

IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS LOCAL UNION 117,)	
)	
UNION,)	ARBITRATOR'S
)	OPINION & AWARD
and)	
)	
)	DENIAL OF VACATION
)	SELECTION GRIEVANCE
WASHINGTON STATE DEPARTMENT)	
OF CORRECTIONS,)	
)	FMCS NO. 210318-05019
)	
EMPLOYER.)	
_____)	

BEFORE: JOSEPH W. DUFFY
ARBITRATOR

REPRESENTING
THE UNION: EAMON MCCLEERY
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REPRESENTING
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HEARING HELD: OCTOBER 13-14, 2021
BY VIDEOCONFERENCE

OPINION

Introduction

International Brotherhood of Teamsters Local 117 (“Union”) serve as exclusive bargaining representatives for a bargaining unit of workers employed by the Washington State Department of Corrections (“Employer” or “DOC”). The Union and the Employer (“Parties”) submitted this dispute to arbitration under the terms of their July 1, 2019 to June 30, 2021 collective bargaining agreement (“Agreement”), copies of which they introduced into the record. (U1, S1) The Parties selected me to arbitrate this dispute from a panel of arbitrators provided by the Federal Mediation and Conciliation Service.

This arbitration involves a grievance filed by the Union alleging denial of vacation selection to members of the bargaining unit. The Union alleges that the Employer made a unilateral change in the vacation selection process. (U2, S2)

The hearing took place by videoconference using the Zoom system on October 13 & 14, 2021. At the hearing, the Employer raised an issue of procedural arbitrability. The Parties agreed to proceed with a hearing on both arbitrability and the merits, with the understanding that I will consider the arbitrability issue first when making my decision and then proceed to the merits only if I determine that I have jurisdiction. (TR7:19-TR9:6) The Parties also agreed that I should retain jurisdiction following issuance of the award to aid in the implementation of the remedy, if a remedy is awarded. (TR10:3-8)

The hearing proceeded in an orderly manner. The attorneys did an excellent job of presenting the respective cases. Both Parties had a full opportunity to call witnesses, to submit documents into evidence and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. A court reporter transcribed the hearing and made copies of the transcript available to the Parties and to me.

The Parties submitted sixteen State exhibits (S1-S7, S11-S19) and thirty Union exhibits (U1-U30) into the record. A total of ten witnesses testified at the hearing. They were: Local 117 President and Executive Director Michelle Woodrow, Corrections Officer Bryan McGarvie, Corrections Officer II David Roberts, Cedar Creek Corrections Center Roster Manager Jessica Kreger, Local 117 DOC Union Coordinator Sarena Davis, OFM Labor Negotiator Tanya Aho, Airway Heights Roster Manager Jill Hanson, DOC Interim Assistant Secretary of Health

Services Scott Russell, DOC Director of Human Resources Todd Dowler and DOC Prison Staffing Manager Tana Southerland.

At the conclusion of the testimony, the Parties elected to submit post hearing briefs to me and to each other on December 3, 2021. (TR299:23-TR300:5) The Parties later extended the deadline by mutual agreement. I received the briefs on December 10, 2021 and then closed the record.

Issue for Decision

At the hearing, the Parties did not agree on an issue statement, so they left it to me to frame the issue based on their proposals and the record. (TR9:22-TR10:2)

The Union proposed the following:

Did the Employer violate Article 21 of the Agreement? If so, what is the remedy? (TR9:12-15)

The Employer proposed the following:

Did the State violate Article 21.8? If so, what is the remedy? (TR9:16-19)

Based on the proposals and the record, I have adopted the Union's issue statement. The grievance cites several sections of Article 21 and so the more comprehensive reference to the entire Article is appropriate rather than the focus on a single section.

Before turning to the merits of this dispute, however, the Employer's procedural arbitrability objection has to be addressed.

