Frankland #6

FEDERAL MEDIATION AND CONCILIATION SERVICES

In the Matter of the Arbitration Between:

Union

-and-

Employer

Gr: Vacation Schedule/ Employee 1

OPINION AND AWARD

The undersigned, Kenneth P. Frankland, was mutually selected by the parties to render an Opinion and Award in the above captioned grievance, FMCS # 0-00000. Hearing was held at Employer Offices, City A, Michigan, on February 23, 2006. The parties presented witness testimony, introduced exhibits, and orally argued their positions. The County filed a "Post-Hearing Brief" received March 25, 2006 and the Union filed a "Summation", received on April 4, and thereafter the record was closed.

ISSUES:

1. Was the grievance untimely filed pursuant to Article V, Section 5.2 A, Step 1?
2. Did the lack of Deputy Employee 1's signature on the Grievance dated 10-3-05 violate Article V, Section 5.2 B, Step 2?
3. Did the sheriff violate any terms of the contract by prohibiting vacation time off during certain home football weekends in fall 2005?

PERTINENT CONTRACT PROVISIONS:

Article IV, Section 4.1

Article V, Section 5.1

Article V, Section 5.2 A, Step1

Article V, Section 5.2 B, Step 2

Factual Background

The relevant facts are not disputed. On July 16, 2005, Undersheriff Person 1 posted a memorandum to all deputies that the department would not grant vacation time on the first weekend of school and for home football game weekends; Friday, September 2, 2005, Saturday, September 24, 2005, Saturday, October 15, 2005 (Homecoming weekend), Saturday, October 29, 2005 and Saturday, November 4, 2005. (E-1) City A is the county seat of Employer and is the home of University A that plays Division I NCAA football. The memo did offer personal time in lieu of vacation time as is permitted in the contract.

September 20, 2005, Deputy Employee 1 filled a leave request form. (J-2) He asked for vacation leave on Wednesday, October 26, Thursday, October 27, Saturday, October 29 and Sunday October 30 each for 10 hours, a normal shift. On September 27, vacation hours were approved for all except Saturday October 29. Assuming he still wanted leave on that day, he was "put down for 10 personal hours**".**

October 3, 2005, the Union representative filed a grievance. (J-3) The statement of grievance was," vacation request for 10-29-05 was denied on basis of football game weekend needing full staffing." Requested action was, " vacation request granted; if full staffing is reason for denial why are people schedule changed for school and not working". The employer responded, "denied. Lack of information in grievance. Unsure what article of contract union is alleging has been violated."

A formal grievance disposition was issued by the county administrator, Person 2 on October 19, 2005 denying the grievance. (J-3) There had been a meeting Friday October 14, 2005 as part of Step 3. The denial in part stated the affected employee first reasonably knew of the events giving rise to the grievance on July 17, 2005 per the memo that disqualified October

29 as a vacation day and thus the grievance was untimely and per Section 5.3 the grievance was considered settled. Further, Section 4.1B unambiguously vests the employer the exclusive right to establish and change work schedules. Thereafter, on November 8, 2005 the Union requested arbitration. (J-3)

Deputy Employee 1 is a 14 year employee on the road patrol, midnight shift, 10 pm through 8 am. There are two deputies on this shift and because of ten-hour shift schedules the two deputies work alone on every night except Thursdays. Other shifts have multiple officers assigned but not more than three. Deputy Employee 1 had accrued 270 hours of vacation and that was the reason for the leave request to avoid losing some hours. Vacation requests need to be filed 35 days before the first vacation day. Normally, if vacation is granted on his shift, a deputy from another shift is moved under the contract to avoid paying overtime. He never had a request denied before. He could recall the former sheriff only exclude one weekend, the Western-Central game and all vacations were denied and overtime had to be used. He was aware of the July memo as he initialed it but was surprised by it and testified "thought it was odd". He never reflected on the issue of management rights regarding scheduling. He did acknowledge that the sheriff makes all final decisions and he never talked to the sheriff about the memo after it was posted. No such memo had been posted or issued before regarding staffing levels or vacation days. Although offered personal leave, he declined and worked Saturday October 29.

Undersheriff Person 1 issued the July 16, 2005 memo and testified that the department needed all available personnel on football weekends and that's why the memo was posted. The county works with the City, University and Michigan State Police agencies to maximize available officers for those events. Personal time cannot be denied unless there is an emergency. One officer did use personal time on Friday October 28. There were other requests that were

denied including Deputy Person 3, Deputy Person 4 and Sgt. Person 5 with only Deputy Person 4 using personal leave time. On Saturday, October 29 only officer was off and he was on sick leave. All others worked. If personal time is elected, the contract allows the sheriff to use overtime procedures to fill vacancy.

