

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MANITOWOC COUNTY (SHERIFF'S
DEPARTMENT)

and

MANITOWOC COUNTY SHERIFF'S
DEPARTMENT EMPLOYEES, LOCAL 986-B,
AFSCME, AFL-CIO

Case 298
No. 52397
MA-8949

Appearances:

Mr. Robert Zeman, Corporation Counsel, 1010 South 8th Street, Manitowoc, WI 54220
appearing on behalf of Manitowoc County.

Wisconsin Council 40, AFSCME, Post Office Box 370, Manitowoc, WI 54220-0370 by
Mr. Gerald Ugland, Staff Representative, appearing on behalf of Local
Union 986-B.

ARBITRATION AWARD

Manitowoc County (hereinafter referred to as the County or the Employer) and Local 986-B, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the County's policy on holiday pay in the Sheriff's Department. A hearing was held on August 10, 1995 in Manitowoc, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the hearing and a transcript was received by the arbitrator on August 26, 1995. The parties submitted post hearing briefs which were simultaneously exchanged through the undersigned. The record was closed on October 19th.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the arbitrator makes the following Award.

I. Issue

The parties stipulated that the following issue should be determined herein:

Did the Employer violate the collective bargaining agreement by withholding and/or recouping holiday premium pay from the employees for their use of sick leave prior to and/or after holidays?

If so, what is the appropriate remedy?

II. Relevant Contract Language

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work force and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

Unless otherwise herein provided, the Employer shall have the right to determine the specific hours of employment and length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement. . . .

. . .

ARTICLE 12 - HOLIDAYS

All employees shall be granted ten (10) paid holidays each year. They are as follows: New Year's Day, Good Friday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Day after Thanksgiving, Christmas Eve Day, Christmas Day, and Day before New Year's Day.

An employee must be in attendance on his or her work day immediately preceding and immediately following the holiday to be eligible for the holiday pay, except when on an approved absence.

When a holiday occurs on a week day (Monday - Friday), employees who are regularly scheduled to work Monday - Friday shall receive the holiday off on the day it occurs. When the holiday falls on Saturday, the employees shall receive the preceding Friday off. If the holiday falls on Sunday, the holiday shall be observed on the following Monday.

. . .

ARTICLE 14 - SICK LEAVE

. . .

B. Notice of Sick Leave: In order to be eligible for sick leave pay, it is understood that on any work day when the employee is unable to perform his or her duties, he or she shall so advise his or her immediate supervisor or department head or department head's designee forty-five (45) minutes prior to the start of his or her work shift, if possible, so that the Employer can make a good faith effort to obtain replacement personnel.

In the event of critical illness or required attendance upon an employee's father, mother, spouse or child, an employee shall be allowed to use accumulated sick leave.

Manitowoc County recognizes and complies with the State and Federal Family and Medical Leave Acts, and when requested, will assist the employee in utilization of those rights.

C. Regulation: Any employee off work for three or more consecutive days may be required by the Employer to submit a physician's statement.

After five (5) occurrences, (funeral supplement not included), the Employer may require an employee to furnish a physician's certificate for the sixth (6th) sick leave occurrence and thereafter in a calendar year. It is understood that in counting occurrences for the requirement of bringing in a physician's certificate to return to work

from sick days, no occurrence shall be counted if a physician's certificate is brought in for such occurrence. If there is any additional expense for such physician's certificate, the Employer shall pay the cost of the same.

. . .

Any employee claiming or obtaining sick leave benefits by proven fraud, deceit or falsified statement shall be subject to just progressive discipline.

. . .

ARTICLE 23 - OVERTIME - COMPENSATORY TIME - HOLIDAY PAY

Overtime shall be compensated at the rate of time and one-half (1 1/2) for the following conditions:

. . .

D. Employees shall be paid time and one-half (1 1/2) for all hours worked on a holiday in addition to holiday time off.

. . .

III. Background

There is relatively little dispute over the facts giving rise to this grievance. The County is a municipal employer providing general governmental services to the people of Manitowoc County in eastern Wisconsin. Among the services provided is police protection through the Manitowoc County Sheriff's Department. The Department employs both sworn law enforcement personnel represented by the Wisconsin Professional Police Association ("WPPA") and non-sworn employees represented by AFSCME ("the Union").

The County and the Union have been parties to a series of collective bargaining agreement stretching back for many years. Among the benefits provided by the contract is a holidays provision in Article 12, setting ten paid holidays per year. In order to receive holiday pay, the contract requires an employee to work the scheduled work days immediately before and after the holiday, unless he or she is "on an approved absence." Since the Department is a 24 hour operation and does not close on holidays, employees do not necessarily receive holiday time off on the actual day on which the holiday falls. Article 23 of the contract addresses this operational reality, and provides that employees who work on a holiday receive time and one-half for all hours worked in addition to holiday time off to be used on another day.

In January of 1995, Inspector Kenneth Petersen ordered an audit of sick leave usage during 1994. The audit showed, among other things, that six employees from the AFSCME bargaining unit and two other employees had been paid time and one-half for work performed on holidays where the employee had used sick leave on the day before or the day after the holiday. An audit of 1993 sick leave usage disclosed similar instances. Petersen directed that the 1994 premium payments be recovered from the employees since, in his view, the time and one half premium would not be available to employees who did not qualify for holiday pay under Article 12. He did not seek to recover premium pay for 1993 because he felt that the passage of time would cut off recovery. The monies were deducted from the pay of the employees involved, and the instant grievance was filed protesting Petersen's interpretation of the contract.

The grievance was processed through the steps of the grievance procedure. In the grievance procedure, the County took the position that sick leave was not an "approved" leave of absence within the meaning of the contract, since the County did not approve sick leave requests, it merely accepted them and excused the absence. The Union took the position that sick leave usage had never been held out as a reason to deny premium pay or impose any other penalty related to holidays. The Union also noted that the County took no steps to find out the precise reason for sick leave usage in each individual case before ordering payroll deductions to recoup the premium pay received by the employees. The matter was not resolved in the grievance procedure and was referred to arbitration.

At the arbitration hearing, the Union presented witnesses who testified that they had examined every time card for the years 1992 and 1993, some 3,200 in all, and had not found a single instance in which an employee who used sick leave on a day adjoining a holiday had been denied premium pay for working the holiday. These witnesses noted that each time card was reviewed and initialed by a supervisor in the Department.

Petersen testified on behalf of the County and stated that vacation, holiday time off, and compensatory time were approved absences, but that sick leave was an excused absence. The distinction Petersen drew was that he was not able to disapprove a request for sick leave, while he could disapprove requests for time off in the other categories. The only usage of sick leave that Petersen viewed as falling into the "approved" category would be elective procedures or doctor's appointments that could be scheduled in advance after clearing the date with the Department. Petersen characterized the instances found by the Union in which payments of premium pay had been made to persons using sick leave adjacent to a holiday as payroll errors, and noted that if these errors had been caught and corrected after the time cards were sent to storage, the corrections would not appear on the cards. Instead they would appear on a separate memo. Personnel Director Sharon Cornils also testified to the distinction between approved and excused absences.

Additional facts, as necessary, will be set forth below.

IV. Positions of the Parties

A. The Position of the Union

The Union takes the position that the County violated the contract by deducting holiday premium pay from the employees' paychecks under the policy announced in January of 1995. Article 12 of the contract requires that employees be present at work or on an approved absence the days before and after a holiday in order to receive the paid holiday. The County confuses the ability to avoid paying holiday pay under Article 12 when employees are absent with the ability to avoid paying the time and one half holiday premium due under Article 14 when employees actually work the holiday. Even assuming for the sake of argument that sick leave is not an approved leave, the duty to pay time and one half for hours worked on a holiday is separate from the right to have a day off with no loss of pay.

The Union notes that if the County wishes to regulate perceived sick leave abuse, it has specific language allowing discipline for such activities, in addition to the normal right of employers to impose penalties for just cause. It may not, however, fail to pay the agreed-upon rate for work actually performed as a back-door means of penalizing employees who are legitimately absent due to illness. Such an action is neither legitimate as a disciplinary act nor as a means of encouraging attendance.

The contract recognizes that existing practices are binding for the term of the contract. The Union presented evidence that a check of thousands of time cards for 1992 and 1993 revealed only seven cases in which employees used sick leave on a day adjacent to a holiday. In each case, the employee received the holiday premium. In addition, there were eight such cases in 1994. Each of the employees received the holiday premium, and then had it taken away by the memo that gave rise to this grievance. Thus over a period of at least three years, there is not a single instance in which the holiday premium was denied because the employee used sick leave on a day adjacent to the holiday. Since employee time cards are approved by supervisory personnel, the County cannot credibly claim not to have been aware of its own practices regarding holiday premium payments.

The overwhelming weight of the evidence shows that there is a continuous practice of allowing premium pay for holidays even when the employee uses sick leave on the day before or the day after. By the terms of Article 3, this practice binds the County for the duration of the contract, and forbids the unilateral change attempted by Petersen's memo. Thus the grievances should be granted and all affected employees should be reimbursed for their lost wages.

B. The Position of the County

The County takes the position that the grievances should be denied. The Sheriff's

Department operates on a 24 hour per day, seven day per week basis and the "surrounding days" requirement cannot therefore be viewed in the ordinary way. This provision usually is aimed at preventing employees from stretching holidays by taking time off on the days surrounding the holiday. Here employees do not receive the actual holiday off, instead receiving a day off in lieu of the holiday and time and one-half for work on the holiday itself. Thus stretching the holiday is not an issue. That is not to say that the employer has no interest in insuring attendance on the days surrounding holidays, since the Department must at all times maintain adequate staffing levels, and this task is more difficult during holiday periods. The County argues that the contract provision here is designed to accomplish that end.

The County does not challenge the legitimacy of the sick leave claimed by unit employees, but it does argue that sick days are not an "approved absence". The County has no general right to approve or disapprove the use of sick leave. Instead, it can either accept or not accept the absence, depending upon whether there is proof of some fraud associated with the claim of illness. Since the only exception to the "surrounding days" requirement is for approved absences, the use of sick leave operates to deny holiday pay to these employees.

The County rejects the Union's claim that there is some sort of past practice supporting the payment of holiday pay to employees who use sick leave on days adjacent to holidays. The Union was able to point to only seven cases in 1992 and 1993 in which employees who used sick leave received holiday pay, and those seven cases involved a total of five employees. There are cases in which the County waives the requirement, such as an accident or a prearranged medical appointment. One of the cases cited by the Union involved an accident. Another involved an absence of only 15 minutes, a usage so small as to not justify correcting once the mistaken payment of holiday pay was discovered. The circumstances surrounding the other five cases are not clear, since none of the affected employees testified. Without proof that these instances actually involved sick leave usage unconnected to an accident or a pre-arranged medical appointment, there can be no finding of a past practice. Adding to the uncertainty of the Union's proof is the acknowledgment of their own witnesses that payroll mistakes can and do occur. With so few cases cited by the Union, it is not possible to state with certainty that the payment of holiday pay reflected a conscious decision by the Department or simply isolated bookkeeping errors.

The plain language of the contract controls the outcome of this case. Since sick leave cannot be characterized as an approved absence, those employees using such leave on days adjacent to holidays cannot be eligible for premium pay when they work the holiday. Thus the grievances should be denied.

V. Discussion

The sole issue in this case is whether the requirement that employees work on the day before and after a holiday allows the County to disallow premium pay for employees who use sick

leave on one of those days, but then work the actual holiday. The contract addresses compensation for holidays in two places. Article 12 specifies the 10 paid holidays each year as well as the requirement that employees work on the surrounding days in order to receive the holiday pay:

All employees shall be granted ten (10) paid holidays each year . . .
An employee must be in attendance on his or her work day immediately preceding and immediately following the holiday to be eligible for the holiday pay, except when on an approved absence.

Article 23 discusses overtime pay, and Section d of that provision sets forth the rate of pay when employees actually work instead of having the holiday off:

Employees shall be paid time and one-half (1 1/2) for all hours worked on a holiday in addition to holiday time off.

With all due respect to the position of the County, there does not appear to be either a logical or a contractual connection between the surrounding days requirement in Article 12 and the premium pay for working holidays in Article 23. Article 12 details a benefit -- a full day's pay on a day which is not actually worked -- and sets the conditions under which that benefit is received. The reference to holiday pay in Article 12 must, if that Article is to be read as a coherent statement of holiday benefits, refer to the right of the employee to receive his or her normal pay in recognition of the holiday even though no services are actually performed. Nothing in the wording of Article 12 itself indicates that the benefit referred to is premium pay for working the holiday rather than paid time off. The fact that employees do not generally get the actual holiday off is not particularly relevant, since they get Article 12's time off benefit at some other point in the year if they have satisfied the surrounding days requirement.

In contrast to the benefit-defining nature of Article 12, Article 23 describes all of the circumstance in which premium pay is available, including work on a holiday. It speaks in mandatory terms ". . . Employees shall be paid time and one-half . . ." and sets no condition for the premium pay other than actually working on the holiday. While Article 23 does make reference to the fact that employees also receive holiday time off, that is in the nature of a clarification that the premium pay for working is in addition to, rather than in lieu of, the benefit granted in Article 12.

Reasonably read, Article 12 defines the Holidays benefit and is a complete statement of the scope and restrictions on that benefit. The benefit therein defined is paid time off, either on the holiday itself or on some other day. As a precondition to receiving the benefit, the employee must work on the scheduled work days before and after the holiday. Article 23 defines the circumstances under which employees receive overtime premium pay. In the case of holiday work, the precondition is that the employee must actually work on the holiday. Although the general subject matter of Article 12 and Article 23, Section d is holidays, the two provisions deal with entirely different aspects of holidays, and each stands alone as a coherent and complete provision. Grafting a specific restriction from one section to the other requires some persuasive evidence that the parties intended that result even though they failed to clearly express it. The

plain language of the contract does not in any way suggest such an intent and there is no evidence that the contract has been interpreted this way in the past. 1/

1/ Petersen testified to his understanding of the proper interpretation of the contract and expressed the view that there could be errors in the payroll records that showed that every employee who used sick leave in conjunction with a holiday in 1992, 1993 and 1994 received premium pay. He also suggested that these errors may have been corrected by way of separate memos, which would not have shown up on the time cards reviewed by the Union. It may be that such memos exist, although if they do the Arbitrator would have expected the County to have provided them to the Union in response to the Staff Representative's request for "any and all documents depicting (Continued on Page 9)

(Continued)

employee attendance before, during, and after holidays and the consequent payment and non-payment of any holiday pay for all holidays starting with New Years Day of 1992" [emphasis added]. In any event, it is not sufficient for the County to simply cast doubt on the Union's evidence of past practice. The Union's position is supported by the contract language. It is the County which is putting forward an interpretation which is at odds with a normal reading of the actual contract language, and it is therefore incumbent on the

County to show some support for its interpretation by way of past practice. I don't question Petersen's sincerity when he says that he believes the County's interpretation is correct, but there is no evidence in the record to show that he administered the contract in that fashion before the January 1995 memo that led to this grievance.

Assuming for the sake of analysis that sick leave is not an "approved absence" within the meaning of Article 12, the use of sick leave under the contract on a day surrounding a holiday would operate to deny the employee the benefit defined in that same contract provision -- i.e. paid holiday time off. The structure, language and practice under the contract do not allow the County to superimpose the surrounding days requirement on the premium pay provisions of Article 23. Thus I have concluded that the County violated the collective bargaining agreement when it denied premium pay to employees in the bargaining unit for work actually performed on holidays in 1994 and thereafter. The appropriate remedy is to make all affected bargaining unit employees whole for their losses, and to cease and desist the practice of conditioning premium pay on not using sick leave in conjunction with holidays.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer violated the collective bargaining agreement by withholding and/or recouping holiday premium pay from the employees for their use of sick leave prior to and/or after holidays. The appropriate remedy is to immediately make all affected employees whole for their losses, and to discontinue the policy of denying holiday premium pay to employees who use sick leave on the day before or the day after a holiday, but who actually work on the holiday.

Dated at Racine, Wisconsin this 20th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator