

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	: Case 236
	: No. 50642
SHEBOYGAN COUNTY SUPPORTIVE SERVICES,	: MA-8327
LOCAL 110, AFSCME, AFL-CIO	:
	: Case 241
and	: No. 50647
	: MA-8332
SHEBOYGAN COUNTY	:
(SHERIFF'S DEPARTMENT)	:
	:

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO
Ms. Louella Conway, Personnel Director, on behalf of Sheboygan County.

ARBITRATION AWARD

Sheboygan County Supportive Services, Local 110, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and Sheboygan County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on April 18, 1994, in Sheboygan, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by May 17, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues. The Union would frame the issue as being:

Did the Employer violate the contract when it failed to pay the Grievant Dan Berg, for Labor Day, 1993, Thanksgiving Day, 1993, and the Day after Thanksgiving Day, 1993?

If so, what is the appropriate remedy?

The County would frame the issue as being:

Did the Employer violate the labor agreement and past practice when it failed to pay the Grievant, Dan Berg, for Labor Day, 1993, and Thanksgiving Day, 1993 and the Day after Thanksgiving Day, 1993?

If so, what is the appropriate remedy?

The Arbitrator concludes that the Union's statement more accurately frames the issue to be decided.

CONTRACT PROVISIONS

The following provisions of the parties' 1992-1994 Agreement are cited:

ARTICLE 18

HOLIDAYS

All employees except as herein provided, shall be granted eleven (11) paid holidays during calendar year 1992, 1993 and 1994. They are as follows:

HOLIDAY	1992	1993	1994
1. New Years Day
2. Good Friday Afternoon			
3. Memorial Day			
4. Independence Day			
5. Labor Day			
6. Thanksgiving			
7. Day after Thanksgiving			
8. Christmas Eve Day			
9. Christmas Day			
10. New Years Eve Afternoon			
11. Floating Holiday			
12. Floating Holiday			

. . .

c. To be eligible for holiday pay the employee must have worked the scheduled hours of work on the last workday prior to the holiday and the scheduled hours of work on the workday following the holiday, except:

- i. Where absence is with written permission of the County except those covering a formal leave of absence granted under the Leave of Absence paragraph of this contract;
- ii. Because of illness verified by a statement from a doctor (the County will pay for the cost of obtaining such statement), or,
- iii. Accident sustained within sixty (60) days prior to the holiday.

. . .

ARTICLE 21

LEAVES OF ABSENCE

I. **GENERAL LEAVES**

Any employee who wishes to absent him/herself from his/her employment for any reason other than sick leave, funeral, jury duty, or any other reason specifically provided for in this Agreement, must make application for leave of absence from the employer. All requests for leave shall be made in writing to the Personnel Committee at least fifteen (15) days previous to the start thereof. The employer shall determine whether or not justifiable reason exists for granting a leave of absence. No leave shall be

granted for the purpose of seeking other employment.

Employees shall be allowed to continue to have coverage of the Hospital and Surgical Insurance Plan and Group Life Insurance upon payment of the premiums (for both individual and family plans) payable in advance each month by the employee to the Payroll Department for all approved leaves of absence for the first six (6) months thereof.

II. LEAVE FOR UNION BUSINESS

. . .

III. MATERNITY LEAVE

A. Maternity leaves shall be granted by Sheboygan County as follows:

. . .

IV. MILITARY LEAVE

Leaves of absence without pay shall be automatically granted all full time and part time employees who are called or volunteer for military service, provided that application for re-employment is made within ninety (90) days of discharge.

. . .

BACKGROUND

The Grievant, Daniel Berg, was employed by the County from 1978 until his resignation effective December 1, 1993. At the time in question, the Grievant was the Huber Law Coordinator in the Sheboygan County Sheriff's Department. In June of 1993, the Grievant became ill and on June 27, 1993, he had open-heart surgery. He was on sick leave from June 24, 1993 until it ran out on July 13, 1993. On July 7, 1993, the Grievant submitted a "Leave of Absence Request" to the County's Personnel Committee requesting a leave of absence without pay due to his medical condition from July 14th to an unknown date. The request was granted, and from July 14, 1993 until his resignation the Grievant was on a leave of absence without pay.

