

IN THE MATTER OF ARBITRATION BETWEEN	}	
	}	
THE CITY OF ST. LOUIS PARK, MINNESOTA	}	DECISION AND
	}	
(THE CITY)	}	AWARD OF
	}	
and	}	ARBITRATOR
	}	
LAW ENFORCEMENT LABOR SERVICES, INC.	}	
	}	BMS CASE: 02-PA-1107
(THE UNION)	}	

ARBITRATOR:	Eugene C. Jensen
DATE AND LOCATION OF HEARING:	November 15, 2006 St. Louis Park City Hall 5005 Minnetonka Boulevard St. Louis Park, MN 55416
DATE OF FINAL SUBMISSIONS:	December 15, 2006
DATE OF AWARD:	January 12, 2007

ADVOCATES

<u>For the City:</u>	<u>For the Union:</u>
Cyrus F. Smythe Consultant Labor Relations Associates 18955 Maple Lane Deephaven, Minnesota 55331	Marylee Abrams General Counsel Law Enforcement Labor Services 327 York Avenue St. Paul, Minnesota 55101

GRIEVANT

Bryan Fraser

WITNESSES

<u>For the Union:</u>	<u>For the City:</u>
Bryan Fraser Grievant	Nancy Gohman Deputy City Manager

ISSUE

The City offered a two-part issue statement:

Is the grievance filed by the Union arbitrable under Section 7.4 of Article VII?

Was the City's action with Officer Fraser consistent with the accepted "past practices" of the parties with regard to leave accruals under Articles 22 and 24?

The Union's offered its own issue statement:

Did the Employer violate Article 22 and Article 24 of the contract when it reduced grievant Bryan Fraser's vacation and sick leave accruals for the time he received Worker's Compensation benefits following his work injury?

The Arbitrator will consider the following two Issues:

1. Was the Union's grievance filed in a timely manner?
2. Did the City violate the labor agreement between the parties when it reduced the vacation and sick leave accruals of the Grievant after he exhausted his "Injury on Duty" (IOD) pay?

JURISDICTION AND PERTINENT CONTRACT LANGUAGE

Pursuant to the rules of the Minnesota Bureau of Mediation Services and the Labor Agreement(s) between the parties, this matter is properly before the Arbitrator.

ARBITRATOR'S NOTE: the following are pertinent passages from the January 1, 2000, through December 31, 2001, labor agreement:

ARTICLE VII EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

7.4 PROCEDURE

Step 1. An EMPLOYEE claiming a violation concerning the interpretation or application of this AGREEMENT shall, within twenty-one (21) calendar days after such alleged violation has occurred,

present such grievance to the EMPLOYEE'S supervisor as designated by the EMPLOYER. . . .

Step 4. A grievance unresolved in Step 3 and appealed to Step 4 by the UNION shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act of 1971 as amended. The selection of an arbitrator shall be made in accordance with the "rules Governing the Arbitration of Grievances" as established by the Public Employment Relations Board.

ARBITRATOR'S AUTHORITY

A) The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any other issue not so submitted.

B). The arbitrator shall be without power to make decision contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based solely on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.

ARTICLE XX INJURY ON DUTY

20.1 EMPLOYEES injured during the performance of their duties for the EMPLOYER and thereby rendered unable to work for the EMPLOYER will be paid the difference between the EMPLOYEE'S regular pay and Worker's Compensation insurance payments for a period not to exceed ninety (90) working days, per injury, not charged to the EMPLOYEES vacation, sick leave or other accumulated paid benefits, after a forty (40) hour initial waiting period per injury. The forty (40) hour waiting period shall be charged to the

EMPLOYEE'S sick leave account less Worker's Compensation insurance payments.

ARTICLE XXII VACATIONS

22.1 EMPLOYEES shall earn vacation time from date of employment based upon the following schedule:

0-5 years of service = 80 hours per year
6-10 years of service = 120 hours per year
over 10 years of service = An additional 8 hours per year not to exceed 160 hours per year. . . .

