BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WAUKESHA CITY EMPLOYEES' UNION, LOCAL 97 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 85 No. 43977 MA-6137
and	
CITY OF WAUKESHA	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1203 Wilshire Place, Waukesha, Wisconsin 53188, appearing on behalf of Waukesha City Employees' Union, Local 97 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Thomas H. Wisniewski, Personnel Director, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188-3633, appearing on behalf of the City of Waukesha, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Melvin Meeth. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 25, 1991, in Waukesha, Wisconsin. The hearing was transcribed, and the parties filed briefs and a waiver of the filing of a reply brief by June 17, 1991.

ISSUES

The parties stipulated the following issues for decision:

> Whether the City violated the terms and conditions of the 1989-1990 Labor Agreement, when it denied holiday pay to Melvin Meeth for January 1st and 2nd, 1990, and if so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 10 - WORKDAY AND WORK WEEK

> 10.01 Working Hours. Forty (40) hours from Monday through Friday inclusive shall constitute a workweek. The workday shall be:
>
> Day Shift: 7:30 a.m. to 12:00 noon
> 12:30 p.m. to 4:00 p.m.

Night Shift:	4:00 p.m. to 12:00 midnight (paid lunch period)
Ice Rinks-Third Shift:	12 midnight to 8:00 a.m. (Shift premium 20 cents per hour)

. . .

10.03 Employees who report to work as scheduled and without prior notice and cannot be put to work because of extreme weather conditions such as temperatures below -6 degrees Fahrenheit shall receive a minimum of two (2) hours reporting pay at their regular hourly rate. In the event some but not all employees are put to work, the City will use its best efforts to follow seniority providing the more senior employees are capable and qualified to perform the available work.

10.04 Overtime:

A. Overtime pay at the rate of time and one-half (1-1/2) shall be paid for the following:

1. All work outside of the daily work schedule or an authorized shift operation change.

2. Any work performed on a Saturday.

. . .

ARTICLE 11 - PAID HOLIDAYS

. . .

11.04 The employee must work the full regularly scheduled workday before and after the holiday to receive the pay for the holiday, excluding vacations, paid sick leave and other excused absences.

BACKGROUND

Article 11 of the parties' agreement recognizes New Year's Day and New Year's Eve as paid holidays. In 1990, 1/ New Year's day fell on a Monday. As a result, Tuesday, January 2 was treated as a paid holiday for New Year's Eve. Meeth worked about three hours overtime on December 30 and 31 of 1989, and on January 1 and 2. He did not, however, work a full shift on Friday, December 29, 1989. His normal shift runs from 7:30 a.m. until 4:00 p.m. He punched out on December 29, 1989, at about 1:15 p.m. As a result, the City denied him holiday pay.

The grievance form, filed by the Union on January 12, seeks "(t)hat Mel Meeth be made whole for any lost wages," because he "performed scheduled work on 12/30, 12/31 and was denied Holiday Pay." The grievance form lists

1/ References to dates are to 1990, unless otherwise noted.

Article 11 and "all others that may apply" as the contract provisions violated by the City.

Meeth is employed by the City as a Building Maintenance Crew Leader. The Job Description for that position details his duties thus:

> DUTIES:
> Under the direction of the Building Maintenance supervisor, an employee of this classification is responsible for the supervision of one or more crews of building maintenance personnel. This employee is responsible for safely conducting various operations with regard to employees, citizens, equipment, and property. The employee is subject to regularly scheduled overtime and also subject to call during emergencies. Also, this employee is responsible for keeping accurate records of work performed and other duties as assigned.
>
> KNOWLEDGE, SKILLS, ABILITIES AND APTITUDES:
> 1. Working knowledge of methods, practices, tools and materials used in general maintenance and repair work.
> 2. Working knowledge of occupational hazards and necessary safety precautions.
> 3. Working knowledge of the building trades.
> 4. Ability to perform a variety of skilled and semi-skilled maintenance tasks without immediate supervision.
> 5. Ability to understand and carry out oral and written instructions.
> 6. Ability to use applicable climbing apparatus and to withstand considerable heights.
> 7. Ability to assign and supervise the work of others.
> 8. Ability to interpret plans and specifications.
> 9. Ability to establish and maintain effective working relationships with employees.

Meeth detailed his reason for leaving early on December 29, 1989, in an undated letter "To Whom It May Concern" which reads thus:

> On Friday, Dec. 29, 1989 on or about 1:00 p.m. I received a phone call from my wife, informing me her sister could not pick-up their brother and his wife at Mitchel Field at 2:15. My wife could not find anyone to pick them up on such short notice. With only one car, which I had. I felt obligated to go because we planned to have them spend the week of Christmas with us.

. . .

Meeth testified that the City requires paid leave (other than sick leave) to be taken before the end of the year, and that he had exhausted his paid leave, thus necessitating that his time off on December 29, 1989, be unpaid.

December 29, 1989, was a cold day, with sub-zero temperatures. At the City garage roughly six employes out of fifty-one worked a full shift. Many City employes were excused from work under the provisions of Section 10.03. None of those employes were denied holiday pay. Only one supervisor, David Liska, worked that day.

Meeth detailed his attempts to contact Liska to be excused from work thus:

> I tried on the two-way radio to reach him in his truck and then I called city hall and asked if he was up there and they said no, he wasn't up there. So that's the two things I tried to do and that's about all I can do. 2/

Meeth acknowledged he did not notify anyone at City Hall that he was leaving to attend to an emergency, and that he did not ask anyone at City Hall to contact Liska or to advise him if anyone else was available to address his concerns. He then asked a couple of other workers if they knew where Liska was. Receiving a negative response, he contacted another Crew Leader to determine if that Crew Leader could spare a man to take over his office duties. Receiving another negative response, Meeth described the situation to a welder on his own crew, and asked the welder to assume his office duties for the balance of the shift. Meeth estimated his efforts to contact Liska took about ten to fifteen minutes. He then waited another roughly fifteen minutes and punched out.

William Oliver, the City's Director of the Parks and Recreation Department, answered the Union's grievance at Step 2 in a letter to the Union's President, Bruce Wery, dated February 23. That letter reads thus:

> On Wednesday, February 21, 1990, you and I and a host of Local 97 personnel discussed the grievance of Mel Meeth. Both of us had a copy of the grievance, a January 23, 1989 letter from Mr. Wisniewski and a February 6, 1989 letter from Mr. Wisniewski.
>
> It is alleged by the Union that Article 11.01, 11.02, 11.03, and 11.04 were violated along with "all others that may apply".
>
> Article 11.04 states "The employee must work the full regularly scheduled work day before and after the holiday to receive the pay for the holiday, excluding vacations, paid sick leave and other excused absences."
>
> The employee did not work the full regularly scheduled work day before the holiday. He was in an unpaid status on Friday, December 29, 1989. It is the Unions contention that "other excused absences" would be applicable.
>
> Mr. Meeth did not receive approval, nor was he excused by a Supervisor - even though one was available. He

2/ Tr. at 13.

took it upon himself to leave and be in the no pay status.

. . .

It would seem to me that permission should be granted prior to the absence. The position of the City in regards to Holiday Pay - 11.04 is very clear and has been made available to the Union in the letters of January 23, 1989 and February 6, 1989.

Based upon the information I have, the grievance is denied.

The January 23, 1989, letter referred to by Oliver concerned a settlement reached between the City and the Union regarding a then-pending grievance. That letter, written by Thomas H. Wisniewski to Wery, reads thus:

This letter will act to confirm our discussion pertaining to Article 11, Holiday Pay - Section 4. A grievance was filed on January 13, 1989 when the payroll for Randi Jorgensen and William VanderWeit was adjusted to exclude payment for the New Year's Holiday since neither worked the day before and after that holiday. It should be noted that these individuals were excused into an unpaid status by their respective supervisors.

In an attempt to remedy this grievance it was agreed that, in this case, since the supervisor had excused the employees without mention of the loss of holiday pay, we would make them whole for their loss. This would not reflect any intent to set a practice or precedent for the future, it is merely to show our good faith in remedying this grievance based on what happened in this individual case.