Procedural Arbitrability

At the hearing and in the closing brief, the Employer argued that the grievance is not properly before me because two conditions of Section 9.1.E.2 have not been met in that a list of affected employees was not provided by the Union at Step One or with the arbitration demand. (TR7:19-TR8:10) Section 9.1.E.2 includes the following:

2. Panel Grievances: For all grievances except those described in Subsection 9.1.E.1 above, the written grievance must include the following information:

....

g. Signature of the Business Representative or Shop Steward. A list naming all known affected employees must be attached prior to or at the Step 1 hearing. If the Union files a demand to arbitrate the grievance the filing will list all affected employees. (U1, S1, p. 18)

Section 9.1.F reads as follows:

Requests for Clarification

The Employer will not be required to process a grievance until the information required by Subsection 9.1.E is provided. Grievances which do not meet the above conditions, or are otherwise unclear, may be identified by the Employer and referred back to the Union for clarification. The Union will provide written clarification to the Employer. (*Id.*)

The record does not indicate that the Employer referred the grievance back to the Union for clarification. The grievance correspondence from the Employer at Step One and after a subsequent meeting on the grievance stated that the Union has a list of staff that were impacted by the recent vacation selection process. The Employer indicated in the correspondence that the list had been requested, but not received. (U2) The Employer, however, continued to process the grievance.

At the hearing, the Union contended that the alleged unilateral change in the vacation selection process affected the entire bargaining unit and therefore any list of affected employees would include the entire bargaining unit. (TR8:11-19)

Labor arbitrators often adopt the view that the parties to a collective bargaining agreement are best served if disputes are resolved on the merits rather than dismissed in grievance arbitration on technical grounds. Therefore, arbitrators recognize a presumption of arbitrability and tend to resolve all doubts in favor of arbitrability rather than dismissing grievances.

The Parties processed the grievance through Step One, a Pre-Arbitration Review Meeting and arbitrator selection from the FMCS panel. Although the Employer requested the list of affected employees, the correspondence in the record does not show that during the grievance procedure the Employer ever raised the contention that the failure to provide the list meant that the grievance could not proceed to arbitration on the merits. The Employer raised that contention for the first time at the hearing. In her testimony, Ms. Davis described her participation in the processing of the grievance through the grievance procedure. She testified that the Employer never raised any procedural objection during the grievance process and never indicated that the grievance process had been violated because a list had not been provided. (TR168:19-TR171:7)

In Section 9.1.E.2, the Agreement states that the written grievance “must include” the list of affected employees as described in subsection g. Despite the mandatory language, Section

9.1.F provides a remedy for an incomplete grievance filing, which is referral back to the Union for clarification. That referral did not occur in this case, even though the Employer noted in the grievance correspondence the absence of the list.

Although substantive arbitrability objections can be raised at any time, arbitrators often rule that procedural objections that are not raised during the grievance procedure are waived. Therefore, a procedural objection raised for the first time at the arbitration hearing will generally not be granted. The policy reasons for this approach involve avoiding the unnecessary expense and effort of taking a case all the way to arbitration when a known procedural defect makes the case not arbitrable under the terms of the contract.

In the present case, rather than forfeiture, the Parties have agreed on a cure for a defective grievance filing which is referral of the grievance back to the Union for clarification. The Employer did not use that alternative and did not clearly raise a procedural objection to the grievance while processing the grievance through the grievance procedure to arbitration.

In addition, the Union made a reasonable argument that an alleged unilateral change in the vacation selection process affects the entire bargaining unit and a list, therefore, would include the entire bargaining unit. The heading of the grievance references “all bargaining unit members.” (U2)

Based on the record, the Employer’s Motion to Dismiss is denied.

Background

Article 21 of the Agreement sets forth the terms under which employees accrue, accumulate and utilize vacation leave.

The vacation selection process established in Section 21.6 for custody staff begins on January 2 of each calendar year. The employees have the opportunity in order of seniority to select three segments of vacation leave for the period from April 1 of the current year through March 31 of the following year. A segment is one or more contiguous days of vacation. In the prime months of June, July and August employees are limited to segments of ten days, but segments may be contiguous, which would enable a vacation longer than ten days during the prime months. Employees schedule the vacation segments by either meeting with or communicating with the facility Roster Manager. (TR22:25-TR24:6) Once the scheduling process for all custody staff in the facility is complete, employees can request additional vacation as a supplemental request under Section 21.7.

In the 2018 collective bargaining negotiations, the Parties discussed making changes in Article 21. In the negotiations, the Employer proposed to modify Section 21.6 to add a limitation of all vacation segments, no matter when scheduled, to ten days. Ultimately, the Parties agreed that instead of a ten-day limitation that applied all year, the limitation would be: “No segment shall include more than ten (10) consecutive days of vacation leave in June, July, and/or August, provided that an employee may select contiguous segments of vacation leave.” (U1, p. 69)

The Union at one point proposed to eliminate Section 21.14 so that employees were not forced to use comp time before vacation time, but ultimately the Union withdrew that proposal. Otherwise, the negotiations did not focus on Sections 21.6, 21.8 and 21.14. (See S11, p. 36 and S13, p. 40 & 53, S14, p. 6; TR192:23-TR193:2)

In October 2019, the Parties held a Labor Management Communications Committee (“LMCC”) meeting. The Employer raised an example of an employee at Clallam Bay who routinely requested substantial amounts of vacation leave. The Employer had concerns that these types of requests made it difficult for less senior employees to get their preferred leave. The Employer brought up the prior proposal to extend the ten day per segment limitation to the entire year. The Union refused this request from the Employer. (TR236:22-TR239:7; TR40:9-19)

Mr. Russell testified that following the LMCC meeting, the Department reviewed the vacation selection process and found what it considered a departure from the contractual standards. Specifically, some Roster Managers allowed employees to schedule vacation segments using comp time and vacation time rather than vacation only. He testified that the Department emphasized to the Roster Managers and Superintendents that Section 21.8 must be followed, meaning that employees must have adequate vacation leave on the books at the time the leave commences. (TR239:8-TR241:22; S5)

Ms. Kreger identified an email in the record as one she received in January 2021. She understood the email as a directive from the head of DOC to allow employees only to use vacation leave balances and accruals when approving vacation segments. (U3, TR147:1-TR148:12) The email includes the following:

This serves as a reminder that we must follow the contract (21.8) as you begin your annual vacation scheduling process. Roster Managers will consider vacation leave balances and the total maximum monthly accruals only when approving leave segments; segments above this total should not be approved. (U3)

By letter dated January 30, 2020, the Union filed this grievance at Step One. The description of the grievance provided in the letter includes the following:

...During the summer of 2018, while negotiating the 2019-2020 CBA, the DOC proposed changes to the vacation leave provisions of Article 21. Article 21.6 provides, without qualification, that employees can “select up to three (3) segments of available vacation leave during the time period of April 1 through March 31.” During bargaining, DOC proposed to limit the amount of time that staff can request to take in one of their three segments. The Union did not agree to DOC’s proposal, but the parties were able to reach a compromise that addressed some of DOC’s concerns. The parties agreed to change Article 21.6 to limit vacation requests made for the months of June, July, and August to ten (10) consecutive days. In October 2019, the DOC and the Union held a Labor Management Communication Committee (LMCC). The DOC agenda item was to readdress the changes to the Vacation Selection procedure that they did not achieve during bargaining. The parties ended the LMCC with no change or agreement to further alter the CBA. During the 2020 vacation selection, DOC unilaterally changed how staff were able to schedule their vacation leave by denying some staff the ability to select three segments of vacation time. DOC unilaterally imposed a new rule on vacation selection. DOC’s new rule is to limit the number of vacation days an employee can bid for based on their vacation accrual. The DOC is raising a different argument that was not raised during negotiations stating Article 21.8 (Adequate Leave) now means that they must have the leave available in order to request vacation time off. The plain text of Article 21.8, however, only requires employees to have adequate vacation leave to cover the absence “when the leave commences.” Contrary to DOC’s position, there is no requirement in the CBA that employees have adequate leave to cover the absence when the leave is scheduled....(U2)

At Step One, the Employer denied the grievance. The response letter, dated March 16, 2020, included the following:

- During the meeting, you were asked how the Department violated Article 44, Entire Agreement and you stated the Department violated the spirit of bargaining and made a unilateral change.
- I responded that I did not make a unilateral change. During the statewide LMCC, the Department was told by the Union to follow the contract. During the December 10, 2019, Superintendent’s meeting, I told the Superintendents to follow the CBA for the 2020 vacation selections.
- Annual leave segments cannot be built by considering compensable time or overtime.
- The Department has to be fiscally responsible. Currently the Department is overspent by \$10 million dollars in overtime costs.

- Staff are calling off because they can't get the time off during annual leave selection.
- I asked for a copy of the list of impacted employees however as of this date I have not received a list. (U2)

The Parties bypassed Step Two of the grievance procedure and proceeded to a Pre-Arbitration Review Meeting ("PARM"). They did not resolve the grievance in the PARM and so the Union demanded arbitration and the Parties engaged in arbitrator selection from a panel of arbitrators provided by FMCS. This arbitration followed.

The Agreement

The Agreement includes the following:

Section 21.1 Vacation Leave Accrual establishes the vacation accrual rates for eligible employees. (U1, p. 68)

Section 21.2 Accumulation provides with some exceptions that employees may accrue maximum vacation balances not to exceed two hundred forty (240) hours. (*Id*)

Section 21.6 Vacation Selection includes the following:

Beginning January 2 of each calendar year, employees will be scheduled a time, based on seniority, to select up to three (3) segments of available vacation leave during the time period of April 1 through March 31. A "segment" is one (1) or more contiguous days of vacation leave. No segment shall include more than ten (10) consecutive days of vacation leave in June, July, and/or August, provided that an employee may select contiguous segments of vacation leave. Each employee will be guaranteed one (1) scheduled workweek of vacation leave if requested as one of their segments. (U1, p. 69)

Section 21.7 Supplemental Requests reads as follows:

Nothing in the above paragraph will preclude the right of an employee to request vacation leave or their personal holiday at any time. The Employer will consider said request in relation to authorized relief, program needs and the existing published vacation schedule, all of which will take precedence. These requests will be resolved on a first-come, first-served basis. Employees will complete a Leave Request Form for any such vacation leave taken immediately upon their return to work. (U1, p. 70)

Section 21.8 reads as follows:

Employees will not request or be authorized to take scheduled vacation leave if they do not have sufficient vacation leave to cover such absence when the leave commences. (*Id*)

Section 21.14 reads as follows:

An employee will use and exhaust all compensatory time prior to the use of vacation leave, unless that would cause the employee to exceed the two hundred forty (240) hour vacation leave maximum on their anniversary date. (U1, p. 71)

Section 9.5 Authority of the Arbitrator includes the following:

The arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement. The arbitrator will be limited in their decision to the grievance issue(s) set forth in the original grievance unless the parties agree to modify it.... (U1, p.21)

Section 17.4.B reads as follows:

An employee may elect to be compensated for overtime hours worked in the form of cash or compensatory time off. Approval to use compensatory time off is not automatic, must be approved in advance, and will be contingent upon availability of a relief employee(s). Relief may be defined as including authorized on-call employees. Employees will have the option of using compensatory time in lieu of sick leave:

1. When approved by the appointing authority; or
2. In accordance with RCW 49.12.270 and the Family Care Act, WAC 296-130. (U1, p. 54)

Section 17.6 Compensatory Time reads as follows:

All Correctional Officers and Correctional Sergeants will be entitled to accrue up to four hundred eighty (480) hours of compensatory time. All other employees will be entitled to accrue up to two hundred forty (240) hours of compensatory time. Compensatory time may be voluntarily cashed out at any time except during the month of February. In addition, the full balance of accrued compensatory time must be cashed out at the end of each biennium. (U1, p. 55)

