

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
CITY OF БЕLOIT : Case 82  
and : No. 42261  
: MA-5633  
LOCAL 643, AMERICAN FEDERATION :  
OF STATE, COUNTY AND MUNICIPAL :  
EMPLOYEES, AFL-CIO :  
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Appearances:  
Mr. Daniel T. Kelley, City Attorney, City of Beloit, City Hall, 416  
College Avenue, P.O. Box 328, Beloit, Wisconsin 53511, appeared on  
behalf of the City.  
Mr. Thomas J. Larson, Staff Representative, Wisconsin Council 40, AFSCME,  
AFL-CIO, 1722 St. Lawrence Avenue, Beloit, Wisconsin 53511 ,  
appeared on behalf of the Union.

ARBITRATION AWARD

On May 24, 1989, Local 643, American Federation of State, County and  
Municipal Employees, AFL-CIO filed a request with the Wisconsin Employment  
Relations Commission to provide an Arbitrator to issue a final and binding  
award on a grievance pending with the City of Beloit. Following jurisdictional  
concurrence from the Employer, the Commission, on June 27, 1989 appointed  
William C. Houlihan, a member of its staff, to hear and decide the matter. A  
hearing was conducted on August 14, 1989, in Beloit, Wisconsin. Post-hearing  
briefs were submitted and exchanged by October 12, 1989.

This award addresses Dennis Miller's request for a Personal Holiday to be  
used in May, 1989.

BACKGROUND AND FACTS

The Grievant, Dennis D. Miller is employed by the City of Beloit Cemetery  
Division. On April 13, 1989 he requested a floating holiday to be used on  
May 11,1989, pursuant to Section 7.05 of the labor agreement. That request was  
finally denied on April 18, 1989 based on Articles 7.05 and 6.11.

The collective bargaining agreement applicable to this dispute regulates  
the terms and conditions of employment of several City Departments, including  
Transit, Water Treatment, Cemetery, Golf Course, Parks, Streets and Sanitation.  
Miller and Terry Lokken are the full-time, year round cemetery workers. A  
number of other employees are brought in to supplement Miller and Lokken from  
time to time.

The month of May is a particularly busy period in the Cemetery Division.  
The City engages in an intense effort to clean up the Cemetery in time for  
Memorial Day. Substantial resources are committed to see to it that the  
grounds are cleaned up, the lawn mowed, the plantings trimmed. Efforts in this  
regard are progressively increased throughout the month, culminating at  
Memorial Day. For example, during the period May 1-5, 1989 the Cemetery  
employed 200 hours of Cemetery staff time and forty hours of seasonal work, for  
a total of 240 hours. For the period May 8-19 the Cemetery employed 400  
regular hours of its staff, 51-1/2 overtime hours, 135-1/2 seasonal hours, and  
assigned Parks and Streets Department employees to work 16 hours in the  
Cemetery, for a total of 551-1/2 regular hours and 51-1/2 overtime hours.  
May 20-28 Cemetery staff worked 200 regular hours and 93-1/4 overtime hours.  
The Cemetery Division employed 508 seasonal hours and brought in Parks and  
Streets employees who worked 71 regular hours and 105-3/4 hours for a total of  
779 straight hours and 199 hours of overtime.

Miller sought the personal day in order to accompany his wife on a trip to La Crosse, where she was scheduled to attend a seminar. The Step 1 denial of the grievance indicated the following: "floating holiday and vacation are considered to be the same as far as the no time off in May rule is concerned. Denied." Richard Freese, the Director of Public Works subsequently denied the appealed grievance with the following memo:

1989

DATE April 18,

SUBJECT TIME OFF REQUEST OF DENNIS MILLER

TO Dennis Miller

FROM Richard Freese

I have reviewed your request for time off on May 11, 1989. This request for use of a floating holiday, per Article 7.01 of the Agreement, was denied by the Assistant Director of Public Works. My decision is to also deny your request for time off on May 11, 1989.

In keeping with the spirit and intent of the Agreement, Article 6.11; "Cemetery employees will not be allowed vacation time off during the period from May 1 through June 1 of each year." To grant paid time off in another form; such as, a floating holiday, would be an intentional and blatant attempt to get around the bargaining provisions of Article 6.11. Your use of sick leave on May 11, 1989 will be considered sick leave abuse and subject you to suspension.

The denial was appealed to the fourth step of the grievance procedure and again denied per the following:

MEMORANDUM

TO: Local 643

FROM: Lee Davis

Dennis Miller, Special Equipment Operator who currently works in the Cemetery has filed a grievance regarding the denial of request to use a floating holiday. The union cites a violation of article 7.05 of the labor agreement between the City of Beloit and AFSCME Local 643. Article 7.05 provides:

"regular employees may schedule floating holidays on any regular scheduled work day with notification at least two (2) working days in advance, subject to the approval of the department head. Floating holidays may be taken in increments of four (4) hours".

The request to use the floating holiday was not approved by the department head, Richard W. Freese. Article 7.05 clearly specifies that the floating holiday may be taken only with the approval of the department head. Further Article 2.01 provides that the employer has the right to "plan, direct and control the operation of the work force".

Having heard union arguments and discussion at the fourth step grievance hearing May 5, 1989 it is my conclusion that there is no contract violation and the grievance is thus denied.

Pam Caples West was a member of the Union's negotiating committee which bargained the 1987-88 contract. That year the Union exchanged 2 unpaid leave days, and the accompanying language, for 1 additional paid day. It was West's testimony that the City never proposed a "no leaves in May" provision for the floating holidays.

Rueben Knutson testified that Mr. Lokken was pulled away from the Cemetery to help out on a Riverfest project. However, it appears that this reassignment occurred after Memorial Day.

At the fourth step grievance procedure meeting Miller advised the City that his wife had changed her plans and that he no longer needed the day.

#### ISSUE

The parties stipulated to the following issue:

Did the employer reasonably withhold approval of the floating holiday request?

If so, what is the proper remedy?

#### RELEVANT PROVISION OF THE 1985-86 COLLECTIVE BARGAINING AGREEMENT

9.06 An employee shall be allowed two (2) days leave per year (non-accumulative) without pay to take care of personal business in increments of no less than four (4) hours each, provided that increments of not less than two (2) hours may be used at the end of the normal work shift. Request for such leave shall be presented to the Chief of Operations or to the Director of Public Works at least two (2) full work days in advance of the date the employee intends to be absent with no reason given. Said request shall be approved unless the request would result in more than 10% of the bargaining unit workforce being absent, for reasons other than illness or injury, on the requested dates. If the request for such leave is made with less than two (2) full work days advance notice, the employee must state the reason and said request then may be approved.

#### RELEVANT PROVISIONS OF THE 1987-88 COLLECTIVE BARGAINING AGREEMENT

##### ARTICLE II MANAGEMENT RIGHTS

2.01 The Union recognizes the Employer as having the right to:

1. Plan, direct and control the operation of work force
2. Hire, lay-off, discipline or discharge for just cause
3. Establish and enforce reasonable rules of conduct
4. Introduce new or improved methods of operation

5. To subcontract work. The City agrees to provide written notice to the union sixty (60) days prior to the effective date of subcontracting the work if there is to be a reduction in personnel. The parties will meet to discuss the impact, however, impasse in such discussions shall not prevent the City from implementation of the decision.
6. Determine all of which shall be in compliance with and subject to provisions of this Agreement, and provided that nothing contained herein shall be used by management to discriminate against any employee or the Union.

ARTICLE VI  
VACATIONS

. . .

- 6.11 Cemetery employees will not be allowed vacation time off during the period from May 1 through June 1 of each year.

. . .

ARTICLE VII  
HOLIDAYS

- 7.01 Each employee covered by this Agreement shall have the following holidays off with pay or shall receive straight time pay in an equivalent amount. Each day named shall equal eight (8) hours.

New Year's Day  
Good Friday  
Memorial Day  
Independence Day  
Labor Day  
Thanksgiving Day  
Friday Following Thanksgiving  
December 24  
Christmas Day  
New Year's Eve Day  
(2) Floating Holidays

- 7.02 All employees who are required to work on a holiday established in 7.01 above, except as outlined in "a" below, shall receive time and one-half pay in addition to holiday pay for all hours worked during the holiday.

