BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CITY OF FOND DU LAC EMPLOYEES LOCAL 1366, AFSCME, AFL-CIO and CITY OF FOND DU LAC (CITY HALL)	Case 133 No. 54999 MA-9862 (Baxter Grievance)
In the Matter of the Arbitration of a Dispute Between CITY OF FOND DU LAC EMPLOYEES LOCAL 1366, AFSCME, AFL-CIO and CITY OF FOND DU LAC	Case 134 No. 55000 MA-9863 (Westphal Grievance)

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. William G. Bracken, Coordinator of Collective Bargaining Services, appearing on behalf of the City.

EXPEDITED ARBITRATION AWARD

Pursuant to a request by City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by the City of Fond du Lac, herein the City, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on April 11, 1997, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide two disputes as specified below. The parties also requested "one arbitrator for both grievances and that both grievances be heard on the same day." A hearing was conducted by the undersigned on June 10, 1997, at Fond du Lac, Wisconsin. The hearing was not transcribed. The parties completed their

briefing schedule on July 29, 1997.

The parties stipulated to one decision covering both grievances. The parties also stipulated that there are no procedural issues, and that the instant disputes are properly before the Arbitrator for a decision on their merits pursuant to the terms of the parties' collective bargaining agreement. The parties further stipulated to an "expedited arbitration decision with limited rationale."

After considering the entire record, I issue the following decisions and Award.

DISCUSSION:

Baxter Grievance

The parties were unable to stipulate to the issue; the Arbitrator frames the issue as follows:

> Did the City violate Article XIV by not allowing the Grievant, Linda Baxter, to take a half-day holiday without working additional time to make up the morning schedule at City Hall? If so, what is the appropriate remedy?

Linda Baxter is an accounts payable clerk employed in the Comptroller's Office. Her normal schedule is 7:45 a.m. until 12:00 noon and 1:00 p.m. until 4:30 p.m. In other words, she works 4.25 hours in the morning and 3.5 hours in the afternoon for a total of 7.75 hours per day with one hour of unpaid lunch. Most City Hall employes work this schedule.

Baxter applied for vacation on April 5, December 24 and December 31, 1996. All were one-half holidays pursuant to the agreement. Baxter was granted these vacation requests. However, because the one-half day of vacation request occurred in the morning, the City debited her vacation account by 4.25 hours. The City viewed a half holiday taken in the afternoon as worth 3.5 hours.

The Union contends clear contract language supports its position that the one-half holiday contained in the agreement means that the Grievant should have received equal credit for the morning and afternoon hours -- 3.87 hours in each portion. The City cites a long-standing practice of requiring vacation to be debited based on the actual amount of time off taken in support of its action noted above.

Article XIV, Section 2 provides: "Each full holiday is indicated in the table as (1). Multiples and fractions in the table indicate multiples and fractions of one (1) full workday." (Emphasis supplied) The only fraction indicated in the "Holiday Table" is one-half, and,

according to the Union, the aforesaid language makes it clear that the half holiday was to consist of one-half of whatever the employe's normal work day was. In the Grievant's case, this would be 3.875 hours, and the Union asks that she be made whole for the half holidays in question.

The problem with this approach is that the contract language does not clearly and expressly state that half holidays are to consist of one-half of whatever the employe's normal work day is. The contract simply refers to "1/2" which can be interpreted in the manner claimed by the Union or in the manner claimed by the City, i.e. the 4.25 hours she was actually scheduled to work in the morning.

Since the contract language is vague and subject to differing interpretations, the Arbitrator turns to past practice to interpret the agreement. It is undisputed that past practice supports the City's position. In this regard, the Arbitrator notes that Ben Mercer, Director of Human Resources, City of Fond du Lac, presented unrefuted testimony and evidence as to the long-standing practice of treating the one-half holiday pay as beginning at 12:00 noon. Employes in the past who requested to be off the entire day had their vacation accounts debited based on the 4.25 hours taken off in the morning. He testified that this practice has been going on for "at least the 6.5 years" he has worked for the City of Fond du Lac and "even longer."

The Union's own witness, Linda Baxter, admitted that employes were docked leave time based on the hours they were actually scheduled to work. She admitted, for example, that bargaining unit employes who were sick in the morning were docked 4.25 hours, and employes who used sick leave in the afternoon were docked 3.50 hours. As noted by the City, Baxter's statement is significant "because it shows that the City has been consistent in how it accounts for employees' time."

Since, as noted above, the disputed contract language is not clear and unambiguous, the arbitration decisions cited by the Union in support of its position are distinguishable from the instant dispute.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the City did not violate Article XIV by not allowing the Grievant to take a half-day holiday without working additional time to make up the morning schedule at City Hall. I, therefore, deny Baxter's grievance and dismiss same.

Westphal Grievance

The parties stipulated to the following issue:

> Did the City violate Article VIII, Sections 1 and 4, when it compensated employes at time and one-half the employee's regular rate for those employees who worked prior to the start of their regular work shift on Christmas Eve and New Year's Eve days 1996? If so, what is the appropriate remedy?

On December 24, 1996, and December 31, 1996, Street Department employes were called in to work prior to the start of their work day to plow and salt for a snow emergency. On both days they were scheduled to work only four hours, from 7:00 a.m. to 11:00 a.m., followed by the half holiday. On the two days in question, said employes were told to report to work at 4:00 a.m.

The City paid the employes time and one-half for the three hours worked prior to their starting time. Employes were paid at their straight time rate from 7:00 a.m. to 11:00 a.m.

Kevin Westphal filed a grievance on behalf of the aforesaid employes requesting double time for the hours from 4:00 a.m. until 7:00 a.m.

The Union maintains that the contract clearly calls for double time to be paid for any work performed outside of their normal work schedule on a holiday.

The City believes that the time and one-half premium is the appropriate one because the holiday begins after the employes' regular shift ends at 11:00 a.m. (Emphasis supplied) The City does not think it makes sense to pay double time, then straight time, then double time as the Union position requires. Rather, the City believes that time and one-half is the appropriate premium for hours worked outside of the normal work schedule followed by straight time and then double time on the half holiday, should it extend past the employe's regularly scheduled shift.

Article VIII, Section 1 of the agreement requires that "time and one-half shall be paid for all time worked outside of the employee's regular shift of hours, except as otherwise provided in this Agreement." (Emphasis supplied) Because it is undisputed that the hours of 4:00 a.m. to 7:00 a.m. on the two half holidays in question are time outside the employe's work shift, the City believes it has properly interpreted Article VIII, Section 1 in granting pay outside the employe's regular shift. The Arbitrator would agree unless the agreement provides "otherwise."

Two sections of the agreement are relevant to the issue. Article VIII, Section 4 states:

> Time worked on a holiday shall be compensated for at twice the employee's regular rate of pay in addition to the holiday pay. For ease of administration and uniformity, premium holiday pay shall be paid to those employees whose work shifts start during the contract

> holiday date listed elsewhere in this Agreement. For the Transit Division, full-time employees shall receive eight (8) hours regular pay for each full holiday and four (4) hours regular pay for each partial holiday.

while Article XIV, Section 4 reads:

> All permanent and probationary employees who are required to work on a contract holiday, except those employees regularly scheduled, shall receive a rate two (2) times their regular rate of pay for all hours worked in addition to the holiday pay. (See Article VIII, Section 4).

The City admits that Article XIV, Section 4 requires it to pay double time in addition to holiday pay when an employe is working on a particular contract holiday. However, the City argues that because employes do not have a full day off, a reasonable interpretation of the aforesaid contract language is for the holiday to begin only after the employe works his or her regular shift. Applying this standard to the facts of the instant dispute, the City maintains that since the employes in this grievance were regularly scheduled to work on the half holidays from 7:00 a.m. to 11:00 a.m. they "are not entitled to receive the double time rate because the half-holiday does not begin until after they complete their regularly assigned duties during their regularly assigned work hours." (Emphasis supplied)

The problem with this approach is that the agreement does not expressly state this or provide for such a result. To the contrary, as pointed out by the Union, said contract provision does not make any provision or exception for work performed on half holiday to be compensated at anything other than the double-time premium.

The City also argues that Article VIII, Section 4 requires holiday pay at the double-time premium beginning only after the shift ends. The City cites the following sentence in said contract provision in support thereof: "For ease of administration and uniformity, premium holiday pay shall be paid to those employees whose work shifts start during the contract holiday date listed elsewhere in this Agreement." (Emphasis supplied) The City adds that "the only proper interpretation of this sentence can be that the double time holiday premium can only be paid when the work shifts start during the one-half-holiday date," namely, Christmas Eve Day and New Year's Eve Day, 1996. Since the employes' work shift did not start until 7:00 a.m., and they were called in to plow snow at 4:00 a.m., the City believes "pursuant to Article VIII, Section 4, the grievants are not entitled to double time until after their regular work shifts start on the two half-holidays in question."

Again, although it may be "logical" to argue that pursuant to the above contract language holiday pay begins after the employe's regular shift ends, the agreement does not expressly and specifically state this. This contract provision likewise does not provide any specific exception to the double-time premium for work performed on half holidays.

An interpretation of the disputed contract language in the manner claimed by the Union is supported by what little evidence of past practice that exists. 1/ In this regard, the record is clear that Westphal was paid double time for the overtime hours he worked on December 24, 1985, prior to the start of his regular shift. Contrary to the City's assertion, a single incident "fully parallel" to the instant dispute must be given weight where parallel situations would not likely arise often. 2/

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the City violated Article VIII, Sections 1 and 4, when it compensated employes at time and one-half the employe's regular rate for those employes who worked prior to the start of their regular work shift on Christmas Eve and New Year's Eve days 1996. The City is ordered to make the Grievants whole for their losses as a result of the City's action.

By terms of this Award I am confirming the foregoing decisions and closing the files on the above cases.

Dated at Madison, Wisconsin, this 25th day of August, 1997.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

1/ In reaching this conclusion, the Arbitrator rejects the City's allegation that the Union's testimony and evidence is suspect and/or unpersuasive on this point.

2/ Elkouri and Elkouri, How Arbitration Works, 650 (Fifth Edition, 1997).