BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN DELLS SCHOOL DISTRICT

and

WISCONSIN DELLS SCHOOL DISTRICT
EMPLOYEES UNION, LOCAL 1401-A,
AFSCME, AFL-CIO

Case 19
No. 41731
MA-5454

Appearances:
Mr. Karl L. Monson, Membership Consultant, Wisconsin Association of School Boards, Inc., on behalf of the District.
Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

Pursuant to the terms of the 1988-91 collective bargaining agreement between Wisconsin Dells School District (hereinafter the District) and Wisconsin Dells School District Employees Union, Local 1401-A, AFSCME, AFL-CIO (hereinafter the Union) the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and resolve a dispute regarding the proper application of the language contained in Article 13 - Holidays to unit employes. The undersigned was designated and after having made full written disclosures to the parties concerning which no objections were raised, hearing in this case was held on April 25, 1989 at Wisconsin Dells, Wisconsin. No stenographic transcript of the proceedings was made. Post-hearing briefs, were received and exchanged by the undersigned by June 1, 1989. On June 13, 1989 the Union waived the filing of a reply brief. The Employer filed a reply brief on June 19, 1989.

ISSUE:

The parties were unable to stipulate completely to the substantive issues in this case; however, both parties agreed that the following issue is before me:

> Did the Employer violate the collective bargaining agreement when it failed to pay time and one-half holiday premium pay for all hours worked on December 26, 1988 and January 2, 1999 for affected unit employes; if so, what is the appropriate remedy?

The Union took the position, objected to by the District, that the following issue is also properly before me:

> Did the Employer violate the collective bargaining agreement when it failed to provide holidays off with pay for the Christmas Eve and Christmas Day holidays in 1988 and the New Year's Day Holiday in 1989; if so, what is the appropriate remedy?

The parties agreed to give the undersigned the authority to decide whether or not the latter issue has been properly raised by the grievance/grievance procedure in this case.

RELEVANT CONTRACT LANGUAGE:

Article 13 - Holidays

13.01 All regular part-time employees will be granted three (3) paid holidays: Thanksgiving, Christmas Day and New Year's Day. All nine (9) and ten (10) month employees will be granted six (6) paid holidays: Labor Day, Thanksgiving Day, Christmas Day, Good Friday, Memorial Day and New Year's Day.

All twelve (12) month full-time employees will be granted eight (8) paid holidays: Labor Day, Thanksgiving Day, Christmas Eve Day, Christmas Day, New Year's Day, Good Friday, Memorial Day and July 4. A paid holiday, for pay purposes, shall consist of the employee's normally scheduled work day hours. To be paid a holiday, the employee must be present the scheduled working day preceding the holiday and also be present the scheduled working day after the holiday.

A. Should an employee be required to work during a holiday, pay shall be at time and one-half rate.

Article 11 - Overtime

11.01 Time and One-Half: All hours worked over forty (40) hours in one (1) week shall be paid at time and one-half (1-1/2) of the regular hourly wage. There should be no pyramiding of overtime.

FACTS:

The District and the Union entered into collective bargaining negotiations which ultimately lead to the parties' executing an initial contract for the years 1988-91 following mediation by the WERC. The proper construction of Article 13 relating to Holidays contained in the 1988-91 agreement is in issue in this case.

It is undisputed that the District proposed the language which later became the substance of Article 13, through the process of negotiations. In their preliminary final offer (dated February 19, 1988) submitted to the WERC mediator pursuant to the Union's petition for interest arbitration, the District included the following language regarding holidays:

8. Paid Holidays

> Eight (8) paid holidays will be granted:
>
> Labor Day
> Thanksgiving Day
> Christmas Eve Day
> Christmas Day
> New Year's Day
> Good Friday
> Memorial Day
> July 4th
>
> A paid holiday for pay purposes shall consist of the employee's normally scheduled workday hours. To be paid for a holiday, the employee must be present the scheduled working day preceding the holiday and also present the scheduled working day after the holiday.

