

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LABOR ASSOCIATION OF WISCONSIN, INC.**

and

**VILLAGE OF EAST TROY**

Case # 55  
No. 68710  
MA-14322

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Appearances:

**Benjamin M. Barth**, Labor Consultant, the Labor Association of Wisconsin, N116W16033 Main St., Germantown, WI 53022, appearing on behalf of the Labor Association of Wisconsin, Inc. for and on behalf of the East Troy Professional Police Association, Local 310.

**Linda L. Gray**, Oleniczak & Gray, LLC, 2847C Buell Drive, P.O. Box 911, East Troy, WI 53120, appearing on behalf of the Village of East Troy.

**ARBITRATION AWARD**

The Village of East Troy, hereinafter Village or Employer, and the Labor Association of Wisconsin, Inc. for and on behalf of the East Troy Professional Police Association, Local 310, hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five Commissioners or staff from which to select an arbitrator to resolve a dispute between them regarding holiday pay. Commissioner Susan J.M. Bauman was selected. The parties waived a hearing in this matter and submitted a Stipulation of Facts on July 31, 2009. The record was closed on October 8, 2009, upon confirmation that all written argument had been submitted by the parties.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

### ISSUES

The parties were unable to stipulate to the issues to be decided by the arbitrator, but have agreed to allow the undersigned to frame the issues. The Association frames the issues as follows:

Did the Village violate the collective bargaining agreement when it refused to pay the Grievant, Officer Karen Barnett, holiday pay for the following holidays: Good Friday, Easter, Memorial Day, July Fourth, Labor Day and Thanksgiving, after she was injured on duty on March 13<sup>th</sup>, 2008 and off of work on Worker's Compensation when the holidays occurred?

If so, what is the appropriate remedy?

The Village frames the issue as follows:

Is the Grievant entitled to receive holiday pay while off work with a job related injury and, if so, did the Grievant timely file her grievance pursuant to the provisions of the collective bargaining agreement?

The undersigned frames the issues as follows:

Is the Village required to pay holiday pay to an employee who suffers an on-the-job injury, receives worker's compensation and is unable to work?

If so, what is the appropriate remedy under the circumstances presented in this case?

### STIPULATED FACTS

1. That the Village of East Troy and the Labor Association of Wisconsin, Inc., for and on behalf of the East Troy Professional Police Association, Local 310, have a collective bargaining agreement in full force and effect during all times pertinent to this grievance.

2. That on March 13<sup>th</sup>, 2008, Officer Karen Barnett was injured on duty while in the performance of her duties as a police officer with the Village of East Troy.
3. That Officer Karen Barnett has been receiving compensation since the injury on March 13<sup>th</sup>, 2008, from the Village of East Troy and Wausau Insurance, pursuant to Section 28.01 of the Collective Bargaining Agreement.
4. That on December 7, 2008, Officer Karen Barnett requested payment for the following six (6) holidays: Good Friday; Easter; Memorial Day; July Fourth; Labor Day; and Thanksgiving.
5. That on December 8, 2008, Officer Karen Barnett received notice from the Village of East Troy, Chief of Police, Alan Boyes, denying her requested holiday pay.
6. That on December 18, 2008, Officer Karen Barnett initiated Grievance 2008-61 alleging that the collective bargaining agreement had been violated by the Village in not paying her holiday pay.
7. That on or about December 23, 2008, Labor Consultant Jason Ganiere informed Village Administrator Judy Weter that the Association is moving the grievance to Step 2 of the grievance procedure.
8. That on January 7, 2009, the parties met to discuss Grievance 2008-61.
9. That on January 20, 2009, Village Administrator Judy Weter informed Labor Consultant Jason Ganiere that the Village denied Grievance 2008-61 at Step 2.
10. That on February 12, 2009, the Labor Association of Wisconsin sent a "Request to Initiate Grievance Arbitration" to the Wisconsin Employment Relations Commission (W.E.R.C.)
11. That on March 20, 2009, Arbitrator Susan J. Bauman, of the W.E.R.C., sent the parties a confirmation to hold a hearing on June 3, 2009.
12. That Article XVIII, Section 18.01 of the current collective bargaining agreement reads as follows: *"Holidays as hereinafter set forth shall be paid for at the rate applicable for each Employee based on the pay rate in effect at the time of the holiday. The Employer may in its sole discretion work out and post a holiday work schedule. Said schedule shall, as far as possible and practical, distribute the holiday work responsibility equally among the*

*Employees. The unworked holiday hours will be the regular rate not the overtime rate. The worked holiday hours will be the overtime rate. In no event will unworked holiday hours accrue to satisfy the minimum hours necessary in connection with earning overtime pay.*

a. *Full day holidays shall be:*

- i. *New Year's Day;*
- ii. *Easter Sunday;*
- iii. *Memorial Day;*
- iv. *July Fourth;*
- v. *Labor Day;*
- vi. *Thanksgiving Day;*
- vii. *December 24<sup>th</sup>;*
- viii. *Christmas Day;*
- ix. *December 31<sup>st</sup>;*
- x. *Three (3) floating holidays, one of which must be earned, and;*
- xi. *The Friday before Easter Sunday.*