22.5 An EMPLOYEE who terminates employment in good standing after providing proper notice of termination of employment shall be compensated for the amount of vacation time accrued and unused at the date of separation.

ARTICLE XXIV SICK LEAVE

24.1 Each EMPLOYEE shall earn sick leave time from date of employment at the rate of eight (8) hours per month. . . .

24.6 Worker's compensation benefits received by an EMPLOYEE during sick leave shall be deducted from compensation due the EMPLOYEE and shall be credited to the EMPLOYEE'S sick leave to the nearest hour. This provision shall take effect after expiration of injury on duty leave.

ARTICLE XXV SEVERENCE PAY

25.1 EMPLOYEE must retire from service with at least ten (10) years of continuous service in the Police Department and terminate employment in good standing after giving proper notice to be eligible for severance pay.

25.2 Eligible EMPLOYEES under Article 25.1 shall be paid an amount equal to one-third (1/3) of their accumulated sick leave as earned in Article XXIV computed on the basis of the base pay rate at the

time of termination to a maximum of three hundred twenty (320) hours.

ARBITRATOR'S NOTE: the January 1, 2002 through December 31, 2003, labor agreement contains substantially the same language that is cited above. Modifications to the language did not become effective until after the incidents giving rise to this grievance.

JOINT EXHIBITS

JE#1. January 1, 2000, through December 31, 2001, labor agreement between the parties.

JE#2. January 1, 2002, through December 31, 2003, labor agreement between the parties.

JE#3. February 1, 2002, grievance filed by the Union on behalf of the Grievant.

JE#4. February 8, 2002, grievance response letter from Nancy Gohman, St. Louis Park Human Resources Director, to Charles Bengtson, Business Agent for Law Enforcement Labor Services.

JE#5. February 15, 2002, letter to Chief John Luse, from Charles Bengtson, requesting that the grievance be moved to the second step of the grievance process.

JE#6. February 27, 2002, letter from Nancy Gohman to Charles Bengtson, in which the City denies the Union's second step.

JE#7. March 4, 2002, letter from Charles Bengtson, to Charlie Meyer, City Manager, in which the union requests that the grievance be moved to step 3.

JE#8. March 18, 2002, letter from Charles Meyer, to Charles Bengtson, denying step 3 of the grievance.

UNION'S EXHIBITS

UE#1. Deposit Advice slips from the City of St. Louis Park, reflecting direct deposits in the NWA Federal Credit Union from June 6, 2001, through January 25, 2002. *ARBITRATOR'S NOTE: some deposit slips were not included.*

UE#2. December 4, 2001, letter from Amy C. Brusven, Human Resources Coordinator, to the Grievant.

CITY'S EXHIBITS

CE#1. August 24, 2001, and December 14, 2001, deposit slips of the Grievant.

CE#2. February 22, 2001, memo from Jodie Meckle, Payroll Clerk, to Robert Molstad.

CE#3. February 1, 2002, communication from Nancy Gohman, to Chuck Bengtson.

UNION'S WITNESS

Bryon Fraser, the Grievant, testified to the following:

- Originally hired by the City in November of 1979, and was assigned to several different tasks during his tenure.
- Injured in 1984 during the apprehension of a suspect: the suspect came down on top of him and caused knee damage.
- Received vacation and sick leave accruals, as though he was employed full-time, during his entire recuperation period.
- On Memorial Day in 2001, he suffered an injury (dislocated knee) while on duty in the offices of the police department.
- The City automatically deposited his paychecks into his credit union account, and he occasionally picked up the pay stubs (left in his mail slot at work) when he had other reasons to be in or around the office.
- Did not notice that his vacation and sick leave accumulations were reduced until after he received a letter from the City in mid-December (UE#2).
- Had difficulty contacting his Union steward and eventually called Chuck Bengtson at the Union office.
- Bengtson filed a grievance (JE#3) for him on February 1, 2002.