UNION POSITION

As to lack of Deputy Employee 1's signature, the Union asserts signing is merely a formality since the blanket denial of vacation in the memo affects all unit members and as such creates a grievance for all, thus a class action grievance that could be signed by a union representative. This was not raised before hearing and thus is moot.

As to untimeliness, it was filed when the vacation request was denied when the memo was actually applied.

As to the merits, consideration should be given to financial and staffing concerns when dealing with the right of the employer to limit or restrict vacation time off. The employer has the burden to substantiate denial of vacation as being reasonable in light of business needs.

COUNTY POSITION

Time limitations are to discourage stale grievances. The Union knew or should have known as of the memo being posted of a potential grievance and thus needed to file within seven days thereof.

The contract requires that the aggrieved employee sign the grievance, he did not therefore the contract requires dismissal.

On the merits, the contract contains no limitation on the Sheriff's right to establish work schedules, staffing levels or restrictions on vacation time use. The Union never cited any contract provision that was alleged to be violated. The Management Rights clause controls in this case as

well as inherent managerial rights. The parties did not bargain any limitations on the ability to determine staffing and schedules by the sheriff and the Union has the burden to show palpable unreasonableness in order to prevail and have not done so.

DISCUSSION

The County raised two procedural issues at the hearing challenging the arbitrability of the case. Generally, such challenges may be addressed immediately at a hearing or by briefs so that evidence on the merits need not be presented should the challenge have merit. Alternatively, parties often place the issue(s) before the arbitrator and take proofs so that they need not return in the event the challenge is not sustained. The parties allow the arbitrator to rule in the Opinion and either grant the challenge and dismiss per contractual necessity or deny and proceed to a ruling on the merits. The arbitrator specifically offered either approach to the parties and the County, as the moving party, agreed that proofs be taken and the issues be ruled on in the Opinion.

A. Timeliness

The grievance procedure is set forth in Article V. The definition is in 5.1

> For purposes of this Agreement, a "grievance" shall mean a complaint filed by an employee or the Union concerning the application or interpretation of this Agreement as written. . . .

Section 5.2 A step 1 states:

> An employee with a grievance shall, either within seven (7) working days of the occurrence of the incident which gave rise to the grievance or within seven (7) working days following the date the employee first reasonably should have known of the evens giving rise to the grievance, first discuss it with the Sheriff or his designee, with the object of resolving the matter informally. . . .

Section 5.2 B step 2 states:

> If the grievance is not satisfactorily resolved at step 1, the grievance shall be re-

> duced to writing, signed by the aggrieved employee, and within seven (7) working days presented to the Sheriff or his designee who shall place his written disposition and explanation thereupon and return it to the Steward within seven (7) working days.

Section 5.3 states:

> The time limits established in the Grievance Procedure shall be followed by the parties hereto. . . . If the time procedure is not followed by the Union, the grievance shall be considered settled.

The County argues that a grievance contractually must be presented within seven (7) days of when the parties knew or should have known of the alleged violation. Here the memo was issued July 16, 2005 and if there might be a violation of the contract the Union and its members were certainly aware of the fact at that time as the vast majority of the membership initialed it. According, a grievance should have been filed long before the filing on October 3, 2005.

Contrarily, the Union responds that the posting of the memo merely establishes a rule or regulation and until the regulation is actually applied and someone is denied something the grievance procedure is not triggered. Here until Deputy Employee 1 was denied his vacation request on September 27 there was no basis for a grievance and the grievance was filed within seven days on October 3.

In this case, I believe the Union position is correct. Advisory opinions are not encouraged in the judicial system. Parties must have an actual case or controversy rather than a theoretical right or claim to adjudicate. The same is true in arbitration. Advisory opinions on theoretical violations of a contract are discouraged. Only when some event or incident occurs based upon a set of facts does an arbitral issue ripen for disposition.

The Union probably was not happy with the memo but as stated in its Summation, the Union opted not to file a class grievance on behalf of the whole membership at that time since it did not know if any members would seek vacation in the prohibited time frame and even if a

request was made whether the policy would be enforced. Had a grievance been filed in July, the County could rightfully argue that it was premature, the Union was asking for an advisory opinion and until a member was adversely affected the matter was not arbitrable. The posting by itself did not generate a basis for a grievance; rather, the application of the policy to a specific individual (s) triggered an alleged grievance. That occurred after Deputy Employee 1's vacation leave request was denied. Accordingly, I find that the grievance was timely filed and the request to dismiss is DENIED.

B. LACK OF DEPUTY EMPLOYEE 1'S SIGNATURE

This issue was first raised at the hearing in contradistinction to the timeliness issue that was raised on October 19 in J-3, Person 2's formal disposition. The latter gave notice to the Union whereas by first mentioning this at hearing the Union could well raise the surprise or laches argument. Many arbitrators assert that an alleged violation of bargained procedural requirements of a contract can be raised at any time and are not waived by waiting until the hearing. Others assert that fairness requires that all ammunition be placed on the table and in the absence of a showing of actual prejudice or bias by the moving party that failure to comply with some written requirement by the other party should not prevent the grievance from going forward. The County did not argue it was prejudiced by the failure of the deputy's signature.