Through the process of mediation by the WERC, in mid-May, 1988, the parties reached a voluntary agreement on the terms of a contract which included language regarding holidays as follows:

13.01 All regular part-time employees will be granted three (3) paid holidays: Thanksgiving, Christmas Day and New Year's Day. All school year full-time employees will be granted six (6) paid holidays: Labor Day, Thanksgiving Day, Christmas Day, Good Friday, Memorial Day and New Year's Day. All regular full-time employees will be granted eight (8) paid holidays: Labor Day, Thanksgiving Day, Christmas Eve Day, Christmas Day, New Year's Day, Good Friday, Memorial Day and July 4. A paid holiday, for pay purposes,

> shall consist of the employee's normally scheduled workday hours. To be paid a holiday, the employee must be present the scheduled working day preceding the holiday and also present the scheduled working day after the holiday.

The Board characterized "Article 13 - Holidays" as containing Board-proposed language in its summary of the tentative agreements reached between the parties dated May 16, 1988.

It should be noted that both Union and Board witnesses agreed that during contract discussions relating to Holidays, the Union indicated that it wished only to maintain the status quo regarding holidays in the parties' initial agreement.

In response to this, the Board admittedly proposed the language contained in Article 13. District Administrator Peterson stated that the paid holidays listed in Article 13 represented the paid holiday practice which had been in place prior to the advent of the Union. Peterson also stated that the Union never proposed during negotiations that the number of paid holidays be increased under the initial agreement.

It is also undisputed that the District did not indicate that by proposing the holiday language of Article 13, it intended to change or abrogate the alleged past practice, asserted by the Union, of giving employes the Friday off with pay before a Saturday holiday and the Monday off with pay following a Sunday holiday. There was no evidence on this record that the parties ever mentioned or discussed any such past practice relating to holidays, during their contract talks.

Evidence regarding past practice with respect to holidays was offered by the Union. The uncontradicted evidence in this case shows that prior to the advent of the Union, employes had been granted days off with pay when paid holidays fell on a Saturday or a Sunday -- that is, employes normally received a day off with pay on Friday when the holiday occurred on a Saturday, and a day off with pay on Monday if the holiday fell on a Sunday. District Administrator Peterson confirmed that this had been the District's practice before the Union came in. It was also undisputed that District unit employes had never received time and one-half pay for working on a holiday (as listed in Article 13) or for hours worked on December 26 or January 2 in any year.

In answer to a question why the District had taken the actions which led to the grievance here, the District Administrator stated that since the Union's contract stated that he should pay employes straight time pay for the holidays listed in the contract, that is what he had done for the Christmas Eve, Christmas Day and New Year's Day holidays in question here. In this regard, the facts showed that District Administrator Peterson issued a memo dated December 22, 1988 which stated:

> Christmas Eve Day for twelve month employees is Saturday,

> December 24, 1988. You will receive regular holiday pay for this day which will be included with your January 10, 1989 paycheck. For twelve month and nine month employees, Christmas Day is Sunday, December 25, 1988. For this day you will also be paid at the regular holiday rate and it will be included with your January 10, 1989 pay check. Regular work days for the last week in December will be Monday, December 26, 1988, through Friday, December 30, 1988.
>
> New Year's Day is Sunday, January 1, 1989. Twelve month and nine month employees will receive regular holiday pay for this day, which will also be included with your January 10, 1989 pay check. Regular work days for the first week in January will be Monday, January 2, 1989, through Friday, January 6, 1989.

As a result, eligible unit employes received 24 hours of straight time pay for Christmas Eve, Christmas Day and New Year's Day holidays if they worked December 23, and 26, 1988 and January 2, 1989. No unit employe was required to work on December 24 or 25, 1988 or on January 1, 1989. The District did not grant employes any time off with pay (as had allegedly been done before the Union contract was executed) during this holiday period.

The Union also submitted a "perpetual calendar". This calendar indicates inter alia where holidays fall on weekend days for the years 1700 through 2018. The Union asked its witnesses to refer to the calendar regarding the occurrence of weekend holidays for the years 1978, 1982 and 1983. Without exception those witnesses working for the District during the years in question confirmed that the District's consistent practice had been to allow them a day off with pay the day before a Saturday holiday and the day after a Sunday holiday.