- a) All employees except Wastewater Treatment Operators and watchmen who are required to work on the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, shall receive double (2X) time pay for all hours worked during the holiday in addition to holiday pay.

- 7.03 If any of the above holiday fall on Sunday, the following Monday shall be deemed the holiday and if the holiday falls on Saturday, either the

preceding Friday or the following Monday shall be declared the holiday by the City Manager for all employees on a regular work schedule from Monday through Friday.

The following holidays will be observed in 1987:

December 24 on December 24  
December 25 on December 25  
December 31 on December 31  
January 1, 1988 on January 1, 1988

The following holidays will be observed in 1988:

December 24 on December 24  
December 25 on December 25  
December 31 on December 31  
January 1, 1989 on January 1, 1989

- 7.04 To be eligible for holiday pay, all employees will be required to work the day prior to and the day following a holiday unless specifically excused by the Director of Public Works. Any employee on a regular scheduled vacation or bonafide sick leave on the day prior to or the day following a holiday will also receive holiday pay.
- 7.05 Regular employees may schedule the floating holidays on any regular scheduled work day with notification at least two (2) working days in advance, subject to the approval of the department head. The floating holidays may be taken in increments of four (4) hours.

. . .

- 12.01 Any difference of opinion, or misunderstanding in regard to the interpretation, application or enforcement of this Agreement or work rules which may arise between the City and the Union or any employee covered by this Agreement shall be handled as follows:
- 12.02 Step 1. The aggrieved employee, a steward, officer, or the Union Grievance Committee shall present the written grievance to the employee's supervisor within ten (10) working days of the alleged violation or knowledge thereof. The employee's supervisor shall attempt to resolve the matter and shall respond in writing to the employee and the Union within five (5) working days.
- 12.03 Step 2. If the grievance has not been settled, it shall be presented in writing, by the steward or the grievance committee to the Division Head (Transit Manager, Wastewater Treatment Plant Superintendent, Cemetery Superintendent, Parks Superintendent and Streets Superintendent) within seven (7) days after the supervisor's response is due. The Division Head shall respond in writing to the steward or grievance committee within five (5) working days.
- 12.04 Step 3. If the grievance still remains unresolved, it shall be presented by the Union steward, grievance committee or Union representative in writing to the Director of

Public Works within seven (7) days after the response is due from the Divisions Head. The Director of Public Works shall respond in writing to the steward, grievance committee or Union representative within five (5) working days.

- 12.05 Step 4. If the grievance still remains unresolved, it shall be presented by the grievance committee and/or the Union representative in writing to the Personnel Director (except in cases involving discharge where the grievance should be heard by the City Manager) within seven (7) days after the response was due from the Director of Public Works. The Personnel Director shall respond in writing within five (5) working days
- 12.06 Step 5. If the grievance is still unresolved, either party may, within fifteen (15) days after the reply of the Personnel Director or City Manager is due, by written notice to the other, request arbitration.
- 12.07 The City Manager or his/her designee and the Union representative shall meet within seven (7) days of the date of notice and shall attempt to agree upon an arbitrator. If the parties cannot agree upon an arbitrator within three (3) days after meeting, either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator who shall conduct the arbitration proceedings.
- 12.08 Whenever one of the parties deems the issue to be arbitrated to be of such significance as to warrant a panel of three (3) arbitrators, each party shall, within five (5) working days of the notification of the request for arbitration, appoint one (1) arbitrator, and the two (2) arbitrators so appointed shall attempt to agree on a neutral person to serve as the chairperson of the arbitration panel. If no mutual agreement is reached in five (5) workdays on the selection of the chairperson, the City and the Union shall request the Wisconsin Employment Relations Commission to submit a list of five (5) arbitrators to both parties. The parties shall meet within five (5) working days of the receipt of said list for the purpose of selecting the chairperson by alternately striking names from said list until one (1) name remains. Such person shall then become the chairperson of the arbitration panel.
- 12.09 The decision of the arbitrator or arbitrators shall be final and binding on the parties and the arbitrator or arbitrators shall be requested to issue a decision in writing within thirty (30) days after the conclusion of the testimony and argument. The arbitrator shall have no power to add to, subtract from, or otherwise modify the terms of the collective bargaining agreement.