When this was raised at hearing, there was some confusion as to whose signature was on the grievance. Deputy Employee 1 said it was not his and he did not sign it. The Union suggested it was the signature of the Union president at the time. No one was surprised by a grievance and to some extent the Union argument that a signature is a formality has some validity. Apparently it did not raise any eyebrows on October 19 when five specific explanations were presented to the Union by Person 2 at step 3 in denying the grievance but not for absence of Deputy Em-

ployee 1's signature. Perhaps the answer is in the hearing testimony that other officers also asked for leave on October 29 and all were denied. Apparently only Deputy Employee 1 brought this to the attention of Union (per his testimony) and the Union treated the matter as if it were a class action using Deputy Employee 1 as an illustrative claimant.

A better resolution of this issue rests with the unambiguous language of Section 5.1. The definition says a claim can be filed by two distinct representatives if the matter **concerns the application or interpretation of this Agreement as written.** All parties agreed at the hearing that the main issue was an interpretation of the contract. **Either an employee or the Union** can file such a grievance. Although the section infers that the Union will be presenting class or group grievances concerning several members individually affected by an action, it does not say that is the exclusive way for the Union to file a grievance. I find the Union may file a grievance on its own if the matter concerns the application or interpretation of the Agreement. That is what happened here. The Union president signed the grievance and that conformed with Section 5.1 and did so utilizing the example of Deputy Employee 1 as the factual predicate to frame the issue. Accordingly, the motion to dismiss on this basis is DENIED.

C. DECISION ON THE MERITS

The County has correctly noted that the Union as the grieving party has the burden of proof in a contract interpretation case such as this. Thus, the Union must show that a specific provision of the contract has been violated by denying vacation leave for Deputy Employee 1 or any other member for that matter on October 29. I am troubled that the Union did not mention a specific provision in the grievance nor any relevant provision at the hearing. The only provisions mentioned were those pertaining to vacation accrual and seniority and those do not address the main issue - the efficacy of the July 16, 2005 memo.

The thrust of the Union presentation was more equitable in nature presenting the best case scenario from its perspective as to how a sheriff should handle staffing issues and the economic aspects of how certain staffing affects overtime in particular. While these factors may well be subjects to be collective bargained they miss the mark in this case. I am not persuaded that Union has carried the burden of proof and the grievance will be denied.

The tone of the Union Summation suggests that they agree that Management Rights is really the nub of the issue. Without delineating Article IV as such, they offer a rationale as to how the Sheriff may have acted unreasonably in exercise of those rights in this case. As will follow, I do not believe the Union has shown any such violation.

Article IV B and C state:

> Except as this Agreement otherwise specifically and expressly provides, the Employer shall also have the right to promote, assign, transfer, suspend, discipline, discharge for just cause, lay off and recall personnel; to establish reasonable penalties for violations of such rules; to make judgments as to ability and skill; **to determine work loads; to establish and change work schedules;** to provide and assign relief personnel, **provided, however, that these rights shall not be exercised in violation of any specific provision of this Agreement** and, as such, they shall be subject to the Grievance and Arbitration Procedures established herein.
>
> **The Union hereby agrees that the Employer retains the sole and exclusive right to establish and administer without limitation, implied or otherwise, all matters not specifically and expressly limited by this Agreement.**
>
> (Emphasis Added)

It is axiomatic in cases of contract interpretation, that the arbitrator must apply clear and unambiguous language of a contract rather than seek rules of construction to resolve alleged ambiguities. I see no ambiguous language in either section and thus must apply the language to the facts presented. In this contract the parties have negotiated a typical provision in Section B

and have emphatically stated in Section C there are no limitations on the otherwise plenary managerial powers of the Sheriff unless mentioned elsewhere in the Contract.

The Union has not pointed to any limiting sections and I have found none in the contract. The Sheriff may if he chooses post a notice that vacation leaves will not granted during certain designated times. He has the ability to set the work schedule and vacation time can only be used with prior approval. This is not to say that the Management Rights clause is unlimited. In appropriate circumstances a clearly unreasonable and arbitrary exercise of such rights could be subject to arbitration, but that is not the case here. The Sheriff acted within the rights specified and no contrary or limiting provision exists in the Contract. If the Union wishes it may take its members' concerns as expressed in this hearing to the bargaining table.

For all of the above reasons the grievance is denied.

Award

The grievance is denied.

Kenneth P. Frankland
Arbitrator

Dated: April 5, 2006