BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF MENOMONIE	Case 78 No. 50312 MA-8209
and	
MENOMONIE CITY EMPLOYEES, LOCAL 734, AFSCME, AFL-CIO	

Appearances:
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appe
Mr. Lowell Prange, City Administrator, and Mr. John Higley, City Attorney, appearing for the City.

ARBITRATION AWARD

Menomonie City Employees, Local 734, AFSCME, AFL-CIO, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The City of Menomonie, herein the City, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Menomonie, Wisconsin on April 6, 1994. There was no transcript made of the hearing. The parties agreed to make verbal closing arguments, rather than to file post-hearing briefs.

ISSUES:

The parties stipulated to the following issues:

> Did the City violate the contract by failing to pay the grievant at the double time rate for the hours he worked on November 26, 1993?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

> Section 7.02 Overtime.
>
> . . .
>
> 4. Holidays: All employees shall receive twice the regular rate of pay for all work performed on holidays, including Easter.

. . .

Section 12.01 Holidays. The following days shall be recognized and observed as paid holidays:

New Year's Day	Veterans' Day
One-half (1/2) day on Good Friday	Thanksgiving Day
Easter Sunday (Sewerage Dept. Employees and Dispatchers Only)	December 24
Memorial Day	Christmas Day
Independence Day	Floating Holiday (1)
Labor Day	

1. In the case of Dispatchers, Veterans' Day and the Floating Holiday are not to be considered Holidays.

POSITIONS OF THE PARTIES:

The Union contends that Section 7.02 of the contract is clear in requiring that an employe be paid at twice the regular rate of pay for all work performed on holidays. The grievant had taken November 26, 1993 as a floating holiday. Accordingly, he should have been paid at double time for the time he worked on said date. Clear contractual language prevails over any past practice.

The City argues that the past practice should establish the proper interpretation to be given to contractual language. The City has a consistent practice of paying time and one-half in similar situations in the past. Therefore, the grievance should be denied.

BACKGROUND AND DISCUSSION:

The facts from which the instant dispute arose are not in dispute. The grievant requested and received approval to take a floating holiday on November 26, 1993. The grievant was called in to work on said date and worked a total of 12 hours for which hours he was paid at time and one-half his regular wage rate. After the grievant received his pay check which included payment for November 26, 1993, he filed a grievance requesting payment for the difference between time and one-half and double time for the 12 hours ($72.06).

The contractual language concerning the floating holiday has continued in successive contracts without change since at least 1977. Since 1980, there have been at least six prior instances when an employe has worked overtime on the employe's floating holiday. In each of those six cases, the employe was paid at the time and one-half rate for the overtime work. In three of those cases, the affected employe also received double time for work performed on a different holiday within the same pay period.

The City has treated floating holidays as vacation days in the past for the purposes of payment for overtime work on the floating holidays. Overtime work on vacation days is paid at the time and one-half rate.

The Union asserts that neither it nor the bargaining unit employes were aware of the City's practice of paying the time and one-half rate, rather than the double time rate, for work performed on a floating holiday. While it may be true that the present Union staff representative was unaware of said practice, the assertion that the employes were unaware of such a practice is not persuasive. However, even assuming that the employes were aware of the

City's practice, a practice can not be relied on to change the explicit terms of a contract.

Section 7.02 (4.) specifies that employes shall receive twice the regular rate of pay for all work performed on holidays. Section 12.01 lists a floating holiday as one of the paid holidays. Such provisions are quite clear and contain no exception from the double pay requirement for a floating holiday. Thus, while the City may have a practice of paying overtime on the floating holiday in the same manner as it pays overtime on vacation days rather than as it pays overtime on other paid holidays, such a practice can not be used to modify the contractual language. Neither does the existence of such a practice constitute a waiver by the Union of its right to enforce the language. However, by its failure to attempt to enforce the language in the past and thereby allow the City to continue its practice, the Union is prevented from seeking to enforce the language prior to the filing of the instant grievance. The filing of the instant grievance notified the City that the Union would no longer waive its rights under the agreement with respect to the appropriate rate of pay for overtime work performed on a floating holiday. Such notification was a sufficient basis for the Union to insist on compliance with the contract requirement in the future, even though a practice existed which would have controlled this matter if the relevant contractual language had not been so clear. The absence of prior grievances may have led the City to believe that the Union agreed with its application of the overtime pay provisions. Accordingly, it is not appropriate to hold the City liable for the financial impact of that application on a retroactive basis. Rather, the City will be liable for double time payment for overtime worked on holidays only for occurrences subsequent to the filing of the instant grievance.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the City's failure to pay double time for overtime work performed on floating holidays does violate the collective bargaining agreement; that the City is not directed to pay any additional monies to the grievant in the instant case; and, that the City shall pay double time for any overtime work performed on a floating holiday subsequent to the filing of the instant grievance on December 7, 1993.

Dated at Madison, Wisconsin this 1st day of July, 1994.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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