With respect to the contract language "and other excused absences" it was noted that this included only paid time off and as such has always been City policy and contract interpretation since 1971. Examples of paid time off of the "other" category are: compensatory time, Worker's Compensation (first 4 months only), Funeral leave (becomes Holiday time off), Court leave (Jury or Witness), and Military Leave (first 2 weeks only).

The City has never paid nor has the Union ever grieved the nonpayment of holiday pay when any employee was off on an excused unpaid leave of absence. We will properly advise our supervisors that should they receive a request for unpaid time off, it can be approved, how-ever, in compliance with Article 11, if it falls around a holiday, the employee will forfeit

such holiday pay.

. . .

The February 6, 1989, letter referred to by Oliver was also written by Wisniewski to Wery and reads thus:

> My letter dated January 23rd discusses the language in Article 11.04, "and other excused absences". In a discussion with Dave Ulrickson, I realize there is another situation which would fall into that category. In a situation where an employee would be out of town; hunting, a wedding, etc. and a situation such as severe wheather or automobile problems would arise which could be substantiated, this would be an excused absence. Dave has mentioned to me that he has excused this type of situation in the past and I see no reason that this could not continue.

. . .

Wisniewski wrote the City's Step 3 response to the grievance in a letter dated April 11. That letter reads thus:

. . .

> Management, on the other hand, stated that all supervisors were not on vacation and that had Mel Meeth wanted, he could have reached Dave Liska. In any case Dave Liska would not have released Mr. Meeth. It was stated that Mr. Meeth made a decision, on his own, to leave work and that Management did not see this as an emergency calling for the immediate release of the employee from the work site.
>
> The Personnel Committee observed that Mr. Meeth tried to make contact with his supervisor for a period of time not longer than fifteen (15) minutes; clearly not a sufficient enough time period. That unless a clear case of emergency existed, which this was not, the employee can only be released from the work site by an authorized supervisor. The Personnel Committee unanimously agrees that the articles, cited by the aggrieved, were not violated by Management. The City agrees that holiday pay is recognized as an earned benefit, although it is conditioned upon the employee's compliance with the contractually state requirements <u>before</u> they are entitled to the holiday pay; which is, working the <u>full regularly scheduled work day before and after each holiday</u>. The intent, as was reiterated at the hearing, is to prevent employees from "stretching" holidays and to assure management a full working force on the day before and after each holiday. It was noted that the Personnel Director's letter was issued as part and parcel of his letter dated, January 23, 1989, Holiday Pay, Article 11.04 and was based on

> the fact that both parties had discussed the clause at great length and agreed upon the letter in order to avoid disputes over "excused absences."
>
> Thus, the Personnel Committee finds that the failure on the part of Mr. Meeth to comply with Article 11, Section 4, as a condition precedent to holiday pay operates to disqualify him from receiving such benefit. Therefore, this grievance is denied.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union argues initially that the Grievant did, in fact, work the entire workday preceding and following the January 1 holiday. The Union argues that the City has acknowledged that the purpose of Section 11.04 is to prevent employes from "stretching" a holiday, thus denying the City a full work force on the day before and after a holiday. According to the Union, the Grievant was scheduled to, and did, work four consecutive days from December 30, 1989, through January 2. It follows, the Union contends, that the Grievant can not be considered to have stretched a holiday.

Beyond this, the Union contends that the City's narrow interpretation of Section 11.04 seeks to imply a requirement that an employe work "the business day prior to and after the holiday." This interpretation would imply that the Grievant could have worked December 29, yet missed the following four scheduled days of overtime, and still have qualified for holiday pay. The Union argues that the City's own interpretation thus invites the "stretching" of holidays the City asserts it seeks to prevent.

That the City was not deprived of a full working force on December 29, 1989, is demonstrated, according to the Union, by the fact that only one out of six supervisors and six out of fifty-one garage employes worked that day. It follows, the Union concludes, that paying the Grievant holiday pay will not subvert the intended purposes of Section 11.04.

The Union's next major line of argument is that the Grievant met the written requirements of Section 11.04 by working on December 31, 1989, and January 3.

Even if Section 11.04 is construed to require the Grievant's attendance on December 29, 1989, the Union argues that the contract does not require the Grievant to be in pay status the entire day. More specifically, the Union contends that the contract clearly and unambiguously permits "excused absences." The Union rejects the assertion that a prior settlement of a grievance defines what constitutes an "excused absence." The rejection is necessary, the Union contends, because the language is clear and unambiguous; no settlement agreement was executed; and the Union did not take the steps necessary to authorize any modification of the contract. Beyond this, the Union contends that the evidence establishes that "it cannot be said that there was any 'agreement' on the meaning of the phrase 'other excused absences'."

The Union next contends that the City's interpretation of Section 11.04 is contradicted by its conduct in paying forty-five Street Department employes

holiday pay in spite of the fact that they failed to work on December 29, 1989. The Union characterizes the City's assertion that these employes were "excused" under the provisions of Section 10.03 as "spurious."

The Union's next major line of argument is that "(t)he Grievant can be said to have qualified for an excused absence," since his absence can be attributed to bad weather or to car problems. Beyond this, the Union contends that the Grievant reasonably concluded that he was excused from work.

The Union concludes by requesting that the Grievant "be made whole for all losses resulting from the City's denial of his holiday pay."

THE CITY'S POSITION

The City argues initially that the Grievant did not, as required by Section 11.04, work the regularly scheduled workday before and after the holiday he seeks to be compensated for. Arbitral precedent establishes that the "surrounding days" requirement of Section 11.04 assures the City that its employes will not "stretch" a holiday and also operates as a condition precedent to the receipt of holiday pay. The City rejects the Union's assertion that the Grievant's work on Saturday, Sunday, Monday and Tuesday, satisfy the require-ments of Section 11.04. Those days, according to the City, "cannot be categorized both as 'regular workdays' and as 'overtime and holiday' as well."

The City's next major line of argument is that the Grievant's absence must not be considered "excused." The City specifically denies that the Grievant can be considered authorized to excuse his own absence; further asserts that a prior grievance settlement buttresses the City's interpretation of what constitutes an excused absence; and further contends that the record establishes the Grievant was not responding to an emergency.

The City also specifically rejects the Union's use of Section 10.03. This section serves purposes distinguishable from Section 11.04, according to the City. Beyond this, the City contends that the Union did not make any claim under that provision "until the Step 3 hearing before the Personnel Commission."

The City summarizes its view of the merits of the grievance thus:

> The evidence at the arbitration hearing establishes that the grievant (1) did not work the "full regularly scheduled workday" before the New Year's holidays; (2) that he did not obtain authorization to leave his place of work; (3) that his leaving was not due to an emergency; and (4) that his overtime work does not fulfill the work requirement specified by the Agreement.

The City concludes that the grievance must be denied.

DISCUSSION

Section 11.04 governs the grievance, and requires that "to receive the pay for the holiday" an employe "must work the full regularly scheduled workday

before and after the holiday." The section provides exceptions to this requirement for "vacations, paid sick leave and other excused absences." There is no dispute that the Grievant had exhausted his paid leave for 1990, and did not qualify for sick leave on December 29, yet punched out before the end of his shift. It follows that the interpretive issues concerning Section 11.04 focus on whether December 29 must be considered the "regularly scheduled workday" before the holidays at issue, and, if so, on whether the Grievant's absence on that date can be considered "excused."

The Union's assertion that the overtime worked by the Grievant on December 30 and 31 can be considered a "regularly scheduled workday" strains the commonly understood meaning of those terms and can not be reconciled to related agreement provisions.

Overtime is commonly understood to command a premium payment because it involves "time" worked "over" the regularly scheduled hours. The Union seeks to turn the Grievant's work on December 30 or 31 into a "full regularly scheduled workday." The Union accurately notes that the Grievant's work on December 30 and 31 was scheduled in advance, and thus arguably constitutes "regularly scheduled" work. The Grievant's job description underscores this by noting the position is "subject to regularly scheduled overtime." If, however, the Grievant's work on December 30 or 31 constitutes a "full regularly scheduled workday," the point of reference defining the time the weekend work is "over" is lost.