Discussion on the Merits of the Dispute

Positions of the Parties

The Union's Position

The Union contends that the Agreement clearly supports the Union's interpretation of Article 21. The Union argues that Section 21.6 governs vacation selection and that provision does not include the limitation that the employee must have adequate vacation leave on the

books when the leave commences. The Union argues that the Employer's contention that Section 21.8 imposes a limit on vacation selection under Section 21.6 is misplaced. The Union argues that if the Parties wanted to add the restriction in 21.8 to the selection process in 21.6, then they would have included the limitation in 21.6 rather than placing it in a separate section. The Union argues that Section 21.8 applies to supplemental leave requests in Section 21.7. The Union relies on the fact that Sections 21.7 and 21.8 refer to "requests" and Section 21.6 uses the term "select" rather than request. The Union contends that the requirement in Section 21.14 that employees exhaust all compensatory time prior to the use of vacation leave shows that compensatory time and vacation leave have to be viewed together when determining whether an employee has sufficient leave to cover the absence when the leave commences.

The Union cites a hypothetical example in which an employee has accrued five days of compensatory time and the employee requests a vacation segment of five days. The employee, however, has only four days of vacation on the books at the commencement of the vacation. If the employee is required to use the compensatory time first, then the employee would have four days of vacation before the leave starts and four days after the leave ends because the five days of compensatory time had to be used first. The Union contends that it is absurd to characterize this example as a situation in which the employee does not have sufficient vacation leave to cover the absence at the commencement of the leave.

The Union contends that the Department has not in the past consistently applied Section 21.8 the way that the Department now proposes to apply it. The Union argues that witnesses testified that prior to 2020 Roster Managers did not look at leave balances when scheduling vacation with employees under 21.6. The Roster Managers focused on the relief factor and left responsibility for having sufficient leave at the time the leave commenced to the employees.

The Union argues that documents in the record show that numerous employees selected more than 240 hours of vacation leave during the annual vacation selection process.

The Union argues that the Employer attempts to obtain in this arbitration what it could not obtain in collective bargaining. Since the maximum vacation accrual is 240 hours, restricting employees to selecting segments based only on vacation on the books and accrual prior to the leave means that the maximum vacation that an employee could select is three segments of ten days each.

The Employer's Position

The Employer contends that no unilateral change in the vacation selection process has occurred. The Employer argues that it has only returned to uniformly applying the plain language of the Agreement.

The Employer concedes that prior to 2020 different facilities handled the vacation selection process differently. The Employer argues that Mr. Russell advised the Union in the LMCC in October 2019 that the DOC would follow the contract in the upcoming January 2020 vacation selection process.

The Employer contends that comp time does not enter into the vacation scheduling process, as clearly shown by the absence of any reference to comp time in Sections 21.6 and 21.8. The Employer argues that to recognize comp time as a basis for scheduling vacation under 21.6 would be adding language to the Agreement, because Sections 21.6 and 21.8 refer only to vacation leave and do not mention comp time, which is a separate subject under the Agreement. Therefore, the Employer contends that vacation segments based on available vacation leave and accrual plus comp time, resulting in one case of an employee scheduling 157 days of vacation in a single year, did not conform to the clear language of the Agreement.

The Employer argues that testimony in the record shows that when the Parties modified Section 21.8 in the negotiations for the 2007-2009 Agreement, they only added a clarification that the employee had to have sufficient vacation leave to cover the absence at the time the leave commences, rather than at the time the leave is scheduled in January. The testimony also referenced the fact that comp time was not discussed in relation to the vacation article.

The Employer contends that the grievance should be denied because the plain language of the Agreement does not provide for the consideration of comp time when determining if there is adequate leave to schedule vacation time. Only vacation leave that has or will accrue before the leave commences can be considered when scheduling vacation leave.

The Employer argues that no attempt has been made and the evidence does not suggest that DOC by requiring contract compliance attempted to limit all vacation segments to ten days or less.

The Employer contends that no unilateral change occurs when an employer returns to applying the clear language of the contract.

Analysis

The Union contends that the Employer changed the process for approving vacation selections from the process that had been in place for at least a decade. (TR40:9-TR41:1)

One factor that underlies the present conflict is that prior to 2020 no one in administration had the responsibility to check the vacation bank at the time of scheduling. The Roster Managers have responsibility for scheduling, but the records of vacation accrual reside with the separate Business Office payroll staff. Roster Managers had limited amounts of time to meet with employees to schedule vacation and did not have immediate access to current information on vacation bank balances for the employees. (TR227:24-TR228:10) In addition, the primary focus for Roster Managers prior to 2020 was on the relief factor. The Roster Managers generally left it to the employees to know how much vacation the employees had in the bank and would accrue prior to the commencement of the leave.

Mr. Roberts testified that in twenty-five years with the DOC he had never been asked previously about the status of his leave bank or comp time bank at the time he scheduled vacation with the Roster Manager at his facility. Mr. McGarvie also testified he had never been asked about his vacation bank when selecting segments. Consequently, many employees scheduled vacation segments based on both available and accrued vacation and comp time. The Employer contends that this practice tilted the selection process too heavily in favor of the senior employees and left junior employees with far fewer choices.

The clear language of the Agreement states that in January employees may select up to three segments of available vacation leave, with no mention of comp time. (Section 21.6)

The Parties disagree about the application of Section 21.8. The Union argues that the use of the word request rather than select makes clear that 21.8 applies to supplemental vacation that an employee may “request” rather than vacation under 21.6 that the employee may “select.” The Union contends that if the Parties intended 21.8 to be a limitation on 21.6 then they should have included the limitation in 21.6 and would have had no need for a separate section. Ms. Southerland’s testimony provided reinforcement for the Union’s interpretation of Section 21.8 in that she always thought 21.8 applied to supplemental leave under 21.7. (TR293:25-TR294:22)

I am not persuaded, however, that a reasonable person reading 21.8 in order to apply it, whether as a Roster Manager or as a Union representative, would focus on the words request and select and conclude that 21.8 applied only to supplemental leave in 21.7. The Union argues that

if 21.8 was meant to apply to 21.6, why have a separate section? The same argument could be made regarding 21.7. Why have a separate section? The most reasonable interpretation is that 21.8 has broader application than relating it to a single section. In addition, the use of the “scheduled vacation leave” in 21.8 suggests that 21.8 refers to 21.6, which covers the scheduling of vacation segments for the year.¹

In addition, Mr. Dowler testified that he participated in the negotiations for the 2007-2009 contract. He testified that the Parties agreed in that negotiation to add the phrase “when the leave commences” to Section 21.8. He testified that the Parties made this change to make clear that employees were allowed to schedule vacation segments based on the vacation they had on the books but also on the vacation they would accrue prior to the commencement of the leave. (S18, S19; TR262:25-TR264:10; TR266:1-24) This testimony clearly shows that the Parties understood that 21.8 related to 21.6.

Even putting aside Section 21.8, however, Section 21.6 clearly refers to selecting segments of “available vacation leave.” Comp time is not mentioned. Vacation leave and comp time are separate and distinct benefits.² (TR195:8-24) Eligibility to take vacation leave depends on the availability of vacation leave either on the books or accrued prior to commencement of the leave. Under the terms of the Agreement, comp time does not factor into the process of scheduling vacation in any way. The record shows that one Roster Manager allowed employees to use comp time in scheduling vacation segments because “it’s their time...that they earned to use.” (TR145:21-TR146:5) That individual example, even if combined with two or three others, does not show a long-standing widespread practice among Department Roster Managers of factoring comp time into the vacation scheduling process. Ms. Southerland testified that the Roster Manager at Cedar Creek stands out among Roster Managers as doing the selection process “very differently.” (TR288:19-TR290:25)

For example, the Roster Manager at Airway Heights for the past approximately twenty years is Ms. Hanson. She testified that, consistent with the training she received when she started, she never considered comp time when scheduling vacation selection. (TR225:12-22) Ms.

¹ I note also that the grievance states: “The plain text of Article 21.8, however, only requires employees to have adequate vacation leave to cover the absence ‘when the leave commences.’” (U2; TR63:10-TR64:24)

² An exhibit in the record shows that in the negotiations for the 2013-2015 Agreement, the Union proposed to add the following definition of authorized leave: “Authorized leave is defined as annual leave, compensatory time, and leave without pay.” That definition did not make it into the contract. (S14; TR80:12-TR81:5)

Hanson sends out to employees an informational sheet each year that describes the selection process. (S4) She testified she has sent out similar notices about the process since about 2008. (TR226:7-11) The notices do not mention comp time.