The Sheriff's Department requires employees to fill out time cards every day stating their status, i.e., if they are working, on a paid leave, etc. Employees on an unpaid leave submit time cards monthly. While he was on his leave of absence, the Grievant turned in a time card for Labor Day and he subsequently received a check for holiday pay for that day. In late October of 1993, the Grievant received a fringe benefit payout for the vacation hours he had accrued, but deducted from that amount was the holiday pay he had received for Labor Day. The Grievant filed a grievance over that deduction, which in effect had denied him the holiday pay for Labor Day. The Grievant also turned in time cards for Thanksgiving Day and the Day after Thanksgiving Day in 1993, but did not receive holiday pay for those days. The Grievant filed another grievance regarding those two holidays. The Grievant subsequently resigned due to health reasons.

The grievances were denied. The parties attempted to resolve their dispute, but were unable to do so, and proceeded to arbitration on the grievances, having agreed to consolidate the grievances for purposes of hearing and decision.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Grievant is entitled to holiday pay for the days in question based upon the clear and unambiguous language in the parties' Agreement. The Union cites the holiday provision of the Agreement, in relevant part, as stating:

c. To be eligible for holiday pay the employee must have worked the scheduled hours of work on the last workday prior to the holiday and the scheduled hours of work on the workday following the holiday, except:

. . .

ii. Because of illness verified by a statement from a doctor (the County will pay for the cost of obtaining such a statement), or. . .
(emphasis added)

Since the Grievant was on a status that was the contractual exception to the requirement that he work the day before and the day after the holiday, the Grievant is entitled to holiday pay for the days in question. He was on a leave of absence for "medical reasons" verified by a doctor's statements, he had permission to be off work, and he filled out and turned in the time cards which were accepted by the Employer. Thus, he met the exception set forth in subsection (ii.) above. The Grievant did not receive a "general" leave of absence or a leave for union business, etc., rather he was placed on a medical leave of absence due to his open-heart surgery and recovery period. The

contract does not require that a person must be on paid status in order to get the holiday pay. Further, a general leave of absence specifically does not include sick leave, funeral leave, jury duty, or other specific reasons provided.

Regarding the County's assertion that there is a past practice of not paying holidays in similar situations, the Union asserts that the evidence offered by the County is not relevant. Those instances all involved leaves of absence for maternity leave, which falls under Article 21, the Leaves of Absence section of the Agreement. The Union concedes that holiday pay is not required for employees under such leaves of absence, but that is not the same circumstances as in this case. The other exhibit (County Exhibit No. 6), offered regarding employe Holly Sixtel to support the claimed past practice involved a case of an employe who had an ill child. In this case, the Grievant, himself, was ill and that situation falls under the exception in subsection (ii.) of the holiday pay provision. The Union requests that the grievance be sustained and that the Grievant receive holiday pay for Labor Day, Thanksgiving Day, and the Day after Thanksgiving Day.

County

The County takes the position that it did not violate the Agreement by denying the Grievant holiday pay for the days in question. In support of its position, the County asserts that there is a long-standing practice of not paying employees for holidays which fall when the employee is on an unpaid leave of absence. It cites the examples it offered at hearing of individuals in the bargaining unit who had been on an unpaid leave of absence and had not received holiday pay during that time. Those individuals were on an approved leave of absence, but did not receive the holiday pay due to their unpaid status at the time the holidays fell. Further, the bargaining history offered by the County shows that the contract language in question has not changed in relevant part since the 1978-79 Agreement. The County cites the exception in subsection c. (i.) to the holiday provision, and asserts that while it is somewhat confusing because of the two exceptions, (exception to an exception) the practice has been to interpret the second part of the exception to mean that those individuals on unpaid leave of absence are not eligible for holiday pay. The evidence supports that practice. In this case, there is no question that the Grievant was on unpaid status from July 14 until December 1.

The County also asserts that arbitrators looking at similar contractual language requiring employees to work the workday before the holiday and the workday following a holiday have interpreted it to imply that they are the last and first scheduled work days of the facility or plant, and not the employee. In one of the cases cited, the arbitrator relied upon a long-standing past practice of not paying employees under that interpretation, and the arbitrator noted that the union had never grieved the company's interpretation and application. Similarly, in this case, the practice has also been long-standing and the Union has never grieved it. The practice has been in place for a long period of time and has not been objected to by the employees.

The County asserts that the language in Article 18, C, of the Agreement, is not clear and cites Elkouri and Elkouri, How Arbitration Works, 4th Ed., for the principle that arbitrators utilize past practice to give meaning to ambiguous contract language. The County cites additional works for the proposition that where a practice has given meaning to contract language contained in past agreements, that same meaning will be presumed to carry over to new agreements. There would have to be very compelling reasons for an arbitrator to change an established practice by which the contract has been interpreted, such that there would have to be a clear and unambiguous direction in the language used in the new agreement to effect such a change. In this case, the agreements going back as far as 1978 contain the same language regarding payment of holidays while an employee is on unpaid leave of absence.

The meaning given that provision by the clear past practice, should be maintained.

As to the Union's claim that it was not aware of the practice, the County asserts that the evidence shows that numerous employes requested and received approved leaves of absence over the years and none received holiday pay while in unpaid status. If any of those employes had questioned their eligibility for holiday pay, they would have had the opportunity to question their supervisor and their bargaining representatives. There is no record of such questions being brought forth, which indicates that the practice was understood and accepted. The County cites arbitral precedent for the proposition that where the practice was widely known and understood by the employes, the union could not credibly claim that it did not know about the practice; if the Union did not know of it, it should have. Citing, Fremont Hotel and Casino, 1993 (Arbitrator Geraldine Randall).

Given the ambiguous contract language covering this matter and the long-standing, binding past practice that gives meaning to that language, and the fact that the Grievant was on unpaid leave status at the time, the Grievant was not entitled to holiday pay for the holidays in question. Therefore, the County requests that the grievances be denied.

DISCUSSION

Article 21, Leaves of Absence, in the Agreement, provides:

I. GENERAL LEAVES

Any employee who wishes to absent his/herself from his/her employment for any reason other than sick leave, funeral, jury duty, or any other reason specifically provided for in this Agreement, must make application for leave of absence from the employer. . .
(Emphasis added).

The Agreement specifically provides for Sick Leave, the use of sick leave for funerals, Leave for Union Business, Maternity Leave, Military Leave and Jury Duty. The Grievant formally applied for, and was granted, a leave of absence without pay for medical reasons. There is no specific provision for such a leave in the Agreement. Therefore, contrary to the Union's claims, a leave of absence without pay for medical reasons, by definition, falls within the "General Leaves" provision of Article 21 of the Agreement.

Article 18, Holidays, specifically provides that:

- c. To be eligible for holiday pay the employee must have worked the scheduled hours of work on the last workday prior to the holiday and the scheduled hours of work on the workday following the holiday, except:
1. Where absence is with written permission of the County except those covering a formal leave of absence granted under the Leave of Absence paragraph of this contract;
(Emphasis added).

That emphasized wording specifically applies to employes on a formal leave of absence granted under Article 21 of the Agreement. A "general leave" under Article 21 is such a leave. Hence, under that specific contract language, the

Grievant did not qualify for holiday pay under Article 18 while on his leave of absence.

The Union's reliance on the exception for illness in Article 18 to having to work the workday prior to and following the holiday to qualify for holiday pay is misplaced. That exception, c., ii, reads, ". . . Because of illness verified by a statement from a doctor (the County will pay for the cost of obtaining such statement),. . ." An employe who has requested, and been granted, a leave of absence presumably has provided the County with justification for the leave of absence. 1/ It would therefore be unnecessary for the County to require additional verification at its expense if that exception applied to employes in the Grievant's situation. Instead, it appears that Article 18, C, ii, applies to absences for illness that have not been previously approved, e.g., an absence that falls within the Sick Leave provision in the Agreement under which employes do not otherwise have to provide verification of their illness, unless the absence is in excess of three days' duration. 2/

For the foregoing reasons, it is concluded that the County did not violate the parties' Agreement when it denied the Grievant holiday pay for Labor Day, Thanksgiving Day and the Day after Thanksgiving in 1993.

Based upon the above, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievances are denied.

Dated at Madison, Wisconsin this 15th day of August, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator

1/ Article 21, Section I. General Leaves, provides, in relevant part:

"The Employer shall determine whether or not justifiable reason exists for granting a leave of absence. .
."

2/ Article 20, Sick Leave, 3, b.