

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT

-AND -

IN THE MATTER OF A GRIEVANCE

BETWEEN:

**OROMOCTO PROFESSIONAL FIREFIGHTERS
ASSOCIATION, LOCAL 1576,
INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS**

UNION

-and-

TOWN OF OROMOCTO

EMPLOYER

A W A R D

Appearances:

For the Union - Andrew Hawkes, Brian Ferguson
For the Employer - Gordon Petrie

BOARD OF ARBITRATION:

Chairman: Raymond P. Gorman, Q.C.
Union Nominee: Lawrence Cook
Employer Nominee: Kenneth Harding

A W A R D

1. This arbitration arises out of a grievance filed by IAFF, Local 1576 on behalf of Captain B. Ferguson, Lieutenants A. Van Wart and A. Hawkes, and Firefighters, B. Gillis, D. Kenny and S. Rowe, which alleges that the Employer wrongfully cancelled annual leave for these employees. The Union contends that the Employer violated Article 7 of the collective agreement which deals with annual leave; Article 22 of the collective agreement which deals with rights, privileges and working conditions; Article 25 which deals with training, and any other article of the collective agreement that might apply to the grievance.

2. The grievance was referred to arbitration and a Board of Arbitration was empanelled consisting of Lawrence Cook, Union Nominee; Kenneth Harding, Employer nominee; and Raymond Gorman, Chair. A hearing was conducted at the Oromocto Town Council Chambers in Oromocto, New Brunswick on March 23, 2006 at which time the parties agreed that there were no preliminary objections and it was agreed that the Board was properly constituted and seised with jurisdiction to hear and determine the matters in issue.

3. The following documents were entered as exhibits during the course of the hearing:

Exhibit 1		Collective Agreement between the Town of Oromocto and the Oromocto Professional Fire Fighters Association, Local 1576, International Association of Fire Fighters, effective from July 1, 2004 to June 30, 2008
Exhibit 2	(a)	Memo from Richard S. Cummings, Divisional Fire Chief, Oromocto Fire Department to All Officers concerning vacation schedule 2005 dated December 8, 2004
	(b)	Signature Form - All Officers dated December 8, 2004

- Exhibit 3
- (a) Shift 1 Vacation 2005 List
 - (b) Platoon 2 Holiday Schedule 2005
 - (c) Shift #3 Vacation Schedule 2005
 - (d) Shift #4 Vacation Schedule 2005
 - (e) Colour Illustration of four shifts vacation schedule
- Exhibit 4
- (a)
 - (i) Request for Leave Form dated May 28, 2005 regarding employee, Ferguson, which was denied by Richard Cummings on May 30, 2005
 - (ii) Request for Leave Form dated May 28, 2005 regarding employee, Ferguson, which was denied by Richard Cummings on May 30, 2005
 - (b)
 - (i) Request for Leave Form dated May 24, 2005 regarding employee, Van Wart, which was denied by Richard Cummings on May 30, 2005
 - (ii) Request for Leave Form dated May 24, 2005 regarding employee, Van Wart, which was denied by Richard Cummings on May 30, 2005
 - (c)
 - (i) Request for Leave Form dated May 28, 2005 regarding employee, Van Wart, which was denied by Richard Cummings on June 30, 2005
 - (ii) Request for Leave Form dated May 28, 2005 regarding employee, Van Wart, which was denied by Richard Cummings on June 30, 2005
 - (d)
 - (i) Request for Leave Form dated May 28, 2005 regarding employee, Andrew Hawkes, which was denied by Richard Cummings on May 30, 2005
 - (ii) Request for Leave Form dated May 28, 2005 regarding employee, Andrew Hawkes, which was denied by Richard Cummings on May 30, 2005
 - (e)
 - (i) Request for Leave Form dated May 28, 2005 regarding employee, Scott Rowe, which was denied by Richard Cummings on May 30, 2005
 - (ii) Request for Leave Form dated May 28, 2005 regarding employee, Scott Rowe, which was denied by Richard Cummings on May 30, 2005
- Exhibit 5
- (a) Grievance on behalf of I.A.F.F., Local 1576, Captain B. Ferguson, Lieutenants A. Van Wart, A. Hawkes and Fire Fighters B. Gillis, D. Kenny and S. Rowe filed June 7, 2005

- (b) Response to Grievance dated June 13, 2005 from Jody D. Price, Acting Fire Chief
 - (c) Letter from Brian Ferguson, Vice President IAFF Local 1576 to CAO, W. Carnell, Town of Oromocto
 - (d) Letter from W. Carnell to Brian Ferguson dated June 30, 2005
 - (e) Letter from Brian Ferguson to Mayor Tidd dated July 12, 2005
 - (f) Letter from Mayor Fay L. Tidd to Brian Ferguson dated July 26, 2005
 - (g) Letter from Brian Ferguson to Mayor Tidd dated October 5, 2005
- Exhibit 6
- (a) List of Oromocto Fire Department Training Sessions May-June 2005
 - (b) List of Essential Training and List of Non-Essential Training
- Exhibit 7
- Collective Agreement between Town of Oromocto and Oromocto Fire Fighters Association, Local 1576, International Association of Fire Fighters dated May 19, 1988
- Exhibit 8
- Collective Agreement between Town of Oromocto and Oromocto Fire Fighters Association, Local 1576, International Association of Fire Fighters dated October 3, 1989
- Exhibit 9
- (a) Request for Leave Form dated August 2, 2005 regarding employee, J. Poirier, which was denied by Richard Cummings on August 8, 2005
 - (b) Request for Leave Form dated August 2, 2005 regarding employee, Ferguson, which was denied by Richard Cummings on August 8, 2005
- Exhibit 10
- (a) Request for Leave Form dated September 8, 2005 regarding employee, J. Poirier, which was denied by Richard Cummings on September 8, 2005
 - (b) Request for Leave Form dated September 8, 2005 regarding employee, M. Toole, which was denied by Richard Cummings on September 8, 2005

Exhibit 11 Request for Leave Form dated September 8, 2005 regarding employee, Hawkes, which was denied by Richard Cummings on September 8, 2005

4. The present grievance involves an allegation that the Employer violated the collective agreement by unilaterally cancelling annual vacation leave for a number of employees without obtaining mutual agreement from the Grievors. As a remedy, the Union requests that this arbitration board require the Employer to recognize that vacation schedules, once submitted by each shift at the beginning of each calendar year, constitute approved leave. The Union further contends that future essential training should be scheduled in accordance with the provisions of Article 25 of the collective agreement.
5. The facts giving rise to this grievance are relatively straightforward. On December 8, 2004, Richard Cummings, the Divisional Fire Chief for the Oromocto Fire Department, sent a memo to all officers concerning the 2005 vacation schedule. Divisional Chief Cummings' memo stated as follows:

*I am sure that each crew is preparing to pick annual leave to be submitted to the Deputy Chief as has been done each year past. In advance of this selection process I am asking that platoons block out the time period from the **30th of May to the 17th of June 2005** as having no personnel on scheduled holidays to enable the Department to conduct a training program.*

If there are any questions or concerns in this matter, please feel free to contact me.
6. The memo was circulated to all officers on December 8, 2004 and each of them signed a form, prior to the end of December, acknowledging that he had received the memo.
7. The practice for establishing vacation leave at the Oromocto Fire Department was for

all members of each shift to submit vacation requests to their officer-in-charge who would then submit it to the Fire Chief. Each shift followed this procedure in December 2004 and several members of Local 1576 selected vacation times which coincided with the period of time between May 30th and June 17th, 2005.

8. Past practice at the Oromocto Fire Department also included a process by which each employee submitted, to the Chief, a written request for annual leave. Evidence at the hearing established that requests for leave had never been denied in the past once a vacation list was prepared. In accordance with this practise a number of the employees completed Leave Request forms as required and their vacation leaves between May 30th and June 17th, 2005 were denied because training was scheduled during that time. As a result of the denials, the Union filed this grievance.
9. The grievance was denied at the first level by Jody Price, the Acting Fire Chief, by letter dated June 13, 2005. In his letter, Acting Fire Chief Price noted that the memo, which was sent to all captains and lieutenants on December 8, 2004, advised that there would be no annual leave approved for the dates of May 30th to June 17th inclusive. As a result, he concluded that any leave schedules which included members having selected annual leave for these dates would not be an approved leave schedule.
10. In the reply, the Acting Fire Chief stated that the decision to provide job specific training to all members of the department and to provide notice of such training several months in advance is considered to be reasonable and not contrary to any article of the collective agreement. He maintained that Article 25 of the collective agreement was not violated since notice of the training period was given to the employees on December 8, 2004 which was prior to the selection of the 2005 vacation leave.

11. The grievance proceeded to the second level where it was denied by A.W. Carnell, Chief Administrative Officer for the Town of Oromocto who stated:

Upon review the notice given to members in December 2004 advising that there would be no annual leave granted for a specific period several months in the future does not violate the collective agreement.

12. A similar response was given at the third level from Town Council as follows:

Council considered and reviewed this grievance on 21 July 2005. It considers that adequate notice was provided and that the notice and training were in compliance with the collective agreement.

13. Both parties to this arbitration agreed that the facts involved in the grievance were essentially not in dispute and that argument would be made based on the exhibits filed with the Board.

14. The Union did, however, choose to call one witness to give evidence, namely Danny Kenny, who had been employed with the Oromocto Fire Department for 29 years and has been involved from the Union side with labour relations matters from time to time. Mr. Kenny testified that he has been the shop steward and part of the Union negotiation team in the past. He testified that the collective agreement wording which deals with "training" was introduced in 1989 in order to help in establishing training for firefighters. He stated that the concept, at that time, was for management to schedule training at a time when holidays would not be an issue. Mr. Kenny testified that, prior to 2005, management had never blocked off a period for training, He also testified that any vacation leave requests that he has made since 1989 were always approved.

15. The issue arising out of this arbitration involves a determination of the Employer's right to refuse to approve an employee's vacation selection in order to carry out staff training when notice of that staff training was provided several months in advance of the period

selected for vacation.

16. The following provisions of the collective agreement are relevant to this arbitration:

ARTICLE 3 - MANAGEMENT CLAUSE

- 3 a. *The parties hereto agree that it is the right of the Employer to manage the Fire Department in all respects, except as specifically limited by the terms of this Agreement (emphasis added).*

ARTICLE 7 - ANNUAL LEAVE

- e. *In fixing the vacation period of an employee, the Fire Chief shall, as far as reasonably possible, give effect to the wishes of the employee having greater seniority.*
- i. *All shifts will submit a holiday schedule to the Deputy Chief's office not later than 1 January each year. This will not prevent employee-requested alterations to an approved holiday schedule if judged operationally functional by management.*

ARTICLE 22 - RIGHTS, PRIVILEGES AND WORKING CONDITIONS

All rights, privileges and working conditions enjoyed by the employees at the present time, which are not included in this Agreement, shall remain in full force, unchanged and unaffected in any manner during the term of the Agreement unless changed by mutual consent

Nothing in this Article shall be interpreted to limit or restrict management's right to manage the workforce, implement training and assign duties to employees, provided however, that management's decisions shall not be unreasonable or contrary to any specific provisions of this Agreement.

ARTICLE 25 - TRAINING

- (b) (ii) *.... No employee shall be required to attend essential training programs during periods of approved leave unless the employee and the Employer otherwise mutually agree. Any employee required to attend essential training sessions shall be given a minimum of two weeks notice by the Employer.*

17. The Union argues that Article 22 of the collective agreement requires mutual consent to alter holidays and, without that mutual consent, the Employer was unable to deny vacation leave to employees who had selected vacation leave during the scheduled

training period. The Union contends that the mutual consent referred to in Article 22 of the collective agreement constitutes a specific limitation on the Employer's right to manage the Fire Department such as was contemplated by the wording of Article 3(a) of the collective agreement.

18. The Union argues that Article 22 provides a further limitation inasmuch as past practise is incorporated into the collective agreement. The Union maintains that, since all vacation leaves requested by employees in the past were approved, the Employer is now required to approve every vacation request because the system of approving all vacation requests is a "*right, privilege and working condition*" enjoyed by employees at the present time. In other words, the Union argues that Article 22 incorporates past practice and, when past practice in granting vacation leave is considered, the Employer does not have the right to refuse vacation leave in order to schedule training.
19. Other arguments advanced by the Union include its contention that, once a shift submits a holiday schedule to the Deputy Chief, it immediately constitutes an approved vacation. Six employees submitted vacation requests that were denied because they fell within the training period. According to the Union, these denials violate Article 7(i) of the collective agreement.
20. In summary, the Union believes that the collective agreement incorporates the past practise of vacations being considered to be approved once the vacation request is submitted, i.e. the employee needs only the permission of the captain for approved leave and that any further steps in the process are mere formalities.
21. The Employer argues, on the contrary, that there is nothing in the collective agreement which states that employees can schedule their own vacation. Article 7(e) designates

the Fire Chief as the person responsible for fixing the vacation schedule.

22. In addition, the Employer submits that Article 7(i) does not allow employees to unilaterally set their vacation schedule. According to the Employer, the past practice is for the Union members to select their preferred vacation leave and the Employer gives the employees the selected vacation leave where possible. That approval comes as a result of the employees submitting the written request for each period of vacation leave. The Employer noted that, in the present case, the Employer advised everyone long in advance as to the training dates and the Employer is justified in refusing vacation leave for training purposes, particularly where notice was given.

23. The often cited labour text, *Canadian Labour Arbitration* by Brown and Beatty, Fourth Edition, (Canada Law Book Inc.) deals with scheduling vacations. The authors state under Topic 8:3240 at page 8-68:

Unless a collective agreement provides otherwise, arbitrators have traditionally assumed that management has the right to fix the vacation schedule for its operations, including the right to schedule a plant shutdown and to require its employees to take their vacations during the shutdown, or to declare certain days to be holidays during which the plant will be closed.

That section of Brown and Beatty goes on to indicate that the employer's discretion is subject to reasonableness. The Employer's argument in the present case was to the effect that to cancel vacation leave during periods of training was abundantly reasonable, particularly in light of the fact that all employees were notified several months in advance of the upcoming training.

24. In *Re Hotel-Dieu Grace Hospital and Service Employees Union, Local 210*, 48 L.A.C. (4th) 368, the arbitrator was dealing with policy and individual grievances

concerning vacation scheduling. The employees' grievances were dismissed. At page 374 of the decision, the arbitrator stated:

In some instances the collective agreement will be silent, save for reserving to the employer the right of management to schedule vacations. Thus in Re United Parcel Service Canada and Teamsters Union, Loc. 141 (1981), 29 L.A.C. (2d) 202 (Burkett), the agreement provided that it was the exclusive function of the employer to "generally manage the business" and, apart from a general clause relating to seniority, was silent on the question of vacation entitlement or employee choice therein. In other agreements the parties will attempt to reflect both of the competing interests in language that varies in terms of the extent of that protection. In Re Whitby Boat Works Ltd. and C.J.A., Loc. 2679 (1980), 27 L.A.C. (2d) 268 (O'Shea), the relevant clause provided that "[s]cheduling of vacations shall be decided by the Company, and the wishes of employees on the basis of seniority will be given consideration". In Re U.E., Loc. 522 and Fairbanks-Morse (Canada) Ltd. (1968), 19 L.A.C. 27 (Johnston), the agreement provided that "[a]ll vacations ... must be taken in the current calendar year at a time satisfactory to the Company but employees should have the opportunity, so far as the scheduling of work permits, to choose their vacation time". (See also Re U.R.W. and Goodyear Tire & Rubber Co. of Canada Ltd. (1964), 15 L.A.C. 34 (Reville), for a similarly worded clause.

25. In dismissing the grievance, the arbitrator stated further at page 375:

Article 16.08 of the instant collective agreement makes it clear that, to the extent that employees wishes are recognized, they are made subject to the right of the employer to operate the hospital in an efficient manner.

26. In *Re United Parcel Service Canada Ltd. and Teamsters Union, Local 141*, 29 L.A.C. (2d) 202, the board of arbitration stated at page 390:

The parties negotiated this agreement in the knowledge that the scheduling of vacations was to be left within the discretion of management and against the backdrop of the arbitration awards which have been referred to ante, p. 207 herein. These awards demonstrate that if on the language the primary consideration is the efficiency of the employer's operation, the employer, so long as he is looking to efficiency, is free to make unilateral decisions in respect of vacation schedules which take little or no account of employee wishes, and which may impact adversely on individual employees. There, as in this case, there is no provision made for the consideration of employee wishes and where the scheduling of vacations is left within the sole

discretion of management, one must conclude that the union understood the extent of the discretion which it was agreeing to vest in management. At the very least the union understood that the efficiency of the operation would be the primary consideration in the scheduling of vacations and that a system would be put in place based on the application of general rules which might adversely impact upon individual employees.

27. In *Re Royal City Bingo and Canadian Union of Public Employees, Local 3999-12*, 82 L.A.C. (4th) 235, the arbitrator was dealing with vacation scheduling involving a Christmas blackout period. The arbitrator reviewed the existing jurisprudence on vacation scheduling and stated at page 241:

These authorities generally also stand for the proposition that unless a collective agreement provides otherwise, management has the prerogative to determine the vacation schedule for its operations.