More significantly, Article 10 of the parties' agreement expressly states this distinction. Section 10.01 defines what a "workday shall be." That definition includes three eight-hour shifts from "Monday through Friday." Section 10.04 further underscores this distinction by separately providing, in Subsection 1, overtime pay for work "outside the daily work schedule," and, in Subsection 2, overtime pay for "(a)ny work performed on a Saturday." Defining December 30 or 31 as a "full regularly scheduled workday" is irreconcilable with these provisions.

Further strains between the Union's interpretation and the parties' agreement can be noted. Section 11.04 is a provision of unit-wide scope. The City's interpretation affirms this, by defining a "full regularly scheduled workday" consistently with Section 10.01. This definition can be applied consistently to all unit members. The Union's interpretation creates separate definitions of a "full regularly scheduled workday." Section 10.01 defines a workday to establish an eight hour shift. The Grievant worked roughly three hours on December 30 and 31, 1989, or on January 1 and 2. Defining any of these days as a "full regularly scheduled workday" would imply that certain unit employes would need to complete an eight hour shift to qualify for holiday payment, while other unit employes would not. This is not an inherently unreasonable or implausible result. It is, however, a result which should be based not on inference, but on an express distinction.

Nor can the Grievant's absence on December 29 be considered "excused." It is not disputed that the Grievant failed to obtain any supervisory approval for his early departure on December 29. Rather, the parties dispute whether the Grievant had the authority to excuse himself. The Grievant acknowledges the situation he faced on December 29 was not an emergency. Thus, the issue posed here is whether the Grievant had the authority to excuse a non-emergency based absence. There is no solid basis in the record to warrant the conclusion that the Grievant had such authority. He has never excused such an absence for one of his crew members. His position description is silent regarding such authority, and his supervisors specifically deny he has been so authorized.

The Grievant testified he believed he had the authority, and based this belief on his understanding that he was to take over the oversight of his crew in the absence of his supervisor. This power of overseeing the work of his crew can be granted, but the authority to excuse a non-emergency absence does not necessarily follow from it. Nor does the record indicate the Grievant was firmly convinced on this point, since his testimony on the extent of his authority is difficult to square with his attempt to obtain supervisory approval for his early departure on December 29.

In sum, December 29 was the "full regularly scheduled workday" before the holidays at issue here, and the Grievant was not excused to leave work early on that date. It follows that the Grievant did not fulfill the conditions established by Section 11.04 for the receipt of holiday pay. The City's denial of that pay did not, then, violate the contract.

Before closing, it is necessary to touch on certain points raised by the parties. The parties dispute whether the settlement of the Jorgensen/VanderWeit grievance establishes that an employe must be on paid leave to be "excused" within the meaning of Section 11.04. The record will not support a conclusion that the parties have reached a mutual understanding on how, if at all, that settlement relates to this grievance. Even if it is assumed that the City's position on the impact of that settlement is correct, it is difficult to reconcile that position with the City's payment of holiday pay to employes who had exhausted their paid leave, but were excused from work on December 29.

Ultimately, the Union's arguments have an equitable, but not a contractual basis. This is not to belittle those arguments. The Union aptly points out that the Grievant's December 29 absence did not significantly impact the avowed purposes of Section 11.04 -- to avoid the "stretching" of holidays and to assure the City of a full workforce. Since the Grievant worked his scheduled overtime, the New Year's holidays were not stretched. Beyond this, the weather, less than the Grievant's conduct, whittled down the City workforce on December 29. Nor would it appear that irreparable precedential harm would necessarily be done by considering the Grievant's absence excusable. These arguments indicate that the City could justify looking the other way regarding the payment of holiday pay to the Grievant. The issue posed in arbitration is, however, whether the City can be forced, based on Section 11.04, to look the other way regarding the Grievant's early departure. To force the City to this position would require distorting the language collectively bargained by the parties. That result, whatever the circumstances of the present grievance might justify, is untenable.

AWARD

The City did not violate the terms and conditions of the 1989-90 Labor Agreement, when it denied holiday pay to Melvin Meeth for January 1st and 2nd, 1990.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin this 26th day of July, 1991.

By _____
Richard B. McLaughlin, Arbitrator