

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**WAUSAUKEE SCHOOL DISTRICT EMPLOYEES,
LOCAL 1752-D, AFSCME, AFL-CIO**
and
SCHOOL DISTRICT OF WAUSAUKEE

Case 40
No. 58110
MA-10844

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Mr. William G. Bracken**, Coordinator of Collective Bargaining Services, appearing on behalf of the District.

ARBITRATION AWARD

Wausaukee School District Employees, Local 1752-D, AFSCME, AFL-CIO, hereinafter referred to as the Union, and School District of Wausaukee, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties mutually agreed to the undersigned to act as the arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in Wausaukee, Wisconsin, on December 16, 1999. The hearing was not transcribed and the parties made oral arguments at the conclusion of the hearing.

BACKGROUND

The grievant is employed by the District as a Teacher Aide and works the school year. In 1999, the last day of school was May 28, 1999. (Ex-2) Memorial Day fell on May 31, 1999, and the grievant was not paid for the holiday. In August, 1999, the grievant put May 31 on her time sheet and requested six hours of holiday pay. (Ex-4) The District denied payment and the grievant filed a grievance on September 10, 1999, which was denied and appealed to

the instant arbitration. (Ex-3) Since the 1993 school year, the last day of school has been after Memorial Day so school year employees have been paid for Memorial Day. In the 1983-1984 school year, the last day of school preceded Memorial Day and the grievant received holiday pay for Memorial Day. (Ex-6) In 1992-1993 and 1991-1992, the employees were paid for Memorial Day and the last day of school was the Friday before. (Exs-5 and 7)

ISSUES

The parties could not agree on a statement of the issue. The Union states the issue as follows:

Did the District violate the parties' collective bargaining agreement, Article 12 in particular, and past practice when it failed to pay the grievant for the 1999 Memorial Day holiday?

If so, what is the appropriate remedy?

The District states the issue as follows:

Is the grievance timely?

If so, did the District violate Article 12, Section A. Paid Holidays and Holiday Pay of the 1997-2000 contract when it did not pay Theresa Aide (the grievant) for the Memorial Day holiday since such holiday did not occur during her regular work schedule? If so, what is the remedy?

The undersigned frames the issue as follows:

Is the grievance timely?

If so, did the District violate the parties' collective bargaining agreement by refusing to pay the grievant for the Memorial Day holiday in 1999? If so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 12 – PAID HOLIDAYS AND HOLIDAY PAY

A. Each employee shall be granted the following paid holidays, for each such holiday that occurs during his/her regular work schedule. (A holiday shall be equal to each employee's regularly scheduled daily hours.)

- | | |
|---------------------|-------------------------|
| 1. New Year's Day | 6. Good Friday |
| 2. Memorial Day | 7. Christmas Day |
| 3. Independence Day | 8. Christmas Eve Day |
| 4. Labor Day | 9. New Year's Eve Day |
| 5. Thanksgiving Day | 10. Thanksgiving Friday |

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ARTICLE 14 – GRIEVANCE PROCEDURE

A. For the purposes of this Agreement, a grievance is defined as a dispute between the School District and the Union covered by this Agreement involving the meaning, interpretation or application of the provisions of this Agreement.

B. Step One

If the matter in dispute is not resolved with the immediate supervisor within ten (10) working days the dispute shall be reduced to writing stating the facts upon which the grievance is based, the issues involved, those sections or section of this Agreement alleged to have been violated and the remedy sought. The written grievant may have two (2) representatives of his/her choice present at the discussion that shall take place upon submission of the written grievance to the District Administrator. The District Administrator shall issue a written response to the grievance and, if denied, state the reason(s) therefore.

...

C. A grievance must be filed and appealed within the time limits set forth above or the grievance shall be considered settled on the basis of the last answer given. A grievance not timely filed or appealed, shall be considered waived and abandoned unless by mutual agreement of the parties, the time limitations have been extended for that particular case.

UNION'S POSITION

The Union contends that the evidence established a past practice of paying school year employes for the Memorial Day holiday even though the school year ended before Memorial Day. It submits that in the past six years the work schedule included the Memorial Day holiday but there was sufficient evidence to show that prior to that time, employes received holiday pay even though the school year ended before Memorial Day.

As far as timeliness is concerned, it observes that a grievance must be filed within ten working days. The grievant did not receive her pay stub until after the school year ended and she was out of State. It argues that working days refers to the grievant's working days so she had ten (10) working days at the start of the 1999-2000 school year to file the grievance, thus it was timely filed. It asks that the grievance be sustained and the grievant made whole.

DISTRICT'S POSITION

The District contends that the grievance was not timely. It asserts that the grievant got paid in May or June, 1999, and knew she was not paid for the holiday and she had ten working days to file a grievance but sat on her rights and did not file within the ten day limit. It defines working days as Monday through Friday, except holidays, all year round and not just when school is in session. It refers to Article 14, Section C which provides that a grievance not timely filed or appealed, shall be considered waived and abandoned. It submits the grievant waited too long and the grievance is not timely.

Turning to the merits, the District maintains that the language of the contract is clear and unambiguous. It points out that Article 12, Section A. lists ten (10) holidays and states that employees will be paid for each holiday that occurs during his/her regular work schedule. In 1999, it notes that Memorial Day occurred after the grievant's work schedule ended. It argues that past practice may be used to interpret ambiguous language but cannot be used to modify clear and unambiguous language. It insists that where there is a long-standing past practice and plain language, the arbitrator must apply the plain language. It cites arbitral authority that when the language is crystal clear, it must be followed even when there is a long-standing past practice. It seeks dismissal of the grievance.

DISCUSSION

Timeliness

Article 14 requires a grievance be filed within ten (10) working days. The agreement does not define the term "working days" and the Union takes the position that as the grievant does not work during the summer, the grievance may be filed when the grievant returns to work. The District, on the other hand, defines it as the District's work days which includes the summer months. In *INDIAN HEAD, INC.*, 71 LA 260 (WEISS, 1978), the arbitrator was also faced with defining the expression "working days," and decided that it depended on who it is that is being required to do something. As the obligation to file a grievance within the timelines was placed on the employe, the term "working days" was applied to the employe's work schedule, otherwise it would place an unreasonable burden on the employe if he/she had to abide by the Company's work schedule. The undersigned finds that this rationale is applicable to the instant case. During the summer break, employes and stewards may be gone from the State. Witnesses may be difficult to reach to gather facts to determine whether or not

a grievance has merit. Also, it does not appear that the District would suffer any damage from this interpretation. Therefore, it is concluded that “working days” are the grievant’s assigned school days. The District denied her request for pay on or about September 3, 1999, and the grievance was filed on September 10, 1999. The September 3, 1999 date is also defensible because the school year extended past Memorial Day for many years, but prior to that, it appears that employes received holiday pay even though the last day of class was before Memorial Day, so a reminder of this past practice and a request for pay to correct a perceived error could be properly made at the start of school and be timely. In all the circumstances present here, the undersigned finds that the grievance is timely.

Merits

Article 12 states that “Each employee shall be granted the following paid holidays for each such holiday that occurs during his/her regular work schedule.” In 1999, Memorial Day occurred on May 31, 1999, and the last day of class or regular work for Aides was May 28, 1999. Since the 1993-1994 school year, the last day of class was after Memorial Day and employes were paid for it. The Union presented evidence going back to 1984 that the last day of class was before Memorial Day and employes received pay for the Memorial Day holiday. (Exs-5, 6 and 7) The evidence is somewhat sketchy in that a note attached to the grievant’s payroll record indicated that holiday pay for Memorial Day was listed under overtime pay. (Ex-6) A review of the pay records for 1985, 1986, 1987 and 1989 list nothing under overtime pay. (Ex-6) The record for 1990 does list something under overtime pay. (Ex-6) It should be noted that the last day of school in 1990 was May 24, 1990, and Memorial Day was on May 28, 1990. (Ex-5) Janet Perry’s records for 1992 and 1993 indicate holiday pay but it appears that it was for eight hours in 1992 and for six hours in 1993. (Ex-7) These inconsistencies aside, the District, in the instant case, chose to rely on the contract language and did not dispute the alleged past practice as asserted by the Union. It thus appears that school year employes were paid for Memorial Day even when it did not occur within the employes’ schedule.

Arbitrators have concluded that the primary purpose of holiday pay is to protect the earnings of the employe when the holiday occurs on a day on which he or she would have worked. Thus, in certain cases of layoff, employes are not paid on the holiday because they would not be working anyway and would have no earnings. In the instant case, the school year employes would not be paid for July 4 because they would not work that day even if it were not a holiday.

Generally, past practice can be used to interpret ambiguous language and provide a benefit not mentioned in the contract. In the instant contract, there is an express provision on holidays and an express requirement that to be paid the holiday, it must occur during the employe’s regular work schedule. As the employes’ last work day occurred before Memorial Day, employes would not have worked that day even if it were not a holiday. Given the primary purpose of holiday pay and the express language of the agreement, the undersigned

concludes that the language of the contract must prevail and past practice cannot be used to alter, modify or amend the plain language of the contract. Article 14 prohibits the arbitrator from amending, modifying, deleting or adding to any provision of the agreement. Giving effect to the past practice would modify the express requirements of the contract and add to it. The undersigned lacks the authority to do so and therefore cannot give effect to a past practice contrary to the express language and requirements of the contract.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes the following

AWARD

1. The grievance is timely.
2. The District did not violate the agreement by refusing to pay the grievant for the Memorial Day holiday in 1999, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 29th day of December, 1999.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator