sentence simply pro-rates the hours a PSO accrued if he or she served as both a Line employee and a Day employee during different parts of the PSO's career. There is nothing in the sentence about changing or reducing the hourly rate used for paying out PSO retirement benefits. I therefore find that the Village's November 2011 contract proposal for a change to Article XVI, Section E, in no way either suggested or actually made a change to the hourly rate to be applied to accrued PTO benefits at the time of retirement. Instead it only changed the manner in which officers accrued those hours during their careers, and prospectively stopped what was then happening of Day employees becoming Line employees at retirement to get a larger sick leave payout.

Aside from the language itself, one would think that if it was the parties' intent to change the hourly rate at which the Village would pay out retirees' accrued sick and vacation time, they would have discussed it in bargaining. However, the unrebutted testimony of past Association president Haines shows that did not happen. Specifically, the record shows that at no time during that bargaining did the Village, either in writing or during in-person meetings, propose a change to the hourly rate used for paying out retirement PTO benefits. Finally, the Village points to no evidence that establishes or even suggests that the Association understood Swanson to be proposing a reduction to the hourly rates which would henceforth be used when PSOs retired. It follows from the foregoing that the parties did **not** agree in bargaining the 2012-2013 CBA to reduce the hourly rate at which the Village paid out accrued PTO hours to retiring PSOs. That finding, in turn, means that the language which was changed in the 2012-2013 CBA did **not** reduce the hourly rate to be utilized in calculating PSO retirement benefit payouts.

In so finding, I have considered the Village's claim that it intended to propose a reduction to the hourly rates via its 2011 bargaining proposal, but that it was simply inartful or inarticulate in expressing that intent. Even if that was the case, basic arbitral principles do not permit one side's intended meaning to justify changing its actual meaning nearly a decade after the 2012-2013 agreement was signed. I therefore decline to use the Village's now stated intent about its 2011 bargaining proposal as a basis for reforming the parties' CBA to allow the number 2920 to be used instead of 2080 when determining PTO retirement payouts.

Although I just found that the change to the 2012-2013 contract language did not give the Village the contractual right to reduce the hourly rate applied to accrued PTO benefits at the time of retirement, I'm still going to address the Village's related claim that it erred when it did not implement what it thought were the new hourly rates that were allegedly agreed upon in 2011 until 2019 (when Wright retired). I find that the Village's actions after January 1, 2012 (i.e. the effective date of the 2012-2013 CBA) belie the Village's claim that its November 2011 bargaining proposal was intended to change the hourly rate at which sick or other PTO benefits were paid out at the time of a PSO's retirement. Said another way, the Village's inaction after that date contradicts its claim that its November 2011 proposal was meant to reduce the hourly rate at which those benefits were paid out. That is because from January 2012 until 2017, in five retirements and one termination, the Village continued to pay PTO benefits under Article XVI Sections E and G in the same way that it had always done up to the time of that 2011 proposal (i.e. annual salary divided by 2080 hours). These retirements/separations are significant, because in all six instances the Village paid out all accrued PTO at the same rate even where the retiring/separating PSO had worked as both a Day employee and a Line employee. Thus, the practice did not change after different contract language was negotiated in 2011 and inserted into the 2012-2013 CBA. That establishes that until PSO Wright's retirement, all other retirees continued to receive payouts as they had before the 2012-2013 agreement was signed, and all officers continued to receive their January annual sick leave/vacation payments under Article XVI, Section G, as they had before that agreement's execution (i.e., their final salary being divided by 2080 hours). The Village's

argument about the alleged intent of its bargaining proposal is simply inconsistent with its conduct after the execution of the 2012-2013 agreement.

As part of this same argument, the Village also contends that it simply made a mistake in making all those retirement payouts after 2011, and that it did not discover until 2019 that it was paying out retirement benefits for Line employees at what it calls the "Overtime Pay Rate" rather than what it calls the employee's "Actual Hourly Rate." I do not find that claim persuasive for the following reasons. First, it's hard to accept that having (allegedly) specifically bargained in 2011 for a reduction in the hourly rate paid for PTO benefits accrued as a Line employee, the Village then failed to implement it for eight years due to human error, inattention or ill-equipped software. That is especially so given that both Village Manager Swanson and Finance Director Wenholz were employed before the 2012-2013 CBA negotiations and at the time all those payouts were made from 2012 to 2017. Second, in 2016, Swanson herself examined the retirement payouts to be made to PSO Kevin Larson providing him with a worksheet showing how many months he had worked as a Line employee and as a Day employee, and explaining that he would be paid \$33.86 per hour for his accrued vacation and sick benefits. Then she sent him a confirming email. Aside from confirming Larson's retirement payout that email also had these practical implications. First, it showed that Swanson was personally aware that the hourly rate that had allegedly been changed as a result of the 2011 bargaining had not, in fact, changed (meaning it was still the same as it was before the 2012-2013 CBA was implemented). Second, it also showed that the Village's practice of paying retiring PSOs at the same hourly rate for all PTO benefits (i.e. dividing their final salary by 2080 hours) regardless of their assignment at the time they accrued those hours (i.e. Day vs Line) was continuing. I therefore decline to use any unilateral Village error or mistake as a basis for reforming the parties' CBA to allow the number 2920 to be used instead of 2080 when determining PTO retirement payouts.

In sum then, the CBA is ambiguous concerning whether a Line employee's retirement payout is to be calculated by dividing by 2080 hours or 2920 hours. A past practice answers that question. Specifically, the Association established that the parties had a longstanding practice, prior to Wright's retirement, of paying retiring PSOs' benefits at an hourly rate calculated by dividing their final salary by 2080 hours. That past practice clarifies ambiguous contract language. Neither the language of the parties' 2012-2013 CBA, the bargaining proposals that led to it, nor the Village's payout to retirees after it was signed reflect an intent to modify that practice. Because of the foregoing, the practice is entitled to contractual enforcement. The Village's departure from that practice, as reflected in both Wright's payouts and in the January 2020 payments for unused 2019 sick time where the Village calculated an hourly rate by dividing their salary by 2920 hours, violated the CBA as it has come to be interpreted by the parties themselves.

If the Village wants to end this practice because it believes that using 2080 hours to make PTO retirement payouts results in payouts that defy common sense, are excessive and constitute a "golden parachute," then it can change it at the bargaining table. However, until that happens, the past practice continues. In so finding, I'm well aware that another option would be to let the practice run just until the end of the contract's term. I decided not to do that because this contract's term ended over a year ago, so if I were to allow the Village to repudiate the practice at the end of the contract's term, that could happen immediately and the Village could unilaterally end the

practice and divide Line employee payouts by 2920 hours instead of 2080 hours. Given the circumstances, that strikes me as an unwarranted outcome.

In light of the above, it is my

AWARD

1. That the Village violated the parties' 2014-2019 CBA, as interpreted by the parties' past practice, when it changed the hourly rate used to pay out accrued retirement benefits to PSO Wright. The Village should have divided his annual salary by 2080 hours, not 2920 hours; and
2. To remedy that contract violation, the Village shall pay out PSO Wright's above-identified benefits at the rate of \$37.53/hour and make him whole; and
3. That the Village violated the parties' 2014-2019 CBA, as interpreted by the parties' past practice, when in January 2020, it changed the hourly rate at which it paid PSOs who had not used all their sick time in 2019 and who therefore earned additional hours under Article XVI, Section G, of the CBA; and
4. To remedy that contract violation, the Village shall pay all PSOs who elected to receive a payout of accrued sick leave hours accrued in 2019, and converted to vacation hours per Article XVI, Section G of the 2014-2019 CBA, at an hourly rate derived by dividing their annual salary by 2080 hours.
5. That the practice referenced in this Award continues until it is changed at the bargaining table.

Issued at Madison, Wisconsin, this 26th day of February 2021.

Raleigh Jones, Arbitrator