CITY'S WITNESS

Nancy Gohman, Deputy City Manager and Human Resources Director, testified to the following:

- Employed by the City since 1998.
- Involved in negotiating the City's labor agreements, including the two mentioned above (JE#1 and JE#2).
- The City's policy, since she has been employed, has been to give employees full vacation and sick leave accruals while they are on "Injury on Duty" (IOD) status, and to reduce those accruals by two-thirds following their IOD eligibility.
- Another employee was treated the same way as the Grievant, and CE#2 was introduced.
- The City, due to the elimination of old records, does not have any payroll records to support or dispute the Grievant's claim that he received full vacation and sick leave accruals during his recuperation from his original injury (1984).

THE CITY'S ARGUMENT

The City, in its Summary Brief, argued that the grievance was not filed in a timely manner:

If Officer Fraser disagreed with the substance contained in the December 4, 2001 City notification concerning his vacation and sick leave benefits, he needed, under the provisions of Article VII, Section 3, Step 1, to file a Step 1 grievance within 21 days after receipt of the December 4, 2001 City letter. He did not and his Union did not on his behalf meet that clearly stated deadline in Article VII, Section 3, Step1 [grievance procedure] of the Labor Agreement. [City Brief page 2 {CB p. 2}]

In addition, the City argued the merits of the case in two ways:

1. The language of the Labor Agreement (Joint Exhibits 1 and 2) clearly supports the City's decision in this case. Employees accumulate sick and vacation leave under Articles XXII and XXIV on the basis of their employment and compensation with the City. An employee working full time will accumulate eight hours of sick leave per month as provided for in Section 24.1. An employee will accumulate vacation hours per year for full-time employment on the schedule shown in Section 22.1.

An employee injured in the line of duty and eligible for Injury on Duty (IOD) will continue to accumulate full sick leave and vacation benefits as provided for by Article XX and receive full normal compensation from the City, less workers compensation pay. When an employee's IOD is exhausted after the ninety day period provided for by Article XX, the employee will cease receiving full normal pay without charge to "vacation, sick leave or other accumulated paid benefits." Rather the employee will receive workers compensation benefits and receive additional pay to the extent the employee has accumulated paid benefits to supplement the workers compensation pay up to the level of the employee's normal pay. [CB p. 3]

[and]

2. The Grievant was paid in the same manner as [another officer] in Calendar 2000 and 2001 and shown on City Exhibit No. 2. Thus the Grievant and [the other officer] were treated alike under the Labor Agreement at approximately the same time. [The other officer] accepted the City calculations of his sick and vacation benefits as consistent with the language of the Labor Agreement. [CB p. 4]

ARBITRATOR'S NOTE: the numbers (1 & 2) above were not included in the City's Brief.

Thus, the City argues that the grievance was not timely; the grievance has no merits; and the City has been consistent in their implementation of the relevant contract language.

THE UNION'S ARGUMENT

The Union, in its Post Hearing Brief, offered the following as fact:

In 1984, Officer Fraser [the Grievant] suffered his first on duty knee injury. He received Worker's Compensation pay, and he earned sick and vacation accrual at the same rate as if he had worked a regular 80 hour pay period. Officer Bryon Fraser suffered a career ending knee injury in the line of duty in May, 2001. He received Injury on Duty (IOD) benefits, followed by Worker's Compensation benefits. During the period following his second knee injury in 2001, his sick leave and vacation accruals were substantially reduced by two thirds (2/3) of the contractual accrual rate. When

he learned of the error he contacted the Union and processed a grievance.

At an undetermined point in time, the Employer adopted a new policy changing its method of processing pay for employees receiving Worker's Compensation. . . . [Union Brief pages 1-2 {UB pp. 1-2}]

[and]

The impact on leave accruals was never discussed with the Union nor negotiated at the bargaining table. [UB p. 2]

The Union, in the same "Brief," argued the following:

The City violated clear and unambiguous contract language included in the labor agreement when it reduced Officer Fraser's sick and vacation accrual for the period he received Workers Compensation benefits. The City made a unilateral change in terms and conditions of employment which reduced the sick and vacation accruals by 2/3 of the negotiated accrual rates. [UB pp. 4-5]

