



Exeter Police Association, NEPBA

Town of Exeter

**Case No. G-0087-8
Decision No. 2015-021**

Appearances:

Meghan C. Cooper, Labor Representative, Nolan Perroni Harrington, LLP, Lowell, Massachusetts, for the Complainant

Thomas M. Closson, Esq., Jackson Lewis, P.C., Portsmouth, New Hampshire, for the Respondent

Background:

On June 19, 2014, the Exeter Police Association, NEPBA (Union) filed an unfair labor practice complaint alleging that the Town of Exeter violated RSA 273-A:5, I (e), (g), (h), and (i) by improperly calculating the accrual of vacation time under the parties' collective bargaining agreement (CBA) and past practice. Prior to filing the complaint, the Union utilized the contractual grievance process, including advisory arbitration, to resolve the issue. After the completion of the advisory arbitration, the Union filed its complaint with the PELRB. The Union requests that the PELRB find that the Town violated RSA 273-A:5, I (e), (g), (h), and (i) and order the Town to cease and desist from improperly calculating the accrual of vacation time and to make all bargaining unit employees whole. The Town denies the charges.

The adjudicatory hearing was conducted on September 18, 2014 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties

filed post-hearing briefs on October 24, 2014. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1, IX.
2. The Union is the exclusive collective bargaining representative for a bargaining unit of police officers employed by the Town. See Stipulated Facts at 1.
3. The Union and the Town are parties to a collective bargaining agreement (CBA). See Stipulated Facts at 3.

4. The parties' 2003-2007 CBA expired on December 31, 2007. Article 12 of the 2003-2007 CBA provided in part as follows:

12.1.1 Unit employees shall be entitled to annual leave with full pay on the basis of the following schedule:

After first year	five work days annually
After second year	ten work days annually
After fifth year	fifteen work days annually
After tenth year	twenty work days annually

For clarification, employees working 10 hours per day, on a four-day on, three day off shift, must use one and one quarter (1 1/4) days of leave per work day off on annual leave.

12.1.2 Except in an emergency, every employee shall be afforded the opportunity to receive at least two consecutive weeks of annual leave if earned leave time is adequate.

...

12.1.3.1. Vacation Schedule:

Vacations shall be scheduled between January 1st and December 31st, allocated in preference by seniority. All vacations must be taken prior to December 31st of the vacation year. A full vacation must be taken each year by each eligible employee. It is the policy of the Town not to grant payment in lieu of vacations.

Notwithstanding 12.1.3 above, any employee who, by virtue of reaching his/her anniversary date between October 15 and December 31, earns additional vacation time shall be allowed to carry over such additional vacation time until June 1 of the following year.

12.1.3.2 Divided Vacation:

A divided vacation may be approved by the Department Head and/or Town Manager provided it is taken within the vacation year. Such a decision will consider the following factors:

- (a) Departmental work schedule and/or schedule for shut down
- (b) If a regular paid holiday occurs during the vacation period on a day which would otherwise have been a regular work day, the holiday is not counted as a day of vacation, and one more vacation day will be taken either the day before or the day after the vacation period, so long as the vacation period was at least one week in duration...

See Joint Exhibit 11.

5. Prior to 2010, the total yearly vacation leave allotment accrued on an employee's anniversary of hire date and the total amount of annual leave was credited to the employee's leave account on January 1st of each year. According to Union Vice-President (VP) Detective Patrick Mulholland, under this system, an employee would receive his/her total annual leave allotment on January 1 and, if he/she hit a milestone in that year (e.g. 2nd, 5th, or 10th anniversary of hire), he/she would receive an additional week of vacation leave.

6. Prior to 2010, the full annual leave had to be used prior to December 31 as the unused leave could not be carried over into the following year, under the so-called "use it or lose it" system. Employees started to earn annual leave after one year of service and the maximum possible earned annual leave was twenty work days, for which employees were eligible after ten years of service.

7. The parties negotiated on a successor CBA from the fall of 2007 until 2009. See Stipulated Facts at 4.

8. In the course of negotiations on a successor CBA, the parties exchanged proposals concerning changes to the Leave Administration provision (Article 12) of the CBA. The Town proposed to change the existing system of crediting the annual total of vacation leave on January 1 of each year into a monthly accrual system. Under the accrual system, each employee accrues a

certain number of vacation leave hours per month up to the maximum accrual cap that is based on years of service.

9. The main reason for the Town's proposal to switch to the accrual system was to prevent employees from retiring immediately after the total annual leave amount was credited to their account in January.

10. The Union's November 9, 2009 response to the Town's bargaining proposal contains the following language:

Vacation

- 5 additional days after 15 years of service.
- Accrual system for vacation
- **No more than two weeks can be carried over into the following year**
- **Employee may use projected vacation for a given year prior to actually accruing it. If separated from the Town employee must pay back any vacation used that was not accrued. This amount may be taken from payroll checks due to the employee.**
- **One vacation day counts for one scheduled shift when working the 4/2 schedule.**
- Agree to Towns [sic] second bullet **but add voluntary coverage, up to 2 days, half day blocks and remove "will not be grievable".**

See Joint Exhibit 8 (emphasis in original).

11. The Town's December 9, 2009 bargaining proposal to the Union contained the following language concerning vacation leave:

- Town would agree to add an additional week at 15 years in exchange for transition to earned time (accrual system for vacation).
- Provided EPA accepts Town proposal No. 11 to eliminate provision about dividing a vacation around a holiday, Town would agree to allow 2 vacation days to be taken with minimum of 24-hour notice (4 or 5-hour blocks may be taken at beginning or end of shift). If the vacation request cannot be covered by "paging out" the vacation day(s) shall be denied.

See Joint Exhibit 5.

12. On January 5, 2010, Detective Mulholland, who at the time was the Union President and acted as a liaison between the negotiation teams, sent to Town Manager Russell Dean the following response to the Town's leave accrual-related proposal:

... We have also agreed to the vacation proposal including the accrual of vacation. As we discussed, up to two weeks can be carried over into the following year and projected vacation for a given year can be used at anytime in that year even if it is not accrued yet.

See Joint Exhibit 6.

13. In his notes concerning the March 25, 2010 meeting between Detective Mulholland and Town Manager Dean, Mr. Mulholland stated in part:

- Confirmed wording on vacation wording [sic].
- He explained that employees can carry over max accrual cap plus 10 days. No longer necessary to use prior to Dec 31. That language has been removed as a result ...

See Joint Exhibit 10. The parties agreed to remove the following sentence from section 12.1.3.1 of the CBA: "All vacations must be taken prior to December 31st of the vacation year." See Joint Exhibit 13.

14. In response to Mr. Mulholland's March 26, 2010 request to confirm that vacation can be carried over starting 2010 into 2011, the Town Manager stated:

Yes you can carry time from this year (if you save it this year) to go into 2011.

Example – you have 3 weeks this year, and use 1, you can carry the two left into next to start your bank, and you begin accruing at the 3 week rate in January 2011. Apply the same logic to all levels of vacation. Remember you do not accrue any more vacation once you hit the cap (3 weeks plus 80 hours).

See Joint Exhibit 7.

15. Following negotiations, Article 12 Leave Administration, including vacation accumulation and accrual, of the parties' CBA was amended. See Stipulated Facts at 5.

16. The 2008-13 CBA was signed on March 29, 2010. See Joint Exhibit 1. Patrick Mulholland was one of the people who signed the CBA on the Union's behalf. He reviewed the CBA before signing it.

17. Article 12 of 2008-13 CBA provides in relevant part as follows:

12.1 Annual Leave:

...

Accumulation. Effective January 1, 2011, employees will be credited with their earned vacation leave on the last day of each full calendar month of service, up to their maximum vacation accrual cap. *Employees may carry over a total of ten (10) earned vacation days in addition to their accrual cap.* At no time will an employee's vacation allotment equal more than their maximum annual accrual plus ten (10) days.

Accrual Rate. Unit employees shall be entitled to annual leave with full pay on the basis of the following schedule:

<i>Length of Continuous Service</i>	<i>Monthly Accrual Rate</i>	<i>Annual Equivalent</i>	<i>Maximum Carryover</i>
<i>Less than 1 year</i>	<i>3.33 hours/.417 days</i>	<i>5 days</i>	<i>80 hours</i>
<i>2 to 5 years</i>	<i>6.66 hours/.833 days</i>	<i>10 days</i>	<i>80 hours</i>
<i>5 to 10 years</i>	<i>10 hours/1.25 days</i>	<i>15 days</i>	<i>80 hours</i>
<i>10 to 15 years</i>	<i>13.33 hours/1.67 days</i>	<i>20 days</i>	<i>80 hours</i>
<i>15 years</i>	<i>16.66 hours/2.08 days</i>	<i>25 days</i>	<i>80 hours</i>

Once the cap has been reached (annual equivalent plus 10 days) employees will no longer continue to accrue vacation. An employee will continue to accrue vacation under the above schedule when, and to the extent that, his or her total accumulated vacation time falls below his or her maximum vacation accrual cap.

For clarification, employees working 10 hours per day, on a four-day on, three day off shift, must use one and one-quarter (1 1/4) days of leave (10 hours) per work day off on annual leave.

Employees may borrow up to his/her maximum annual equivalent against their pending accruals. Upon termination of employment negative vacation accruals must be paid back to the Town.

Vacation leave accrual rates will be adjusted on the first day of the month in which an employee will be eligible for additional vacation leave on the 2nd, 5th, 10th, and 15th anniversary of hire subject to the adjustment in accordance with this section.

Termination of Employment. Upon termination of employment, regular full-time employees will be paid for any unused accumulated annual leave at their regular rate of pay...

12.1.2 Except in an emergency, every employee shall be afforded the opportunity to receive at least two consecutive weeks of annual leave *if earned leave time is adequate.*

...

12.1.3.1 Vacation Schedule: Vacation shall be schedule [sic] between January 1st and December 31st, allocated in preference by seniority. A full vacation must be taken each year by each eligible employee. It is the policy of the Town not to grant payment in lieu of vacations.

12.1.3.2 Divided Vacation: A divided vacation may be approved by the Department Head and/or Town Manager provided it is taken within the vacation year. ...

12.1.5 Upon termination of employment, a permanent employee will be paid for any unused accumulated annual leave at his/her regular rate of pay.

See Joint Exhibit 1 (emphasis added). The "days" referred to in 12.1 Accrual Rate schedule are 8-hour days, e. g., the 5-day "annual equivalent" equals 40 hours.

18. The new system of leave accrual went into effect on January 1, 2011. The parties agreed to treat 2010 as a transition year. Employees were allowed to transfer the unused 2010 vacation leave into 2011.

19. Vacation leave accrual spreadsheets for each employee are prepared by the Police Department Office Manager. She coordinates the spreadsheets with the Town's Human Resources (HR) Director once a month. According to the Police Chief, no one oversees the Office Manager's day-to-day work directly.

20. The Police Chief informed the Office Manager about the changes to the vacation leave accrual system in 2010, after the 2008-13 CBA was signed, without explaining how she was to calculate the leave accrual under the new system. To prepare for the new method of calculating the leave, the Office Manager reviewed the accrual rate schedule in section 12.1 of the 2008-13 CBA. The Office Manager also met with the Town Manager and the HR Director at the end of 2010 to discuss the implementation of the new accrual system. The HR Director told the Office Manager to do monthly allocation in accordance with the 2008-13 CBA accrual rate schedule.

21. The Office Manager testified that she put the number indicated on the schedule in each employee's account at the end of every month and kept the record on a spreadsheet on a calendar year basis, from January to December. She ensured that employees get their allotted annual leave between January and December. For example, when an officer reached his one-year anniversary, she added 40 hours of vacation leave to his account. When the HR Director compared the HR leave spreadsheet with the Office Manager's spreadsheet in July of 2011, the

HR Director informed the Office Manager that she was calculating leave accrual incorrectly. Leave records of two employees were affected by the Office Manager's method of leave accrual calculation.

22. Since July, 2011, the Office Manager has calculated leave accrual in accordance with the HR Director's instructions by putting the accrued monthly leave amount into employees' accounts at the end of each month.

23. On December 14, 2011 Mr. Mulholland sent the following message to the Town Manager:

You may recall that we discussed the vacation accrual system before we signed the new contract. Could you do me a favor and take a look at section 12.1 of the CBA. Can you confirm that that middle paragraph "Accumulation" indicates that we can carry over 10 days PLUS our max accrual cap. Meaning, if my cap is 4 wks, I could carry over 3 wks and once I reached 6 wks into the following year (4 wks plus 10 days max) I would no longer accrual [sic] vacation.

The Town Manager responded as follows:

Patrick I think you are talking about it a different way, but if I understand you right, you are correct. If you have 3 weeks on the books today, you could carry those into the next year and you would stop accruing once your bank reached 6 weeks in total, which is 4 weeks you can accrue plus the 2 more you can carry at any given time.

