

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Appearances

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT

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No. 15024-A

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ARTICLE VII. HOLIDAYS

7.1 There shall be granted to all full-time employees the following paid holidays: New Years Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Friday after Thanksgiving Day, December 24, and Christmas Day. Payment shall be on the basis of eight (8) hours per day at base pay rate for each holiday.

7.2 To be eligible for holiday pay, employee must have worked the last scheduled work day prior to and the next scheduled work day immediately following such holiday, unless absence is due to illness or injury, or unless absence due to other valid reasons is excused by the Company; employee must furnish Company a doctor's statement if absence is due to illness or injury.

. . .

ARTICLE IX. BEREAVEMENT PAY

9.1 In the event of the death of an employee's spouse, parent or stepparent, parent or stepparent of current spouse, child or stepchild, brother or stepbrother or sister or stepsister, he will upon request be excused from work for three (3) or fewer days, these days being the date of the funeral and a total of two (2) or fewer days immediately before or after the funeral when such days fall on the employee's regularly scheduled work days. In the event a member of an employee's family as described above dies while in active service of the Armed Forces of the United States the employee may, should the funeral be delayed, have his excused three (3) or fewer days absence from work delayed until the date of the funeral or memorial service and a total of two (2) or fewer days immediately before or after the funeral or memorial service when such days fall on the employee's regularly scheduled work days. In all instances bereavement pay will be paid only if employee attends the funeral. Payment shall be made for eight (8) hours at straight time pay for each excused day of absence.

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ARTICLE XIV. GRIEVANCES

14.1 Any employee's grievance which is not settled by the foreman, the shop committeeman and the employee involved shall be referred to the superintendent who must give an answer no later than the end of the following working day.

14.2 Failing satisfactory adjustment with the factory superintendent, the shop committee may appeal the grievance in writing to higher management and an answer shall be given no later than the end of the following third (3rd) work day.

14.3 In the event of the inability of the management and the Shop Committee to agree, additional meetings may be scheduled by mutual agreement."

4. Ronald Gipson, Brian Jensen and David Flores are employed by Respondent and are represented for collective bargaining purposes by Complainant. Their normal days of work are Monday through Friday.

5. Gipson worked on Friday, July 2, 1976. ^{1/} On that day, he was notified that he would be suspended without pay on Monday, July 12 and Tuesday, July 13 for certain conduct which occurred on Thursday, July 1. He was on vacation from Monday, July 5 through Friday, July 9. Gipson was excused from work on Wednesday, July 14. Because he did not work on Monday, July 12, Respondent refuses to pay Gipson holiday pay for Independence Day, July 4.

6. The week of July 4 through 10 was a shutdown week during which employees took a week of paid vacation. Some employees, however, were scheduled to work and did work during this week.

7. Jensen worked on Friday, September 3, 1976. On that day, he was notified that he would be suspended on Tuesday, September 7 and Wednesday, September 8 for certain conduct which occurred on September 3. Labor Day fell on Monday, September 6. Because Jensen did not work on September 7, Respondent refuses to pay Jensen holiday pay for Labor Day.

8. Gipson and Jensen are entitled to receive holiday pay for Independence Day and Labor Day, respectively, pursuant to Article VII of the collective bargaining agreement.

9. Flores was suspended without pay on Monday, August 9 and Tuesday, August 10 for certain conduct which occurred on Thursday, August 5. His sister died on Sunday, August 8, 1976. He attended her funeral on Monday, August 9. On Wednesday, August 11, Flores requested to be excused from work for that day because of his sister's death; his request was granted and Respondent paid him bereavement pay pursuant to Article IX. Respondent refuses to pay Flores bereavement pay for Monday, August 9, the day of his sister's funeral, because Flores was suspended.

10. Flores is not entitled to receive bereavement pay for August 9 pursuant to Article IX of the collective bargaining agreement.

On the basis of the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant exhausted the available contractual grievance procedure with respect to its allegation that Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act by denying holiday pay to Ronald Gipson and Brian Jensen and by denying bereavement pay to David Flores and thus the Examiner will assert the Wisconsin Employment Relations Commission's jurisdiction to determine the merits of that allegation.

2. Respondent, by denying holiday pay to Ronald Gipson for Independence Day, 1976, and to Brian Jensen for Labor Day, 1976, violated the parties' collective bargaining agreement and thus

^{1/} Unless otherwise mentioned, all dates refer to 1976.

committed an unfair labor practice within the meaning of sec. 111.06 (1) (f) of the Wisconsin Employment Peace Act.