Thus the Union argued that the language of both the sick leave and vacation leave articles of the contract clearly call for full accruals, without reductions due to workers compensation. [UB p. 5]

In addition, the Union argued that the Grievant's testimony regarding his 1984 experience was not refuted by the City: the Grievant testified that his sick leave and vacation leave were not reduced when he received workers compensation. [UB p. 5]

The Union also addressed the arbitrability (time line) issue:

When he [the Grievant] realized there was an error in the accrual rates for sick and vacation leave, he attempted to research the problem. He tried, but was unsuccessful in reaching Officer Molstad. He did reach Officer Hildebrandt and discussed accrual rates with him. He also spoke to Terry Herberg, retired St. Louis Park officer and union steward, and presently an LELS Business Agent. He also called LELS Business Agent Chuck Bengtson. After speaking with Chuck Bengtson he processed a grievance. There was no evidence to suggest Officer Fraser unreasonably delayed or hesitated prior to filing a grievance. He prudently sought out knowledgeable individuals to confirm there was indeed a

shortage in leave accruals and then timely processed the grievance. [UB p. 4]

DISCUSSION AND DECISION

I will first discuss the issue of arbitrability. After all, if the grievance is not arbitrable, then there is no need to address the merits. In the instant case, the issue of compliance with the time lines contained in the grievance procedure was brought to bar by the City. Much has been written about this topic:

Procedural arbitrability may arise from provisions that a grievant is entitled to arbitration only if all the grievance steps have been followed in order to avoid stale claims, memories growing dim, and back pay piling up. Just as we have a statute of limitations in the external law system, we have limitation periods in provisions establishing grievance machinery. The question of whether or not such procedural prerequisites have been satisfied would appear on the surface to be as jurisdictional as the question of whether or not the claim that the agreement has been violated falls within the scope of the arbitration clause.¹

The City's argument, that the late filing of the grievance should negate any attempt on my part to examine the merits, is supported in one section of the "arbitration bible:"

If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus the practical effect of late filing in many instances is that the merits of the dispute are never decided.²

It is appropriate to note that arbitrators have differing opinions as to the actual interpretation and implementation of the time line clauses contained in grievance procedures. Some have interpreted them as clear and unambiguous language: if the language says twenty-one days, then twenty-one days it shall be; and others have allowed mitigating circumstances to excuse later filings. This is well illustrated in the following passage:

Grievances are not always discovered at the time they occur. Some agreements provide specifically that grievances are to be filed within a certain number of days after they occur or are

¹ Christopher A. Barreca et al., *Labor Arbitrator Development, A Handbook* (Washington D.C.: The Bureau of National Affairs, 1983), p. 21

² Elkouri, Frank and Edna Asper Elkouri, *How Arbitration Works, Third Edition* (The Bureau of National Affairs, 1981), pp. 148-149

discovered. Even without such specific provision, arbitrators have held that one cannot be expected to file a grievance until he is aware or should be aware of the action upon which the grievance is based. But time limits cannot be extended by the excuse that the grievant just didn't think of it sooner. Furthermore, where the employee had knowledge of adverse action but did not speak up, the union will not be heard to say that the time limit should be extended because the union did not know.³

Other factors can also influence an arbitrator's decision regarding a late filing:

A party sometimes announces its intention to do a given act but does not do or culminate the act until a later date. Similarly, a party may do an act whose adverse effect upon another does not result until a later date. In some such situations arbitrators have held that the "occurrence" for purposes of applying time limits is at the later date. For example, where a company changed a seniority date on its records as a correction, a grievance protesting the change was held timely though not filed until nine months later; the arbitrator stated that the basis of the grievance would be the employee's frustrated attempt to exercise seniority rights based upon the old date, rather than the mere change in the company's records.⁴

I hold in this case that the grievance is timely. While this would not have been an issue, had the Grievant and/or Union filed a grievance soon after he received the notification letter from the City, dated December 4, 2001 (UE#2), I find that the Grievant was not actually harmed until he was denied the hours of compensation that he alleged he deserved. In essence, the Grievant did not suffer any harm while he was employed by the City. The actual harm occurred when he was denied severance pay for his accumulated but unused sick and vacation leaves. In addition, even if I held that the grievance was filed late, I could not have denied the Union's right to have me address the merits. The ongoing nature of vacation and sick leave accruals (on a bi-weekly basis) would still place some of the requested relief within the time lines of the grievance procedure.

As to the merits of the case, in all my years of experience with arbitrations, as an advocate and as an arbitrator, I cannot recall a case with less supportive evidence. The Grievant alleges that he received full accruals for vacation and sick leave in 1984, and yet no records were introduced to either support or deny that claim: neither party retained payroll records from 1984. The Union alleges

³ Elkouris, p. 151

⁴ Elkouris, pp. 151-152

that the City changed its policy regarding employees on workers compensation, and yet there is no record of a previous policy. Both parties allege that the language of the labor agreement is clear and unambiguous, and yet they have two totally different interpretations. The City alleges a consistent past practice, and yet their past practice argument is based on employees who received workers compensation long after 1984. And, the City's witness could only testify to the City's practice since she became an employee in 1998.

In view of the limited supportive evidence, I decided it would be helpful to glean some direction from other arbitrators regarding both the level of evidence and the burden of proof:

There are some things that are important to keep in mind both as theoretical propositions and very practical points. Arbitrators will say again and again that the burden of proof does not mean much in arbitration, that all the arbitrator really wants to do is find out which side has the stronger case, what are the real facts, and what is the meaning of the contract. He is not interested in who has the burden of proof or what the quantity of the burden is, if that further issue comes up. In the vast majority of cases, for all practical purposes, that is a sound statement. It does not make much difference about burden of proof if you are satisfied one way or the other way how the case should come out.⁵

It is also interesting to note that the burden of proof can change from one party to the other.

It may be noted that the burden of going forward with the evidence may shift during the course of the hearing; after the party having the burden of persuasion presents sufficient evidence to justify a finding in its favor on the issue, the other party has the burden of producing evidence in rebuttal.⁶

I will therefore use the evidence provided by both parties, limited as it may be, to make my decision in this matter.

I do not believe that the Grievant falsely reported his earlier experience. I found the Grievant to be quite credible when he testified that he was treated differently in 1984. It is sometimes fair to doubt witnesses when it is to their advantage to testify in a certain way; however, I found the Grievant to be honest and forthright. I also found the City's witness, Nancy Gohman, to be honest and forthright. I believed her when she said that the practice of the City had been consistent since 1998. I also believe that the City did eliminate old records, including 1984

⁵ Barreca, pp. 66-67

⁶ Elkouris, pp. 278-79

payroll records, in an attempt to legally reduce record retention levels.

My decision to value the testimony of both witnesses, leads me to believe that the City, at some time between 1984 and 1998, changed its sick leave and vacation accrual policy for employees receiving workers compensation. This may have been coupled with a decision to no longer have employees sign over their workers compensation checks to the City, and/or when the City realized that they were improperly taxing the workers compensation portion of their employees' income. It is plausible that the City found the change to be an appropriate *quid pro quo*: the employee saves paying taxes on two-thirds of his/her income, and the City reduces its vacation and sick leave liability.

No matter the reason, it is reasonable to assume that this change did not become a topic of discussion with the Union at the time the policy was revised -- nor in ensuing rounds of collective bargaining. And yet, the new policy changed terms and conditions of employment: specifically, the vacation, sick leave, and severance articles of the Agreement had new meaning, even though the language remained substantially the same. And, although the parties may have been able to negotiate a position somewhere between the City's current policy and the Union's requested relief, I am left with no alternative: I shall sustain the Union's grievance in full.

AWARD

The City shall credit the Grievant with vacation and sick leave accruals as though he had been employed full time between October 16, 2001, and the date of his resignation. The Grievant shall be compensated for these additional accruals as per Articles 22.5 (Vacations) and 25.2 (Severance) of the Agreement.

Respectfully submitted this 12th day of January, 2007.

Eugene C. Jensen, Neutral Arbitrator