28. The Board has considered all of the evidence before it and the able arguments of counsel for both the Union and the Employer. The majority of the Board of Arbitration concludes that the present collective agreement does not limit the Employer's prerogative to determine the vacation schedule for its employees, except for the requirement that management's decisions shall not be unreasonable (Article 22) and the requirement that, in fixing the vacation period of an employee, the Fire Chief, as far as reasonably possible, is to give effect to the wishes of the employee having greater seniority (Article 7(e)). That position is supported by the language of the collective agreement. The agreement contains a management rights clause by which the parties agree that it is the right of the Employer to manage the Fire Department in all respects except as specifically limited by the terms of the collective agreement. It is noted that, although Article 22 of the collective agreement purports to preserve past practice, the article provides that it should not be interpreted to limit or restrict management's right to manage the workforce, implement training and assign duties to employees provided it is not unreasonable or contrary to any specific provisions of the collective agreement.

29. There are no provisions of the collective agreement that would support a conclusion that submission of holiday requests to a shift captain would constitute approval of vacation leave requests for the year. If that were the case, it would render Article 7(e) meaningless. Article 7(e) refers to the Fire Chief "*fixing the vacation period of an employee*". One of the meanings of the word "fix" is "*to agree, arrange, or settle something, especially a time or a price*". In that context, the Fire Chief has a role to play in vacations, i.e. to agree, arrange or settle vacation time.
30. The general proposition is that, unless the collective agreement provides otherwise, management has the prerogative to determine the vacation schedule for its operations. After closely examining the collective agreement, the majority of the Board cannot find any provisions in the agreement that provide otherwise.
31. The majority of the Board concludes, therefore, that the Employer's right to deny vacation leave is limited to reasonableness, a term which is used both in Article 7(e) (Annual Leave) and Article 22.
32. The Union also contended that the Employer must schedule training in accordance with the provisions of Article 25 of the collective agreement. The provisions of Article 25, which state that no employee shall be required to attend essential training during periods of approved leave, are subject to the leave having been approved by the Employer. The Employer in the present case did not approve any leave for the planned period of training and made that fact clear in advance of any employee selecting their 2005 annual leave. The Employer has also clearly met the requirement of giving two weeks notice of training pursuant to Article 25 of the collective agreement. Again, the test of reasonableness comes into play and, in the circumstances of the present case, the Employer has acted reasonably. The majority of the Board finds that there was no

violation of Article 25 of the collective agreement and that the essential training in May and June 2005 was scheduled in accordance with that article.

33. As a result of the foregoing, the majority of the Board of Arbitration finds that the Employer has not violated the collective agreement and the grievance, therefore, is denied. That is not to say that the Employer has an unfettered right to unilaterally establish training periods which would interfere with approved leave. The collective agreement is structured in such a way that the Employer must act reasonably when refusing to approve a selected period of leave such as it did in 2005 when notice of the training period was given approximately six (6) months in advance.

DATED this 11th day of September, A.D. 2006.

Raymond P. Gorman
Chairman

I, Kenneth Harding, the Employer Nominee on a Board of Arbitration involving a grievance between the Town of Oromocto and the Oromocto Professional Fire Fighters Association, Local 1576, International Association of Fire Fighters, hereby _____ agrees _____ with this decision.

Kenneth Harding
Employer Nominee

I, Lawrence Cook, the Union Nominee on a Board of Arbitration involving a grievance between the Town of Oromocto and the Oromocto Professional Fire Fighters Association, Local 1576, International Association of Fire Fighters, hereby _____ dissent _____ with this decision.

Lawrence Cook
Union Nominee

DISSENT
OF
LAWRENCE COOK, UNION NOMINEE

I agree with the Union's position that the three aggrieved articles are sufficient to provide management the needed flexibility to conduct the training required to run a competent and efficient workforce, without having to block out weeks of the calendar as unavailable for leave in order to conduct training. The current past practice enjoyed by the employees is that they are able to take their leave at any time throughout the calendar year provided it does not create any unnecessary overtime. This practice was long established prior to 1989 and cemented with the insertion of Article 7(i) in 1989.

Article 7 and Article 25 are specific in that they prescribed how training is to be conducted and how vacation leave works within the department. Article 22 binds these articles to the practices that they establish.

It is still my assertion that the grievance should be upheld.

Lawrence Cook