See Joint Exhibit 9.

24. The parties' 2008-13 CBA contains a grievance procedure the last step of which is advisory arbitration. See Joint Exhibit 1.

25. On January 11, 2013, the Union filed a grievance concerning vacation accrual, which stated in part as follows:

Vacation accrual:

All members who are eligible for additional vacation hours after 1 year, 2 years, 5 years, 10 years and 15 years of service are affected. The idea that after each member's anniversary hires [sic] date and the accrual of less vacation hours is not the correct [sic] according to the contract. Also that since this issue has been discussed by both our office manager and Human Resources proves that there are inconsistencies, we cannot allow such ambiguity. Section 21.1 [sic] of the contract states that additional vacation shall be given with 5 days after 1 year of service, 10 days after 2 years of service, 15 days after 5

years of service and 20 days after 10 years of service, and 25 days after 15 years of service.

The remedy to this matter is to make sure all members accrue the proper number of vacation hours from their anniversary hire date to the following January 1.

See Joint Exhibit 2.

26. On January 29, 2013, the Town Manager sent the following response to the grievance:

... [T]he Town and the Association have been operating under the current accrual system since January 1, 2011, and this is the first time I have been alerted to an issue regarding the system, or it has been grieved. That being said, I have made the following notes:

- The old vacation system was an “accelerated system” where employees were credited with leave the first day of the year for that year, under a use it or lose it system. The accrual system modified this to “earned time” where employees earned an annual equivalent over the course of 12 month time. Under the old system, employees had to wait one year before getting any vacation leave. After 12 months they were credited with 5 days in their leave bank. The difference under the new system is accruals are earned monthly...
- Under the current accrual system, employees earn their annual equivalent over a 12 month period. This would be either 5 days, 10 days, 15 days, 20 days or 25 days depending on years of continuous service with Exeter. This is covered under the current section 12.1 of the contract.
- During the “transition year” from 2010-2011, employees were able to carry over as the starting amount in their January 1, 2011 bank, whatever vacation they had remaining from 2010. As you have pointed out one employee was hired in October, 2010 and therefore did not receive any vacation accrual for October, November, and December, 2010. Under the old system, he would have been granted 5 days after one year of service. To remedy this, I have proposed giving that employee 3.33 hours of leave for each of the three months he worked for the Town in 2010.
- Employees should be able to use vacation leave from the date of hire if they desire as it is accrued, and borrow up against their leave balances for the year. So if their maximum annual equivalent is 5 days, they could borrow up to 5 days in a 12 month period. If they earned five days and took five days in the first year, their balance at year end would still be zero.
- I have asked Human Resources and the Police Administration to work on the issue of rounding 39.96 hours to 40 hours, and 79.92 hours to 80 hours by making an adjustment in month 12 of the accrual year. The Munismart system should be able to do this.
- Vacation accrual rates are adjusted based on the first day of the month where an employee is eligible for additional leave. This paragraph is at the bottom of Page 12 of the contract and the adjustment is made based on length of continuous service. I believe all of these adjustments have been made since the contract has been in effect.

Given what we know about the system and the transition, it would appear it is working as intended. I would say that the intent of the new system was to eliminate the advancing of vacation altogether and replacing that system with an accrual, earned time system. Adopting the new system effectively ended the practice of "advancing" vacation leave on anniversary dates and replaced it with a higher monthly accrual rate. When looking over a 12 month period, however, it would not impact the amount of vacation accrued over that period. It would simply be earned over the 12 months instead of advanced to the employee. This was the desired effect – and in return, employees were granted additional leave, as well as the ability to accrue an extra 80 hours above their accrual cap, as well as carry their banks from year to year instead of the "use it or lose it system."

See Joint Exhibit 4.

27. The parties went through advisory arbitration in accordance with the CBA grievance procedure. The arbitrator issued a decision.

28. Both parties agree that the correct number of annual leave to be allotted per year is set forth as "Annual Equivalent" in the Accrual Rate schedule of CBA Article 12.1 and that 3.33 hours of leave per month (39.96 hours per year) does not add up to 5 days or 40 hours of leave per year; 6.66 hours of leave per month (79.92 hours per year) does not add up to 10 days or 80 hours of leave per year; 13.33 hours of leave per month (159.96 hours per year) does not add up to 20 days or 160 hours per year; and 16.66 hours of leave per month (199.92 hours per year) does not add up to 25 days or 200 hours per year.

