Antoine #1

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

UNION,

and

EMPLOYER

Gr.: Employee 1 (Personal Leave Day)

OPINION AND AWARD

BEFORE:

Theodore J. St. Antoine, Arbitrator, University of Michigan Law School, Ann Arbor MI 48109-1215.

FACTS

This case involves the entitlement of a Public Safety Officer at Employer to a personal leave day. Employee 1 is one of twelve officers represented by the nonsupervisory Employer Public Safety Officers, an affiliate of the Union. Under the Parties' applicable 2004-07 Agreement, bargaining-unit members work ten-hour shifts, which are regularly scheduled as follows: 7:00 a.m. to 5:00 p.m.; 5:00 p.m. to 3:00 a.m.; and 9:00 p.m. to 7::00 a.m. (J-1, p. 17). They may also be asked to work "extra hours" (*ibid*). Work schedules are set for 28-day periods at a time and are posted at least 28 days in advance (*ibid*).

Officer Employee 1 was working the 9:00 p.m. to 7:00 a.m. shift in the Spring of 2007. Because of staff shortages, he was also scheduled to work overtime on April 14, 2007 from 5:00

p.m. to 9:00 p.m., or four hours prior to the start of his regular shift. This schedule was posted on February 26, 2007 (J-2).

On March 16, 2007 Employee 1 submitted a request on the standard form for 10 hours of personal leave on April 14, from 9:00 p.m. to 7:00 a.m. (J-2). There is no dispute that Employee 1 met all the procedural requirements in requesting leave. But on the same day, March 16, Captain Person 1 denied the request, stating: "You will need to switch shifts, including the overtime, with someone to have the day off. If you have any questions, please see me" (J-3). Employee 1 did not discuss the matter with Person 1, but found an officer who was willing to trade shifts, including the overtime, and took April 14 off.

Employee 1 filed a grievance on March 22, 2007 concerning the Employer's refusal to grant him a personal leave day on April 14. Ultimately an arbitration was conducted before the undersigned on November 29, 2007 in City A, Michigan. All parties were present, examined and cross-examined witnesses, and submitted other evidence. Both the Union and the Employer filed comprehensive post hearing briefs, and these have been duly considered.

ISSUE

Did Employer violate Article 27 of the Parties' 2004-07 Agreement when it denied Grievant Employee 1 a personal leave day on April. 14, 2007? If so, what shall the remedy be?

DISCUSSION

Article 27 of the Parties' 2004-07 Agreement reads as follows (J-1, p. 27):

Article 27. – PERSONAL LEAVE

> An employee with at least one (1) year seniority at the time of the effective date of this contract, and annually thereafter each July 1, may have two (2) days' personal leave, one (1) chargeable to sick leave and one (1) not chargeable. Employees must apply for personal leave at least two (2) working days before such leave is desired, except in cases of emergency. Personal leave days are not cumulative from year to year.

The Union argues that the Employer erroneously relies on the boilerplate of the management rights clause in asserting that it has the inherent right to deny requests for personal leave so long as the decision is not arbitrary, capricious, discriminatory, or in bad faith (U. Br., p. 3). Provided the two-day notice requirement is met, the Union insists that "personal leave must be granted absent an actual staffing emergency demonstrated by the Employer" (ibid.). According to the Union, other sections of the contract help in the interpretation of Article 27. Thus, by contrast, the timing of vacation leave, which is covered by Article 22, is said to be at the discretion of the Employer (id., pp. 22-23). No such limiting language is found in Article 27. The Union also analogizes personal leave to sick leave, covered by Article 17, and sick leave may be used at the employee's discretion (J-1, p. 14).

Furthermore, continues the Union, there is an "established past practice of granting personal leave without challenge to the employee" (U. Br., p. 5). On this point the Union cited the testimony of Sergeant Person 2, who served as Acting Assistant Director for some time in 2002-03, and of Union President Person 3, who submitted a list of eight different employees who received personal leave days in 2003-04 (U-1). The Union contends that all this was changed unilaterally by Person 1 when he became Captain and Assistant Director. Person 1, says the Union, relied on the Human Resources Manual, which is subordinate to the collective bargaining agreement (U. Br., p. 7). Finally, the Union maintains that it is not seeking to obtain in arbitration what it failed to secure in negotiations. It filed the present grievance in March 2007 and sought arbitration the following May. The Parties did not begin bargaining for a new contract until July. The Union was simply proposing to clarify Article 27, and that proposal was not presented to the Employer until four months after the grievance was filed (id., pp. 7-8).

Employer responds, first, by looking to the language of Article 27 itself (F. Br., pp. 4-5).

Article 27 is said to provide no guarantee. It states employees "may" – not "shall" -- have two personal leave days. They may "apply" when such leave is "desired," words that connote supplication and "wishing" for something. Moreover, according to the Employer, Employee 1's request in this instance was denied on reasonable grounds. The department was short staffed, and that was why Grievant was scheduled to work overtime. Person 1 gave him the opportunity to trade shifts. Requests for personal leave are reviewed on "an individual basis ... in conjunction with the work schedule, staffing requirements and whether an overtime situation will result" (id., p. 5). The Employer added that Grievant never approached Person 1 to discuss the request but Employee 1 wound up getting the desired day off anyway. The Employer concludes that Person 1's decision was not unreasonable, arbitrary, or discriminatory.

On the contention of an established past practice, the Employer asserts that even a Union witness acknowledged the Union had only a random sampling of requests that had been approved in the past. Others had been denied. Only one involved an overtime situation, which Person 1 considers an important consideration. That history, contends the Employer, is not sufficient to establish a past practice. The Employer also cites a decision by Arbitrator Harry Dworkin holding that the benefit of personal leave days is "subject to reasonable regulation with the expressed intent of the parties, including the management rights clause" (F. Br., p. 6). Lastly, the Employer points out that another union contract at the Employer does provide for the "routine" granting of personal leave days, absent "undue hardship," but that is not the language of Article 27 here.

Both the Union and the Employer make powerful and effective arguments and I have tried to craft a decision taking appropriate account of the strengths in each position. Both Parties properly start with the language of Article 27, covering the subject of personal leave, and rightly

treat it in the context of the Agreement as a whole. That includes contrasting this particular provision with other sections in the same contract or with other sections that might have appeared instead of Article 27. All this has been most helpful in working toward a resolution of the dispute that is unlikely to satisfy either Party fully but nonetheless seems the most sensible outcome in light of all the factors involved.

The Union discounts the importance of the "boilerplate" in the management rights clause, Article 13. It is true that few arbitration decisions turn on the particular language in a management rights clause. But it is "boilerplate" precisely because it is so universally accepted. And it expresses some fundamental truths about the role of the Employer in the workplace, which must be kept in mind as we assess the rights spelled out for employees in the collective bargaining agreement. Article 13, Section I-A-3 does recognize the right of the Employer to "determine the duties, responsibilities and assignments of all employees," and Section 1-B recognizes that the "adoption of reasonable policies, rules, regulations and practices ... and the use of judgment and discretion ... shall be limited only by the specific and express terms of this Agreement..." J-1, p. 10 (emphasis added).

Article 27 declares that employees "may have" two personal leave days a year. In context, as part of a bargained-for benefit, I read that "may have" in the sense of an authorization, a permission, a right granted by the Employer and exercisable at the choice of an employee. It is not merely "may have" in the sense of some sort of speculation that it "might" happen; that is not the way parties negotiate in collective bargaining. The use of "may have" instead of "shall have" carries little significance in this situation. It could have been used simply to indicate that an employee is not obligated to take the two personal days -- especially the one that is chargeable against sick leave. Furthermore, there is force to the Union's argument

that Article 27, dealing with personal leave, does not have the expressed limitations set forth in Article 22, Section 2, dealing with vacations, about being "mutually agreeable to the Employer," with "the need for the services of the employee at the particular time being paramount" (J-1, p. 23). That plainly suggests that the Employer has more flexibility or discretion in handling requests for vacations than requests for personal leave days.

Nonetheless, I join Arbitrator Harry Dworkin in Lorain County Human Services, 94 LA 661, 664 (1990), in holding that the benefit of personal leave days is "subject to *reasonable* regulation in a manner consistent with the expressed intent of the parties, including the management rights clause" (emphasis added). As I have indicated, the management rights clause is seldom front and center in arbitral decision-making, but it is a pervasive backdrop. To cite the most obvious example, could all the officers on the 9:00 p.m. to 7:00 a.m. shift have requested a personal leave day for April 14, 2007 two days in advance and have automatically been entitled to it, regardless of the Employer's management right to determine employees' "assignments"? Article 27 contains no language that suggests the rights there granted to employees override the Employer's authority to meet staffing requirements in a reasonable fashion.

The key word here is "reasonable." Indeed, both Article 13, Section 1-B of the Parties' Agreement and the Employer's Brief speak of "reasonable" rules and actions (J-1, p. 10; F. Br., pp. 4, 5, 7, 8). In the present case the Employer asserted and the Union did not dispute that there was a staffing shortage on April 14, 2007, necessitating the assignment of overtime. In such a situation I find reasonable the denial of Grievant's request, and the insistence he arrange a "trade" of shifts, including the overtime, if he wanted the day off. I am going to confine my holding in this case to these very facts, namely, a genuine staffing shortage requiring the assignment of overtime to cover the security services that were needed. What would be reasonable in other

circumstances leave to the Parties to negotiate or to another arbitrator to resolve in another arbitration.

On the literal language of Article 27, I should also point out that after the Employer's denial of Grievant's request for leave on April 14, 2007, he still "may have" had an alternative personal leave day available, depending on the reasonableness of his next request. He retained what I regard as his entitlement under the Parties' Agreement.

The Union makes a couple of other arguments that I do not feel persuasive, but they need to be addressed. Importantly, a past practice is said, to support the Union's position that the Employer has granted personal leaves without challenge in the absence of a staffing emergency. I happen to be a strong believer in the notion that a proven past practice is one of the best indicators, if not the very best, of what any parties meant by their contract. Yet in the classic article by Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 Michigan Law Review 1017, 1019 (1961), stiff requirements are set for establishing the existence of a binding practice. It must be (1) clear, (2) consistent, (3) repeated over time, and (4) mutually accepted by the parties. Those criteria were not satisfied here. Some requests for personal leave were granted with little if any inquiry, but others were denied. That is not clear and consistent. Apparently only one approved request was shown to have involved overtime, which is the precise issue here (U-1). That does not constitute repetition. And of course more recently there have been disputes over these claims, not mutual acceptance of the practice. Past practice has not been proven.

The purported "analogous" relationship of personal leave and sick leave, with the latter supposedly allowed at the employee's discretion, is not persuasive. As long as there is no malingering, employees have no choice about being ill. In many instances such employees may

simply be incapacitated from working at a demanding job like security, and could not be on duty however much they might wish to be. In those situations the Employer has no choice but to make other arrangements to meet staffing needs. I find sick leave in the typical instance entirely different and distinct from personal leave. And even in the case of illness, the Employer retains "the right to require substantiation of the reason for this absence ..." (J-1, p. 13).

I accept the Union's position that its effort to modify Article 27 in collective bargaining could fairly be treated as an effort at clarification that should not prejudice it in pursuing the present grievance through to arbitration. But that has no bearing on my disposition of this case.

AWARD

The grievance is denied. Employer did not violate Article 27 of the Parties' 2004-07 Agreement when it denied Grievant Employee 1 a personal leave day on April 14, 2007.

THEODORE J . ANTOINE Arbitrator

Ann Arbor, Michigan

February 8, 2008