#### POSITIONS OF THE PARTIES

The Union contends that the holiday was denied pursuant to the City's "no leaves in May" policy applicable to the Cemetery. It is the Union's view that the contract permits that policy for vacations, but not for holidays. The Union points to the bargaining history leading to the added floating holiday and contends that Cemetery workers have not been excluded from the provisions of 7.05 of the contract. In the Union's view, only a valid business reason justifies the exercise of departmental discretion to deny the leave. It is the Union's view that the absence of a single employee for a single day is meaningless compared to the tremendous numbers of hours worked. The City had a full work force and could have reassigned other employees.

It is the view of the City that Miller's May 5 grievance step remarks constitute a withdrawal of the grievance. The issue is moot. The City argues that request for a floating holiday will be given due and proper consideration.

The City points to Davis' denial letter which references Article 7.05 and 2.01, and contends that there is no blanket refusal but rather that each case must be addressed on a case by case basis.

The denial was for legitimate business reasons. May is the busiest and most important time of the year for the Cemetery Division. The community demands that the cemetery be cleaned and attractive for Memorial Day.

Miller brought no exigent or unusual circumstances that would have required the City to grant him his requested day off.

#### DISCUSSION

The City argues that the grievance has been dropped and/or rendered moot. I disagree. The Grievant has a contractual role in step 1 of the grievance procedure. From step 2 on, it is the Union which controls the grievance procedure. The fact that Miller no longer has interest in his grievance does not operate to divest the Union of its authority to press the grievance to arbitration. Neither is the matter moot. Notwithstanding the City's post-hearing assertion that each request must be dealt with on a case by case basis, lower grievance procedure answers suggest a blanket denial of May requests.

Article VII provides each employee with two paid floating holidays. The scheduling of those days is governed by Section 7.05. Section 7.05 begins with the proviso that "regular employees may schedule the floating holidays on any (emphasis added) regular scheduled work day . . .". There is no contractual distinction or differentiation drawn between days. This right to schedule days off is ". . . subject to the approval of the department head". This latter provision gives the Department Head some control over the scheduling of time off.

I do not believe the floating holidays are subject to the "no time off in May" rule. The basis of that rule as applied to vacations is the explicit language contained in Article 6.11. Article 7 has no parallel language. There is no evidence that floating holidays have been subject to his blanket rule in the past. To the contrary, the City argues that each request must be addressed on the merits. Testimony relative to the bargaining history was that the City never sought a blanket restriction prohibiting cemetery employees from taking May holidays.

I don't believe that a hard and fast rule governing utilization of those days is possible. The parties had such a rule applicable to the two unpaid days. Former Article 9.06 guaranteed approval of those days unless ". . . more than 10% of the bargaining unit workforce . . ." was absent. In eliminating the two unpaid leave days the parties also eliminated the objective standard regulating those days. For me to impose such a standard would operate to undo a portion of what the parties created.

The Employer is left with approval rights and has the contractual authority to exercise those rights. As noted above, they may not be exercised in some blanket fashion that operates to eliminate a negotiated benefit for the month of May.

The City argues that each request must be considered on a case by case basis. I agree. I believe that a certain balancing must exist. The employee has an interest and a right to take paid time off. The City has an interest and an obligation to see to it that work is performed on a timely schedule. Those competing interests have to be balanced. May is obviously a very busy month for the Cemetery. There is a reluctance, borne of business necessity, to grant time off. However, the Division must remain open to requests for personal holidays during May and must respond to each such request on the merits. Failure to do so in an objective fashion runs afoul of Article 7.

In light of the limitations of this case, i.e. the Grievant's withdrawal and the changed basis of the Employer's answer, I don't feel comfortable commenting further on the language.

#### AWARD

The grievance is disposed of in accordance with the above discussion.

#### RELIEF

No relief is directed.

Dated at Madison, Wisconsin this 22nd day of December, 1989.

By \_\_\_\_\_  
William C. Houlihan, Arbitrator