At the LMCC in October 2019, the Union said that the Employer should follow the contract, which Ms. Woodrow testified meant that the contract provides ways to deal with the employee at Clallam Bay who claimed large amounts of time off without changing the selection process for everyone³. (TR75:5-25) Mr. Russell testified that after the LMCC the Department reviewed the vacation scheduling practices at the institutions and learned that some Roster Managers had “drifted” from the terms of the Agreement on vacation scheduling. (TR240:1-TR241:22)

In the Step One response letter, Mr. Russell included the following:

I responded that I did not make a unilateral change. During the statewide LMCC, the Department was told by the Union to follow the contract. During the December 10, 2019, Superintendent’s meeting, I told the Superintendents to follow the CBA for the 2020 vacation selections. (U2)

The question arises whether the Employer’s failure consistently to follow the contract and allowing comp time to be factored into vacation segment scheduling in some cases constitutes a waiver of a contractual right. The following describes the better view adopted by labor arbitrators:

The issue of waiver frequently arises in past practice cases through the failure to exercise a contractual right. The better view is that the non-use of a right does not entail its loss and that management or a labor organization can assert or reassert a right under the agreement, or even recapture a right which has not yet ripened into a past practice.⁴ (Hill & Sinicropi, *Management Rights*, p. 36 (BNA Books; 1986)

The Elkouri textbook includes the following regarding waiver of a contractual right:

Especially common in arbitration is that species of waiver known in law as ‘acquiescence.’ This term denotes waiver that arises by tacit consent or by failure of a person for an unreasonable length of time to act on rights of which the person has full knowledge. While arbitrators generally hold that acquiescence by one

³ How the Employer could have limited that employee’s vacation scheduling without placing limits on the use of comp time in scheduling is not clear to me.

⁴ In the present case, the evidence concerning vacation scheduling does not meet the standard test of a binding past practice typically applied by labor arbitrators. (See *Celanese Corp. of America* 24 LA 168, 172 (Justin; 1954))

party to violations of an express rule by the other party precludes action about past transactions, they do not consider acquiescence precludes application of the rule to future conduct. (Elkouri & Elkouri, Kenneth May, *How Arbitration Works*, 7th Edition, Section 10.9.B, p. 10-75 (ABA; 2012)) (citations omitted)

In my judgment, the Employer reviewed the situation with vacation scheduling and determined that the Agreement had not been followed in some cases. Therefore, the Employer directed the Superintendents to follow the clear language of 21.6 and 21.8, which the Employer was entitled to do.

The Union argued that the change in scheduling practices was designed to achieve the limit of all segments to ten days that the Employer could not achieve in bargaining. Mr. Russell testified that was not the Employer's objective. He testified that he wanted the Roster Managers to follow the contractual requirement that employees have sufficient vacation leave when the leave commences. (TR241:7-22) A document in the record shows that the change has not limited all vacation segments to ten days. Ms. Southerland requested from Office Managers at the institutions examples of employees who selected vacation segments of more than ten days from April 2020 to March 2022. Among the 71 employees listed as examples, some of the individuals took leave slightly over ten days, but others took longer leaves that covered an entire month.⁵ (S15; TR81:13-TR82:25) Therefore, this evidence counters the Union's argument that the Employer's interpretation of 21.6 and 21.8 is intended to limit all vacation segments to ten days. (TR282:12-TR284:5)

Conclusion

After full review of the evidence and the arguments presented by the Parties, I find that the Employer did not violate Article 21 of the Agreement. Consequently, no remedy is appropriate.

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⁵ In a bargaining unit of about 6,000 members, 71 represents a small percentage of the total, but Ms. Southerland testified that the list is examples only and she asked only for up to five examples from each institution.

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EMPLOYER.)	
_____)	

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is denied.

Consistent with Section 9.6 of the Agreement, my fee shall be shared equally by the Parties.

Dated this 22nd Day of December 2021



Joseph W. Duffy
Arbitrator