Finally, the Union asked that the undersigned take arbitral notice of the following provision in the Wisconsin Statutes (1987-88):

> 895.20 **Legal holidays.** January 1, January 15, the 3rd Monday in February (which shall be the day of celebration for February 12 and 22), the last Monday in May (which shall be the day of celebration for May 30), July 4, the 1st Monday in September which shall be known as Labor day, the 2nd Monday in October, November 11, the 4th Thursday in November (which shall be the day of celebration for Thanksgiving), December 25, the day of holding the September primary election, and the day of holding the general election in November are legal holidays. On Good Friday the period from 11 a.m. to 3 p.m. shall uniformly be observed for the purpose

> of worship. In every 1st class city the day of holding any municipal election is a legal holiday, and in every such city the afternoon of each day upon which a primary election is held for the nomination of candidates for city offices is a half holiday and in counties having a population of 500,000 or more the county board may by ordinance provide that all county employes shall have a half holiday on the day of such primary election and a holiday on the day of such municipal election, and that employes whose duties require that they work on such days be given equivalent time off on other days. Whenever any of said days falls on Sunday, the succeeding Monday shall be the legal holiday.

The Union sought such arbitral notice of this Section assertedly to show that District unit employes should have received time off with pay as a matter of law, over and above the contract. The Union also submitted the school calendar negotiated by the Teachers' bargaining unit. The District objected to the Union's use of this document on the ground that this calendar affects only a distinct bargaining unit, not represented by the Union, which has its own separate collective bargaining agreement with the District.

It should be noted that the District also objected to the entire array of testimony relating to the District's alleged practice of allowing days off with pay whenever a holiday has occurred on a weekend day. In this regard, the District pointed out that the instant grievance form makes no mention of time off with pay. I/ The District Administrator testified, without contradiction, that time off with pay was not mentioned or sought throughout the grievance procedure until the day of the hearing herein.

POSITIONS OF THE PARTIES

Union

In its initial brief, the Union argued that the record in this case establishes the existence of a longstanding, clear and consistently followed practice regarding holidays. The Union asserted that both its witnesses and District Administrator Peterson agreed that in the past, the District has allowed employes the day before a holiday off with pay if the holiday fell on a Saturday and the day after a holiday off with pay if the holiday fell on a Sunday.

In addition, the Union contended that where fewer instances of a practice can arise due to the nature of the circumstances, the number of instances where the practice has been honored is less important then the consistency of the application of the practice. In this regard, the Union pointed to the "perpetual calendar" it submitted to show that the holidays in question here fall on weekend days on an irregular and infrequent basis. Thus, the fact that the District applied the practice in each instance in which it has occurred in the past -1978, 1982 and 1983 -- shows the practice to be a true past practice. The Union argued that had the District followed the past practice in 1988, eligible employes would have had December 23 and 26, 1988 and January 2, 1989 off with pay as well as receiving holiday pay for the holidays listed in the agreement.

The Union contended that since the District did nothing to overtly indicate it wished to change or repudiate the pre-contract holiday practice, and since the Union made it clear that it only wished to maintain the status quo regarding holidays in its contract, the pre-contract practice of allowing employes the day off either the day before or the day after a weekend holiday should have been continued. This, the Union asserted, was especially true where the practice involved a well-established benefit to employes upon which they had relied and where no discussion of the practice had occurred in negotiations.

The Union further contended that any ambiguity in Article 13 should be construed against the District, the drafter of that language. The Union pointed to the School calendar (negotiated by the Teacher's Union) and argued that its contract language should be found ambiguous regarding what the parties meant by the terms "Christmas Eve" "Christmas Day" and "New Years Day" -- the traditional day of observance or the legal holiday pursuant to Section 895.20, Wis. Stats. The Union urged the arbitrator to find the contract ambiguous, thereby requiring the arbitrator to conclude that the District should have recognized the legal holidays to be December 23, 26 and January 2nd so that employes who worked on those days should have been paid time and one-half for work on the legal holiday.

Finally, the Union contended that the grievance form was sufficient to raise the matters litigated here. The Union noted that the form properly stated a violation of Article 13 and sought a make-whole remedy. In the Union's view, the fact that the form did not mention the past

practice, admittedly first asserted by the Union at the instant hearing, should not preclude this arbitrator from ordering a proper make-whole remedy based upon the Union's past practice arguments.

In conclusion the Union asserted that the District abrogated its practice of granting paid days off for holidays falling on weekends deliberately and spitefully. It urged the arbitrator to sustain the grievance, to order that the employes be paid time and one-half for work performed on December 23 and 26, 1988 and January 2, 1989 and to order that employes be allowed to select paid days off for the holidays in question to which they were entitled pursuant to the agreement, or to receive straight time pay therefor if the employe terminates or retires.

District

In its initial brief, the District urged the arbitrator to completely reject the issue raised by the Union at the instant hearing regarding the alleged past practice of allowing paid days off either before or after a paid holiday when the holiday falls on a weekend day. In this regard, the District noted that in the interest of labor peace, arbitrators generally require that the parties have an opportunity to remedy or settle contractual violations before an arbitration hearing is held. This, the District contended, never occurred regarding the Union's past practice issue since that issue was first raised at the hearing herein. In addition, the District pointed to the language of Article 5 of the agreement:

> 5.01
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> a. Definition
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> > Grievance is defined to be and limited to a dispute concerning the interpretation or application of the terms of the written agreement entered into between the parties on wages, hours, and conditions of employment for the employees for whom Local 1401-A, WCCME, AFSCME, AFL-CIO is the negotiating representative.
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> . . .
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> 5.02 Procedural Steps
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> f. . . . Nor shall the arbitrator have the power to hear or determine any dispute except those limited to the interpretation or application of the express and specific

> provision(s) of this written agreement, not to add to, subtract from, modify or amend any terms of this agreement. The arbitrator shall have no power to substitute his discretion for that of the Board in any manner not specifically contracted away by the Board. The decision of the arbitrator shall, within the scope of his authority, be final and binding upon the parties.
>
> . . .

These provisions, the District contended, require this arbitrator to reject the Union's past practice issue and claims.

In regard to the issue (stipulated by the parties) whether the District should have paid time and one-half for hours worked on December 26 and January 2, the District urged that the contract clearly does not require such payments be made. In this regard, the District asserted that the Union sought to commingle statutory Legal Holidays with contractual paid holidays in order to get extra pay where none was intended to be granted. In fact, the District observed, if the arbitrator were to adopt the Union's interpretation of the contractual language, unit employes would be granted a maximum of 12 holidays instead of the 8 holidays specifically listed in the agreement for full-time employes (in years like 1988-89). Therefore, the District urged that Legal Holidays, including December 26 and January 2 which were not specified by the agreement were not intended by the parties to be holidays and should not be paid at time and one-half. The District urged denial and dismissal of the grievance.

REPLY BRIEFS

Although the parties reserved the right to file reply briefs, on June 13, 1989 the Union waived its right to file such a brief, in writing. On June 19, 1989 the Employer filed a reply brief herein.

In its Reply Brief, the District emphasized certain arguments made in its initial brief regarding the impropriety of the Union's expansion of the instant grievance to cover the District's alleged practice of granting paid time off before or after a weekend holiday. The District discussed the testimony of several witnesses regarding the alleged paid time off practice as well as the bargaining history surrounding holidays. The District then pointed out that this testimony had been inconsistent, in its view. Finally, the District asserted that since the language of Article 13 is clear, the evidence of practice which seeks to vary and add to Article 13 should not be incorporated into the agreement, given the fact that the testimony tended to show that there was no discussion or meeting of the minds between the parties regarding granting paid time off when holidays fall on weekend days.

DISCUSSION

In this case, the grievance form states a violation of one specific provision of the agreement, Article 13. It does not mention a violation of past practice or otherwise indicate that a practice might be in issue here. Furthermore, the grievance form specifically seeks a time and one-half premium pay remedy for two specific dates -- December 26, 1988 and January 2, 1989. No mention is made in the form of any claim for time and one-half pay for December 23, 1988 or of any request for time off (with or without pay) for employes who worked on December 23 and 26, 1988 and January 2, 1989. Finally, the evidence here showed and the Union admitted that the Union never raised the issue of past practice or sought the additional remedy of time off with pay for December 23 and 26 and January 2 in conjunction with this case until after the hearing herein had commenced.

In these circumstances, normally I would sustain the District's objections to the Union's introduction of the second issue stated supra involving past practice and the Union's request for time off with pay for employes who worked on December 23 and 26 and January 2. In my view, the Union's assertion that its general statement of a violation of Article 13 and its request for a make-whole remedy are insufficient in the context of the other details and statements contained in the grievance form to put the District on notice of the Union's past practice and paid time off claims. However, given the fact that I have a full record before me regarding the Union's assertions at hearing and given the importance of the issue to the parties and the likelihood of the reoccurrence of the issue over time, I feel that I should decide both issues arising in this case in order to avoid the filing of further grievances which would necessarily cause a delay in the parties' receipt of an arbitrator's opinion on the subject.

Therefore, I turn to the first issue in this case. Whether the District was required to pay time and one-half premium pay for work performed on December 26 and January 2 depends upon whether December 26 and January 2 constituted holidays under the agreement. In my view, the language of Article 13 is clear and unambiguous regarding which days are to be considered paid holidays. Specifically, I note that the dates December 26 and January 2 are not listed as holidays in the agreement. Nor are these dates otherwise described as holidays in the contract -- e.g. Day after Christmas or Day after New Year's Day. In addition, it is undisputed that no employes were required to work on any of the holidays specifically listed in the agreement. However, the Union argued that since December 26 and January 2 are legal holidays pursuant to Sec. 895.20 Wis. Stats., employes who were present at work on those days should be considered to have worked a holiday and they should then receive time and one-half premium pay (pursuant to paragraph 2 of Article 13) for those days.

There is simply no support, either in fact or in law, for such a conclusion. In this regard I note that the parties negotiated an agreement which clearly specifies the paid holidays employes can expect to receive. In these circumstances, Sec. 895.20 Wis. Stats., may not supersede the clear

contractual intent of the parties. Additionally, I note that all of the employes who testified indicated that they had never previously been paid time and one-half for work on December 26 or January 2. District Administrator Peterson confirmed this fact and he also stated that the District has never previously paid time and one-half premium pay for work on a holiday since employes have not been required to work on any "holidays". Finally, the Union's assertion that the District has celebrated holidays on the statutory legal holiday was not supported by either the language of the agreement or by the facts of this case. 2/

Based upon the relevant evidence in this case, I find that the District did not violate the agreement by refusing to pay affected employes time and one-half holiday premium pay for hours worked on December 26 and January 2.

Turning now to the second issue in this case, the initial question that must be answered is whether the language of the agreement pertaining to this issue is clear. If the relevant contract language is clear and unambiguous, arbitral precedent demonstrates that I may not consider extrinsic evidence (such as evidence of past practice or bargaining history) which would vary, change or contradict the clear language of the agreement.

I can find no ambiguity in the language of Article 13. Article 13 lists the particular days that shall constitute paid holidays. Based upon this listing in Article 13, there can be no question which days of the year are holidays.

Furthermore, the last sentence of the first paragraph of Article 13 makes it clear that in order to receive holiday pay, employes must be present at work on the scheduled work day preceding and the scheduled work day following a listed holiday. This sentence directly contradicts the evidence of past practice submitted by the Union which showed that where a holiday had previously fallen on a weekend day, the District had waived the requirement of employe presence at work on either the day before or the day after such a weekend holiday. In addition, Article 13 demonstrates that the parties were fully aware of the normally scheduled work days for unit employes (Monday through Friday for full-time employes) at the time they entered into their agreement on Article 13. In my view, had the parties intended to vary, alter or waive the general requirements for holiday pay entitlement stated in Article 13, they could have placed a simple sentence in the agreement specifying what would occur if a holiday fell on a weekend day. Finally, where, as here, no maintenance of benefits clause was included in the agreement and the Union has asserted that a past practice existed allowing time off with pay in addition to holiday pay, such a relatively unusual provision should have been specifically detailed in the agreement.

In these circumstances and based upon all of the relevant evidence in this case, I find that the evidence of past practice and bargaining history proffered by the Union may not be considered to vary or change the clear language of Article 13 of the agreement. The grievance is, therefore, denied and dismissed in its entirety.

AWARD

1. The Employer did not violate the collective bargaining agreement when it failed to pay time and one-half premium pay for all hours worked on December 26, 1988 and January 2, 1989 for affected employes.

2. The Employer did not violate the collective bargaining agreement when it failed to provide holidays off with pay for the Christmas Eve and Christmas Day holidays in 1988 and the New Year's Day holiday in 1989.

3. The grievance is therefore denied.

Dated at Madison, Wisconsin this 13th day of July, 1989.

By _____
Sharon Gallagher Dobish, Arbitrator

2/ The Union's proffer of the Teacher bargaining unit's calendar is not relevant to this case.

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