29. The Town agreed to adjust the leave records of affected employees at the end of each accrual year so that they match the "Annual Equivalent" numbers. The Town Manager believes that the leave records have already been adjusted accordingly and that this problem has been resolved. Union VP Mulholland believes that no adjustment has yet been made.

Decision and Order

Decision Summary:

The Union failed to prove, by a preponderance of the evidence, that the Town committed an unfair labor practice in violation of RSA 273-A:5, I (e), (g), (h), and/or (i). The disputed leave accrual language is clear and unambiguous and the evidence is insufficient to establish that the

Town administered leave accrual provision in violation of the parties' agreement. The relief requested by the Union is denied and the Union's claims are dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, see RSA 273-A:6. The PELRB "does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration." See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006). In this case, however, the last step of the contractual grievance procedure is an advisory, not binding, arbitration. "[W]ith no explicit or implicit language in the contract stating that the last step of the grievance procedure is final and binding on the parties," the PELRB has jurisdiction to hear the Union's unfair labor practice complaint. See *Appeal of Silverstein*, 163 N.H. 192, 198 (2012) (citing *Appeal of Campton School Dist.*, 138 N.H. 267, 270 (1994)).

Discussion:

The Union claims that the Town violated RSA 273-A:5, I (e), (g), (h), and (i)¹ by improperly calculating the accrual of vacation time under the parties' CBA and past practice. The claims arise from the interpretation of the Leave Administration provision of the parties' 2008-13 CBA. When, like here, "the parties to a collective bargaining contract have not agreed to be bound by an arbitrator's decision, the PELRB, in the context of an unfair labor practice charge, must conduct a de novo evidentiary hearing." *Appeal of Campton School District*, supra, 138 N.H. at 270.

"A CBA is a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its

¹RSA 273-A:5, I provides in relevant part:

It shall be a prohibited practice for any public employer ... (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit ... (g) To fail to comply with this chapter or any rule adopted under this chapter; (h) To breach a collective bargaining agreement; (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer ...

terms, which are the product of their collective bargaining.” *Appeal of the City of Manchester*, *supra*, 153 N.H. at 293 (citations and quotation marks omitted). “Collective bargaining agreements are construed in the same manner as other contracts.” *Appeal of Lincoln-Woodstock Coop. Sch. Dist.*, 143 N.H. 598, 601 (1999). In interpreting a CBA, a court begins “by focusing upon the language of the CBA, as it reflects the parties’ intent. This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases.” See *Appeal of Nashua Police Commission*, 149 N.H. 688, 690 (2003) (citations and quotation marks omitted). “Absent fraud, duress, mutual mistake, or ambiguity,” the search for the parties’ intent must be restricted to the words of the contract. See *Appeal of Town of Durham*, 149 N.H. 486, 487 (2003).

“A clause is ambiguous when the contracting parties reasonably differ as to its meaning.”

Id. It is a well-established view that:

[T]he existence of an ambiguity must be determined from the ‘four corners of the instrument’ without resort to extrinsic evidence of any kind. This is the so-called ‘plain meaning rule,’ which states that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.

Elkouri & Elkouri, *How Arbitration Works* 434 (Ruben ed., 6th ed. 2003). The interpretation of a CBA, including whether a contract term is ambiguous, is a question of law. See *Appeal of Nashua Police Commission*, *supra*, 149 N.H. at 690. Past practice and other extrinsic evidence may be examined to discern the intent of the parties where the language of a CBA is ambiguous or “the contract is entirely silent.” See *AFSCME Local 3657, Hillsborough County Sheriff’s Office v. Hillsborough County*, PELRB Decision No. 2012-117.

The contract language at issue in this case is as follows:

Accrual Rate. Unit employees shall be entitled to annual leave with full pay on the basis of the following schedule:

Length of Continuous Service	Monthly Accrual Rate	Annual Equivalent	Maximum Carryover	Accrual Rate
Less than 1 year	3.33 hours/.417 days	5 days	80 hours	7.33 hours/.917 days
2 to 5 years	6.66 hours/.833 days	10 days	80 hours	13.33 hours/1.667 days
5 to 10 years	10 hours/1.25 days	15 days	80 hours	16.66 hours/2.083 days
10 to 15 years	13.33 hours/1.67 days	20 days	80 hours	20 hours/2.5 days
15 years	16.66 hours/2.08 days	25 days	80 hours	23.33 hours/2.917 days

Vacation leave accrual rates will be adjusted on the first day of the month in which an employee will be eligible for additional vacation leave on the 2nd, 5th, 10th, and 15th anniversary of hire subject to the adjustment in accordance with this section.

See Findings of Fact at 17. The Union argues that, under the CBA, an employee must receive his or her annual leave equivalent in the calendar year (from January to December) when he or she reaches a milestone anniversary of hire year (2nd, 5th, 10th, or 15th). The Union asserts that “during such milestone years, the increased accrual rates must continue to be adjusted ... so that the officer receives his or her annual equivalent during the calendar year.” See Union’s Post-Hearing Brief at page 8. The Union also states that “[a]s a practical matter, this means that the accrual rate would be adjusted such that the entire annual equivalent would be distributed to a bargaining unit member in each check over the rest of the calendar year.” See Union’s Post-Hearing Brief at page 9.

The Town counters that, under the CBA, the leave accrual rate should be adjusted only after an employee has completed the requisite years of continuous service, i.e. in the month in which an employee actually reaches his or her 2nd, 5th, 10th or 15th anniversary of hire; and that the total annual leave amount then accrues from the anniversary of hire to the next anniversary of hire, and not on a calendar year basis, from January 1 to December 31, as claimed by the Union.

I find that the language concerning the adjustment of vacation leave accrual rate is clear, unambiguous, and specific² and that the Union’s interpretation of this language is unpersuasive.

²It is a well-established principal that, in contract interpretation, specific language trumps general language. See 11 Williston on Contracts § 32:10 (4th ed.) See also *VFC Partners 26, LLC v. Cadlerocks Centennial Drive, LLC*, 735 F.3d 25, 31 (1st Cir. 2013); *Londonderry School District v. Londonderry Education NEA-New Hampshire*, PELRB Decision No. 2000-046 (July 19, 2000) (“Unless a contrary intention appears from the contract construed as a whole, the meaning of a general provision of the contract should be restricted by the more specific provisions of the contract”).

The plain meaning of the relevant language and common sense³ dictate that the adjustment to a new accrual rate (set forth in the accrual rate schedule) be made on the first day of the month in which an employee reaches his or her 2nd, 5th, 10th, and/or 15th anniversary of hire and that the accrual year starts on the date, or anniversary of, hire and ends on the anniversary of hire in the following year. This means that if, for example, an employee reaches a milestone (e.g. 5th anniversary of hire) on September 1, 2014, then the vacation leave should accrue at the new rate (10 hours per month) starting on September 1, 2014; 10 hours should be credited to the employee's account on the last day of September, 2014; and the employee would, thereafter, accrue leave, in monthly 10-hour increments, up to the new total annual leave amount (15 days) between September 1, 2014 and September 1, 2015.

The word "accrual" implies the gradual or periodical, here monthly, accumulation or addition of vacation leave, as opposed to the lump-sum advancement of the total annual leave, or total leave adjustment, amount, i.e., the system that was utilized by the parties prior to 2010. See Merriam-Webster's Collegiate Dictionary 8 (10th ed. 1993) ("accrue ... to accumulate or be added periodically ... to accumulate or have due after a period of time ..."). The "length of continuous service" and "anniversary of hire" language of the leave administration article supports the interpretation that an employee must complete the required number of service years before receiving a new accrual rate and the leave accrual year is from the date or anniversary of hire to the next anniversary of hire. Furthermore, the provision allowing employees to "borrow up to his/her annual equivalent against their pending accruals" indicates that the parties understood and compensated for the fact that, under the new accrual system, employees, depending on their date of hire, might not have accrued enough leave time to allow them to take a vacation at the desired time.

³ "Common sense is as much a part of contract interpretation as is the dictionary ..." *VFC Partners 26, LLC v. Cadlerocks Centennial Drive, LLC*, 735 F.3d 25, 31 (1st Cir. 2013).

In addition, the Union's interpretation of the contract language would lead to the system in which the leave would have to be adjusted retroactively to the beginning of the calendar year in which an employee reached a milestone anniversary of hire. However, nothing in the contract language calls for the retroactive application of the rate adjustment. Furthermore, the Union's reliance on the multiple occurrences of the word "annual" to support its position is misplaced.

The word "annual" does not necessarily implicate a "calendar year," as claimed by the Union but, rather, "annual" means "covering the period of a year ... occurring or happening every year or once a year ... an event that occurs yearly ... something that lasts one year or season." Merriam-Webster's Collegiate Dictionary 47 (10th ed. 1993).⁴ Nothing in the CBA requires that the accrual year (from anniversary of hire to anniversary of hire) be the same as the vacation year (January 1 – December 31, as argued by the Union). In addition, the Union's reliance on the language in sub-section 12.1.3.1⁵ is similarly misplaced because under the new contractual leave administration system, the employees are allowed to carry over unused vacation leave into the following calendar year and to "borrow up to his/her maximum annual equivalent against their pending accruals" and are no longer required to take "all vacations ... prior to December 31 of the vacation year." See Findings of Fact at 4, 13, and 17.

Therefore, the manner in which the Town administers leave accrual is consistent with the clear and unambiguous language of the agreement. Even if the relevant language were ambiguous, the extrinsic evidence does not support the Union's position. The evidence shows that, in 2010, the parties entered into a new CBA in which they agreed to eliminate a "use-it or lose-it" system of "lump-sum" leave advancement and replaced it with the monthly accrual system; and that both parties understood what this change entailed. Furthermore, the fact that at

⁴ "Annually" means "[i]n annual order or succession; yearly, every year, year by year... Yearly or once a year but does not in itself signify what time in year." Black's Law Dictionary 46 (5th ed. 1983).

⁵ "Vacation shall be schedule [sic] between January 1st and December 31st, allocated in preference by seniority. A full vacation must be taken each year by each eligible employee..." See Findings of Fact at 17.

the beginning of transition to the new accrual system, from January to July of 2011, the Office Manager continued to credit employees with leave time in the same manner she had done prior to the signing of the 2008-13 CBA is not sufficient to establish a binding past practice⁶ because the record shows that leave was credited in an erroneous manner for a relatively brief period of time; that the Town management was not aware of the error until July, 2011; and that the Office Manager's error was corrected when the HR Director and the Town Manager became aware of it.

Based on the foregoing, the manner in which the Town is applying leave accrual language of the CBA does not constitute a violation of RSA 273-A:5, I (e), (g), (h), and/or (i). Accordingly, the Union's requests for relief based on these claims are denied and these claims are dismissed.

The Union also claims that the Town committed an unfair labor practice by crediting employees with an incorrect number of hours per year, based on the fact that the monthly accrual rate multiplied by the number of months per year is less than the total number of leave days/hours employees are supposed to receive per year under the following CBA accrual schedule:

Length of Continuous Service	Monthly Accrual Rate	Annual Equivalent
Less than 1 year	3.33 hours/.417 days	5 days
2 to 5 years	6.66 hours/.833 days	10 days
5 to 10 years	10 hours/1.25 days	15 days
10 to 15 years	13.33 hours/1.67 days	20 days
15 years	16.66 hours/2.08 days	25 days

It is true that the schedule contains a discrepancy, e.g. 3.33 hours per month (39.96 hours per year) does not amount to exactly 5 days of leave (i.e. 40 hours) and 13.33 hours per month (159.96 hours per year) does not amount to exactly 20 days or 160 hours per year. However, the

⁶ To establish a past practice, a party must show that the alleged practice "occurred with such regularity and frequency that employees could reasonably expect it to continue or reoccur on a regular or consistent basis. In addition, it is implicit in establishing a past practice that the party which is being asked to honor it ... be aware of its existence." *Appeal of New Hampshire Department of Corrections*, 164 N.H. 307, 309 (2012) (citation and internal quotation marks omitted).

Union's claim cannot be sustained because the Town credited employees with the monthly leave hours in accordance with the Monthly Accrual Rate schedule set forth in the CBA. There is no dispute that these numbers need to be reconciled but the fault lies with both parties, as they failed to correct this slight mathematical inconsistency before signing the agreement. Further, during the hearing, the Town Administrator indicated that the Town is addressing the problem by rounding up leave hours to match the annual equivalent for each employee at the end of the accrual year.

Based on the forgoing, the Town did not commit an unfair labor practice when it credited employees with vacation leave hours based on the numbers set forth in the agreed upon Monthly Accrual Rate schedule.

Accordingly, the Union's claims that the Town violated RSA 273-A:5, I (e), (g), (h), and/or (i) are dismissed and the Union's request for relief is denied.

So ordered.

February 6, 2015



Karina A. Lange, Esq.
Staff Counsel/Hearing Officer

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