3. Respondent did not violate the parties' collective bargaining agreement by denying David Flores bereavement pay for August 9, 1976 and thus Respondent has not committed an unfair labor practice within the meaning of sec. 111.06(1) (f) of the Wisconsin Employment Peace Act.

On the basis of the above Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the portion of the complaint alleging that Respondent violated the parties' collective bargaining agreement by denying David Flores bereavement pay for August 9, 1976 and thus violated sec. 111.06(1) (f) of the Wisconsin Employment Peace Act be, and the same hereby is, dismissed.


IT IS FURTHER ORDERED with respect to the remaining portions of the complaint that Respondent, its officers and agents shall immediately:

1. Cease and desist from violating the collective bargaining agreement which exists between Complainant and Respondent.
2. Take the following affirmative relief which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:
 - a. Pay Ronald Gipson holiday pay for Independence Day, 1976, and pay Brian Jensen holiday pay for Labor Day, 1976, pursuant to Article VII of the parties' collective bargaining agreement.
 - b. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to the steps which have been taken to comply herewith.

Dated at Madison, Wisconsin this 16th day of September, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant alleges that Respondent violated Article VII of the parties' collective bargaining agreement, thereby violating section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA), 2/ by denying Ronald Gipson and Brian Jensen holiday pay for Independence Day (July 4, 1976) and Labor Day (September 6, 1976) respectively. Complainant also alleges that Respondent violated Article IX of the collective bargaining agreement, thereby violating section 111.06(1)(f) of WEPA, by denying David Flores bereavement pay for August 9, 1976.

Respondent denies that it violated Article VII or Article IX of the bargaining agreement and thus denies that it violated section 111.06(1)(f) of WEPA.

In regard to the holiday pay issue, both Complainant and Respondent agree that Gipson and Jensen worked "the last scheduled work day prior to . . . such holiday," as required by section 7.2. The parties differ as to whether Gipson and Jensen worked "the next scheduled work day immediately following such holiday." Complainant argues that "scheduled work day" refers to a day on which an individual employee is scheduled to work. Thus, Gipson's next scheduled work day after Independence Day was not Monday, July 12 since he was not scheduled to work that day due to his disciplinary suspension. He was next scheduled to work on Wednesday, July 14 and therefore July 14 was "the next scheduled work day immediately following" Independence Day. Although Gipson did not work on July 14, his absence was excused and thus he is considered to have worked on July 14 for purposes of receiving holiday pay.

Similarly, Jensen's next scheduled work day after Labor Day was not Tuesday, September 7 since he was not scheduled to work that day due to his disciplinary suspension. He was next scheduled to work on Thursday, September 9 and thus September 9 was "the next scheduled work day immediately following" Labor Day.

Contrary to Complainant, Respondent defines the term "scheduled work day" in section 7.2 as a normally scheduled work day for the plant, a day when the plant is running or a normal production work day. If the parties had meant the term to refer to an individual employee's scheduled work day, they could have added the appropriate words, as has been done in Article IX, the bereavement pay article. Monday, July 12 and Tuesday, September 7 were normally scheduled work days for the plant and since Gipson and Jensen did not work on July 12 or September 7, respectively, they do not qualify for holiday pay.

2/ Section 111.06(1)(f) of WEPA provides that it is an unfair labor practice for an employer to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

Turning to the bereavement pay issue, Complainant contends that Respondent violated Article IX by refusing to pay Flores bereavement pay for Monday, August 9, the day of his sister's funeral. The bereavement pay article provides that an employee shall receive pay for the day of a family member's funeral, provided the employee attends the funeral. The phrase "when such days fall on the employee's regularly scheduled work days" applies only to the "two (2) or fewer days immediately before or after the funeral", not to the day of the funeral. Since Flores attended the funeral, he is entitled to receive bereavement pay for that day, regardless of whether or not the day of the funeral was one of Flores' regularly scheduled work days.

Respondent contends that Flores is not entitled to receive bereavement pay for the day of his sister's funeral because he was suspended for that day.

DISCUSSION

In order for the Examiner to determine whether Respondent has violated the collective bargaining agreement and therefore violated sec. 111.06(1)(f) of WEPA it must first be determined whether or not Complainant exhausted all steps of the contractual grievance procedure. 3/ Complainant and Respondent stipulated that Complainant had exhausted the contractual grievance procedure (which does not contain a provision for final and binding arbitration) and that the Commission has the jurisdiction to determine the merits. Therefore, the Examiner will assert the Commission's jurisdiction to determine the merits of the alleged contractual violations.

The parties' arguments concerning holiday pay for Gipson and Jensen center around the interpretation of the phrase "scheduled work day" found in Article VII. Although the article does not specify that the "scheduled work day" is the individual's, the Examiner is not persuaded that this lack of specificity necessarily means that the term disregards the individual employee's schedule.

The week of July 4 through 10, 1976, the week Gipson was on vacation, was a shutdown week during which many, if not all employees, took a week of paid vacation pursuant to section 6.2. However, some employees worked during that week. Although the plant may not have been "running" and there may not have been any normally scheduled work days for the plant, the individuals who worked during the shutdown week undoubtedly qualified for holiday pay for Independence Day, not because they worked July 12, but because they worked Monday, July 5, which was their next scheduled work day. Thus, "scheduled work day" refers to the individual employee.

Neither Gipson nor Jensen were scheduled to work on July 12 or September 7, respectively, since they were suspended on those days. However, these days were their regularly scheduled work days which raises the question of whether the work day in section 7.2 refers to the employees' next actually scheduled work day or their next regularly scheduled work day. It is not necessary to answer this question. Assuming it means the former, Gipson and Jensen were eligible to receive holiday pay since their next actually scheduled work days were July 14 and September 9, respectively. Assuming it means the latter, Gipson and Jensen were still eligible to receive holiday pay

3/ Schlueter Co. (9348-A, B) 2/69.

because of the provision in section 7.2 which provides that, when an absence due to a valid reason is excused by Respondent, the employee is considered to have worked for holiday pay purposes. Both Gipson and Jensen had a valid reason for being absent as Respondent had ordered them not to work. These absences were necessarily excused by Respondent since they were pursuant to Respondent's order. Accordingly, Gipson and Jensen are entitled to receive holiday pay for Independence Day and Labor Day, respectively.

Not only does the contractual language lead the Examiner to the above conclusion, but the purpose of the requirement that an employee work the day before and after the holiday also supports this conclusion. The purpose is to prevent employees from stretching a holiday by voluntary absence. The absences of Gipson and Jensen were not voluntary; granting them holiday pay does not disregard the purpose of the requirement.

In addition, it must be noted that the Employer imposed upon Gipson and Jensen suspensions of two days, not three. Yet to deny Gipson and Jensen holiday pay under these circumstances would have the effect of increasing their suspensions to three days since, although they lost two days of work, they would lose three days of pay.

The Examiner will now discuss the bereavement pay issue. Article IX, the bereavement pay provision, provides generally that (1) Respondent must excuse an employee from work for bereavement purposes and that (2) Respondent must pay that employee for a day's work even though the employee was absent from work. These provisions indicate that the purposes of the bereavement pay article are to guarantee that an employee will be excused from work and to protect against loss of income due to a death in the immediate family. Given these purposes, it is reasonable to construe the term "employee's regularly scheduled work day" as modifying the term "date of the funeral" as well as the term "two (2) or fewer days immediately before or after the funeral." Thus, an employee is not entitled to receive bereavement pay for the day of a funeral unless that day falls on the employee's regularly scheduled work day. In addition, in light of the purposes of the article and the language that an employee will be "excused from work" and will be paid "for each excused day of absence", an employee is not entitled to receive bereavement pay for the day of the funeral unless that day falls on an actually scheduled day of work from which the employee needs to be excused and for which he would be paid.

Monday, August 9, the day of his sister's funeral, was a regularly scheduled work day for Flores since he was regularly scheduled to work Monday through Friday. However, Flores was not scheduled to work this particular Monday; he did not need to be "excused from work", he was not absent due to the funeral and he suffered no loss of pay due to his attendance at the funeral. Accordingly, he was not entitled to bereavement pay for the date of the funeral and, therefore, Respondent did not violate Article IX by refusing to pay him for that day.

This conclusion does not mean that Flores was not entitled to receive bereavement pay for Wednesday, August 11. Article IX conditions bereavement pay for three or fewer days on attendance at the funeral. It does not condition payment for a non-funeral day on payment for the day of the funeral.

Dated at Madison, Wisconsin this 16th day of September, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner