

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
: LOCAL 133, DISTRICT COUNCIL 48,
AFSCME, AFL-CIO :
: and : Case 46
: No. 41779
: MA-5460
OAK CREEK-FRANKLIN SCHOOL DISTRICT :
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Appearances:

Ms. Monica M. Murphy, Podell, Ugent & Cross, S.C., Attorneys at Law,
Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202,
appearing on behalf of the Union.
Mr. Mark L. Olson, Mulcahy & Wherry, S.C., Attorneys at Law, 815 East
Mason Street, Suite 1600, Milwaukee, Wisconsin 53202-4080, appearing on
behalf of the District.

ARBITRATION AWARD

Local 133, District Council 48, AFSCME, AFL-CIO, hereafter the Union, and the Oak Creek-Franklin School District, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to appoint a staff member to hear and decide a grievance concerning the meaning and interpretation of the collective bargaining agreement. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Oak Creek, Wisconsin, on July 25, 1989; no stenographic record was made. The District filed a brief on September 25, 1989; the Union responded on October 11, 1989. The District submitted a response on November 14, 1989, at which time the record was closed.

ISSUE

The Union frames the issues as follows:

Did the District violate the collective bargaining agreement, Article X, par. 4, Article XIII, par. 5d, and Appendix "A" par. 5 when it failed to pay the grievant two days holiday pay for holidays that occurred while she was on unpaid leave of absence? If so, what is the remedy?

The District frames the issue as follows:

Did the District violate the terms of Appendix A, Sec. 5 of the 1988/89 collective bargaining agreement when it did not provide holiday pay to the grievant for December 24 and December 25, 1988? If so, what is the remedy?

The undersigned frames the issue thus:

Did the District violate the collective bargaining agreement, Article X, par. 4, Article XIII, par. 5d, or Appendix A, par. 5, when it denied holiday pay to the grievant for December 24 and 25, 1988? If so, what is the remedy?

BACKGROUND

Carol Riley, the grievant, is a part-time custodial aide for the District. On October 27, 1988, while in a non-work setting, she broke her wrist. At that time, she had approximately 23 days of accumulated sick leave. Her sick leave bank ran out on or about December 2, 1988, at which time Riley went on an unofficial, informal, unpaid leave of absence. Riley did not return to work until January 3, 1989. Upon her return to work, Riley sought two days holiday pay (December 24 and 25, 1988), for holidays which occurred during her absence. The District declined to pay such payment, which action Riley has grieved.

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE X

LEAVES

1. Sick leave shall be provided all employees within this bargaining unit based on the following:

- a. Employees shall be allowed one day of sick leave for each month of service accumulated to 120 days.
 - b. Part-time employees will receive one day per month of their normal daily work (i.e. 4-hour per day employees will receive one 4-hour day) cumulative to 120 days. Any employee advancing to a position with greater hours shall have their sick leave converted to new position. (Example: A 20 day - 4 hour sick leave accumulation converts to 10 - 8 hour days.)
 - c. Sick leave is allowed when an employee works more than 50 percent of possible days within a month.
2. Sickness is defined as personal illness, or emotional upset by accident, death or illness in the immediate family, or similar circumstances which render the worker incapable of carrying out his or her regular assignment. Maternity is considered an illness under this definition.
3. Sick leave may be taken for up to five (5) working days for any death or critical illness in their immediate family requiring the employee's presence at home.
4. If an employee is off on sick leave and a holiday(s) falls during said sick leave, the employee shall not have a sick leave accumulation changed for the day(s).
5. Certification by a physician may be required for sick leave as the Business Manager deems necessary.
6. Sick leave records are available for review during regular office hours in the Business Office, and annually in December the Business Office shall supply employees with a written statement of their accounts as of that date.
7. Upon satisfactory termination of employment or retirement, accumulated sick leave beyond sixty (60) days will be reimbursed by an unused sick leave bonus to be based upon the days past sixty (60) multiplied by the beginning base rate of the employee's classification.
8. Any employee who has accumulated thirty-five (35) days or more of unused sick leave and a prolonged illness or off-duty injury consumes said accumulated allowance time, then the accumulated allowance, upon employee's return to work, shall be equal to or not less than one-half of said accumulated total allowance.

. . . .

11. Leaves of Absence Without Pay The Board, upon written request, may grant a leave of absence for a period not to exceed one year, subject to renewal at the will of the Board. The terms and conditions for each leave shall be discussed and decided by the Board and determined on the merits and circumstances of each particular request. This section will be subject to the grievance procedure provided herein up to, but not including arbitration.

ARTICLE XIII

WAGES AND HOURS OF WORK

. . . .

5. The normal work year (calendar) for Custodial Aides and Laundry Workers (part-time) will be:
- a. All regularly scheduled teaching days.
 - b. Summer work consisting of hours equal to twenty

(20) normal week days shall be scheduled.

- c. The Board of Education will annually submit the work calendar for unit members. Changes in the calendar after that date shall be at least two weeks before the change, except in emergency situations.
- d. During the normal calendar work year up to ten (10) days of unpaid vacation may be taken each year upon the prior approval of the Supervisor of Buildings and Grounds. Request for such leave shall be at least five (5) working days in advance. If a paid holiday falls during this non-paid vacation, the employee shall receive holiday pay as listed in Appendix "A".

APPENDIX "A"

. . .

5. Each employee under this agreement shall be paid for seven holidays - Good Friday, Memorial Day, Thanksgiving Day, Day after Thanksgiving, Day before Christmas and Labor Day. To be eligible for these paid holidays the employee must have worked or been on sick leave the last scheduled day before and the first scheduled day after the holiday. Holiday pay shall be at the employee's base rate for the average hours currently being assigned.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be denied the District asserts and avers as follows:

Holiday pay is an earned benefit, conditioned upon an employee's compliance with certain requirements as stated in the contract, which requirements the grievant has failed to fulfill. The grievant had exhausted her bank of paid sick leave on December 6, 1988, and was thereafter on unpaid leave until her return on January 3, 1989. Thus, by neither working nor being on paid sick leave on the days bracketing the holidays in question, the grievant has not met the eligibility test of Appendix A of the collective bargaining agreement. Further, there is no past practice under which an employee who did not comply with the express terms of Appendix A ever received holiday pay.

Finally, the grievant should not be allowed to raise new grounds of alleged contract violations after expiration of the time limit to bring grievances. Throughout the grievance process, the grievant claimed only a violation of Appendix A; it was not until fifteen (15) days after the grievance was filed that the union alleged a violation of Article X, relating to leaves. It is well-settled that issues not properly raised are not properly before an arbitrator for consideration; as the contract requires an oral presentation of the grievance within five working days, the union has failed to submit this issue in a timely manner. The issue of an alleged violation of Article X is thus not properly before the arbitrator for consideration.

In rebuttal, the Association posits as follows:

It is misleading for the District to argue that it has never paid holiday pay under these circumstances, inasmuch as this circumstance has never happened before. There never having been an employee on unpaid sick leave during a holiday period, there is no controlling precedent.

Further, the District errs in contending that the grievant was on sick leave. The relevant contractual provision, Appendix "A," does not differentiate between paid and unpaid sick leave. The grievant used her bank of paid sick leave, and was granted a leave of absence; she was thus on unpaid sick leave until she returned to work.

Finally, the District errs when it asserts that holiday pay

must be "earned" by working the days before and after the holiday. Employees on unpaid vacation leave on such days still receive holiday pay; so, too, should employees on unpaid sick leave.

There being no controlling precedent, the grievant should be paid for the paid holiday that occurred while she was on unpaid sick leave just as she would have been had she been on unpaid vacation.

The District further responds as follows:

The Union arguments ignore the relevant bargaining history, which clearly establish that holiday pay was only to be provided to employees who had been at work on paid sick leave the days bracketing the holiday. Such was the uncontroverted testimony of the District's chief negotiator, former Business Manager Arthur Olson. More-over, as it was the Union which proposed the language in question, such language must be construed against the interpretation which the Union now offers.

Further, the Union's assertion that the grievant is entitled to the holiday pay because she was on "unpaid sick leave" is hollow and unconvincing, in that the contract makes no reference at all to such a status. This is in contrast to the provision for holiday pay for employees on unpaid vacation, which is clearly set forth in the contract.

Nor was the grievant on an unpaid leave of absence, in that she failed to apply for such status pursuant to the explicit terms of the agreement.

The Union also errs in stating that the contract does not require that holidays be earned, inasmuch as the agreement explicitly requires an employee to satisfy the precise terms of Appendix A, paragraph 5 to be eligible for holiday pay. The grievant failed to satisfy those terms, and is therefore not entitled to the holiday pay sought.

Because the payment of holiday pay in this situation is contrary to the explicit terms of the contract and the relevant bargaining history, this grievance should be dismissed with prejudice.

DISCUSSION

The underlying facts of this dispute are simple and straight-forward. The grievant, injured in a non-work accident on October 27, was neither at work nor on paid sick leave the days immediately before and after the holidays of December 24 and December 25. 1/ The issue is whether, notwithstanding such status, she was still entitled to two days pay for these holidays.

In interpreting the contract, first recourse is of course to the relevant text. Appendix "A," paragraph 5, provides as follows:

To be eligible for these paid holidays the employee must have worked or been on sick leave the last scheduled day before and the first scheduled day after the holiday.

In its brief, the Union contends that this provision makes no distinction between paid and unpaid sick leave, and that the grievant, being on unpaid sick leave on the days bracketing the holidays, met the contractual requirement. This is an interesting theory, but it is not one which I can accept.

It does not require advanced work in linguistic deconstructionism to understand that the totality of the text in question is key to its meaning. Here, the contract uses the phrase "sick leave" in two separate sections, the aforementioned Appendix "A," and Article X, Leaves. That Article, particularly paragraphs 1., 3., 4., 5., 6., and 7., clearly establishes that "sick leave" means paid sick leave. Indeed, there is an entirely separate provision which applies to unpaid sick leave, par. 11, "Leaves of Absence Without Pay." Thus, when Appendix "A" refers to "sick leave," it means the status of an employee who

1/ Because these days were on the weekend, the District apparently regarded December 23 and 26, 1988, as the holiday days for purposes of holiday pay. (Ex. Bd. 3) Because the parties framed the issue in terms of December 24 and 25, and because to do so does not affect the outcome of this arbitration, this award refers to December 24 and 25 as the days in question.

is paid at the usual hourly wage notwithstanding absence from work due to personal or family illness.

The District has objected to any consideration in this Award of the Union's allegations concerning violations of Article X, noting that such allegation was not raised within five (5) days of when the employee knew or should have known of the cause of the grievance. The contract provides that "the failure of the party to file or appeal" a grievance within such time period "shall be deemed a settlement and waiver" of the grievance. Here, Riley did file her grievance within five days of her knowledge of its occurrence; while the initial filing alleged a violation of Appendix "A," and stated in sufficient detail the facts of the grievance, it was not until approximately 15 days later that allegations involving Article X were raised. While it is certainly preferable for the parties to make their allegations and defenses known as early as its practicable, the Union did, in its timely filing of the grievance, provide adequate notice to the District of the issues involved, both as regards Appendix "A" and Article X.

Finding that the Union had the ability to raise the issue of Article X, however, I yet find no merit in its argument. The Union apparently concedes this point, making no mention of this provision in its written brief. Article X, par. 11., provides that the Board, upon written request, may grant a leave of absence for up to one year, subject to terms and conditions determined by the Board. It appears that this provision could have been utilized to accommodate the grievant, at the time she had exhausted her sick leave bank but was still physically unable to return to work. However, no such written request was ever submitted, nor demanded. Thus, the grievant apparently assumed a status not specifically provided for in the contract, being on an unofficial, informal unpaid leave of absence. Notwithstanding this extra-contractual status, the District continued to consider the grievant as its employee, albeit in a non-pay status. Its action in this regard, while not within the strict letter of the contract, was certainly conducive of good labor-management relations, and in no way diminishes its defense against this grievance.

Finally, the Union contends that an employee on "unpaid vacation" the days bracketing a holiday receives holiday pay, and asks why this should be, while an employee on "unpaid sick leave" does not receive the same benefit. Indeed, the contract does provide, in Article XII, par. 5d., that "if a paid holiday falls" during the period when an employee is on a non-paid vacation, "the employee shall receive holiday pay as listed in Appendix "A." To be on such non-paid vacation, however, an employee must make such request five working days in advance, and receive prior approval of the Supervisor of Buildings and Grounds. There is nothing in the record to indicate that such request was ever sought or obtained. Moreover, the contract limits the extent of such non-paid vacation to ten days per year; even had the grievant sought and received such leave, it too would have expired at least two days prior to the holidays in question. Thus, this provision will not cover the grievant's circumstances.

The Union asks why employees on non-paid vacation may receive holiday pay, while employees on non-paid sick leave do not. From the perspective of logic and policy, that may be a good question -- but it is a question which must be answered in the context of collective bargaining, not through grievance arbitration.

Upon review of the record evidence and the arguments of the parties, I find that the District did not violate the collective bargaining agreement when it denied Carol Riley holiday pay for December 24 and December 25, 1988.

Accordingly, it is my

AWARD

That his grievance is denied and dismissed.

Dated at Madison, Wisconsin this 16th day of November, 1989.

By _____
Stuart Levitan, Arbitrator