13. That Article XVIII, Section 18.02 of the current collective bargaining agreement reads as follows: *“In order to qualify for holiday pay, an Employee must work the regular work day immediately preceding or following the holiday, if said Employee is regularly scheduled to do so.”*

14. That Article IX – Grievance and Arbitration of the current collective bargaining agreement reads as follows:

**SECTION 9.01 DEFINITION.**

- a) **GRIEVANCE:** A grievance is a formal claim in writing that the Employer has not complied with some specific provision of this Agreement.
- b) **WORKING DAYS:** For the purposes of this Article, working days shall be defined as Monday through Friday excluding legal holidays.

**SECTION 9.02. PROCEDURE.** A grievance shall be handled in the following manner:

- a) An Employee who has a grievance shall within ten (10) working days from the date such grievance arises, file a written grievance with the Chief of Police. The Police Chief shall thereupon make a written determination within a reasonable length of time not exceeding ten (10) working days.

- b) The grievance will be considered settled in paragraph 9(a) above unless within ten (10) working days of the decision of the Police Chief or last due date, the grievance is submitted by the Association to the Village Administrator or his designee.
- c) In the event that the Village Administrator, or his designee and the Association cannot reach a mutually satisfactory decision within twenty (20) working days after service of the grievance on the Village Administrator's Office, or his designee, in paragraph (b) above, then the Association shall make application to the Wisconsin Employment Relations Commission (W.E.R.C.) for the selection of an arbitrator. A copy of this application will, at the same time, be sent to the Village Administrator's Office, or his designee. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission staff, a panel of arbitrators shall be submitted to the parties, and the Association and the Village shall split the cost of the arbitrator so appointed.
- d) The time limits herein above set forth are binding and failure of either party to comply therewith shall constitute waiver of the grievance involved. The time limits herein above set forth may be extended by mutual agreement of the parties.
- e) Any arbitrator appointed hereunder shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement and shall be limited in authority to determining whether or not the offense has been committed. The decision of the arbitrator shall be final and binding on the parties.

**SECTION 9.03.** The provisions of the Article with respect to filing grievances shall be available to employees and to the Association.

### **ADDITIONAL PERTINENT CONTRACT PROVISIONS**

#### **ARTICLE XIV – SICK LEAVE**

. . .

**SECTION 14.02.** After each full-time Employee has accumulated the Employee's one hundred twenty (120) days sick leave and uses all or any portion thereof, sick leave shall again accrue but at the rate of one (1) day sick leave for each month of employment thereafter until the Employee has again accumulated one hundred twenty (120) days. If the

Employee accrues more than one-hundred twenty (120) days sick leave, in such cases, the village will keep a record of all days over one-hundred twenty (120) days to be used only for catastrophic illness or injuries that go beyond one-hundred twenty (120) days, provided however, that days over one-hundred (120) [sic] shall not be provided to an Employee in the case of injury or illness covered by Worker's Compensation.

. . .

**SECTION 14.04.** Any sick days on which the Employee would not have been scheduled to work will not be counted against sick leave.

**ARTICLE XVII – VACATION**

. . .

**SECTION 17.07.** If a holiday occurs during the vacation period of any Employee, such Employee shall receive his holiday pay in addition to his regular vacation pay.

**ARTICLE XXVIII – WORKER'S COMPENSATION**

**SECTION 28.01.** In the event an Employee becomes entitled to and receives worker's compensation under the appropriate sections of the Wisconsin Statutes, the Employer will supplement all temporary total disability payments made there under [sic] for a period of one (1) year to the extent that the Employee will receive (80%) percent of their salary during said period of temporary disability provided, however, the amounts of temporary total disability made by the insurance carrier and social security payments and unemployment benefits of any other kind and nature whatsoever shall first be deducted in determining the amount of said supplemental payment.

**DISCUSSION**

The facts of this case are not in dispute. The Grievant suffered an on-the-job injury on March 13, 2008 and was unable to work. In accordance with Wisconsin law, she was entitled to, and received, worker's compensation benefits. In accordance with the collective bargaining agreement between the parties, she was entitled to additional payment. Section 28.01 provides:

In the event an Employee becomes entitled to and receives worker's compensation under the appropriate sections of the Wisconsin Statutes, the Employer will supplement all temporary total disability payments made there under [sic] for a period of one (1) year to the extent that the Employee will receive (80%) percent of their salary during said period of temporary disability provided, however, the amounts of temporary total disability made by the insurance carrier and social security payments and unemployment benefits of any other kind and nature whatsoever shall first be deducted in determining the amount of said supplemental payment.

At issue herein is the question of whether, under these circumstances, the Grievant is entitled to receive holiday pay for those holidays named in Section 18.01 of the collective bargaining agreement which occurred during the period of time when she was unable to work.

In its brief to the arbitrator, the Employer raises a question of the timeliness of the grievance. As did the Employer, the undersigned will address that question after a determination on the merits of the grievance.

**Is the Grievant entitled to Holiday Pay while off work due to an on-the-job injury?**

The Association contends that the clear and unambiguous language of Section 18.02 provides that the Grievant should receive holiday pay for the days claimed: "In order to qualify for holiday pay, an Employee must work the regular work day immediately preceding or following the holiday, if said Employee is regularly scheduled to do so." Inasmuch as the Grievant was unable to work, she was not regularly scheduled to work either the day before or after each holiday in question and, therefore, she is entitled to holiday pay for each day in question. The Employer, on the other hand, contends that since the Grievant was unable to work, she was not eligible for benefits - regularly scheduled to work implies that the employee must be available and eligible to work.

The parties are in agreement that the language does not specifically address the instant question. The Association argues that the arbitrator should use the ordinary and popularly accepted meaning of these words, together with other contract clauses and the general proposition that a benefit is not to be forfeited without clear language to that effect, to find the Grievant eligible for holiday pay. The Employer, on the other hand, argues that the lack of specific language to address this situation requires forfeiture since the collective bargaining agreement specifically states that an arbitrator shall not amend, modify, nullify, ignore, or add to the language of the agreement.

As a general rule, the requirement to work, or be available for work, on the day before and the day after a paid holiday in order to receive pay for that holiday stems from the industrial setting and seeks to prevent employees from extending holiday periods by taking off the day before or the day after a holiday. Thus, in a Monday through Friday work setting, an employee would not receive holiday pay if he or she were to have an unexcused absence on the day before or the day after a paid holiday. A police department is a seven day a week, twenty-four hour a day, work place. The language of Section 18.02 requires an employee to work the day before or the day after a holiday only if the employee is “regularly scheduled to do so.” The crux of this dispute centers on whether one can be regularly scheduled to perform work when one is unable to perform work (the Association’s contention) or whether being unable to perform work means that one fails to be available for regularly scheduled work (the Employer’s position).

Both parties contend that the language of the collective bargaining agreement supports its respective position. The Employer cites DENMARK SCHOOL DISTRICT (MA-12446, 5/04, Gallagher) to support its use of the dictionary definition of the words in question, “regularly scheduled.” However, the decision in that case clearly turned on the language of the collective bargaining agreement that required payment for holidays which fell during the employee’s work year and specific language to the effect that if an employee worked less than 540 hours per year he or she was not eligible for fringe benefits unless specific language, such as the holiday language, provided for it. The Association cites FERRELGAS, INC. (A-4477, 12/89, Jones), MARSHFIELD ELECTRIC AND WATER DEPARTMENT (MA-12755, 3/05, Mawhinney), CITY OF SOUTH MILWAUKEE (MA-10925, 7/00, Shaw) and TAYLOR ENTERPRISES (A-4950, 11/92, Nielsen) to support its arguments. TAYLOR ENTERPRISES turned on the fact that the employer had initially excused the Grievant therein from working part of the day prior to a holiday to attend a worker’s compensation hearing. During the course of the same work day, the employer rescinded its permission for the absence. The case bears no relevance to the case at bar. SOUTH MILWAUKEE is correctly cited for the proposition that if an agreement is susceptible of two constructions, one of which works a forfeiture and one of which would not, the latter is preferred in the absence of strong evidence that the parties intended a forfeiture. In MARSHFIELD ELECTRIC AND WATER DEPARTMENT the collective bargaining agreement language was clear in providing that one did not receive sick leave benefits until worker’s compensation benefits had ceased. However, the vacation section had no such language regarding vacation accrual during worker’s compensation leaves. Accordingly, the arbitrator found the grievant entitled to vacation accrual. In FERRELGAS, INC. the arbitrator found that the requirement to be at work the day before and the day after a holiday in order to receive holiday pay was met by the fact that an employee on worker’s compensation was “excused” from being at work by virtue of being on compensation. None of these cases are precisely on point and do not provide sufficient guidance to render a decision, but they are of assistance in informing this decision.

The undersigned does not find the language of Section 18.02 to be clear and unambiguous and finds it necessary to look at other provisions of the collective bargaining agreement to determine the meaning of the language in question. We begin with Section 28.01 which provides that should an employee receive worker's compensation, the Employer will supplement temporary total disability for a period of one year to the extent that the employee will receive 80% of his or her salary. The caveat set forth in that provision, however, provides that "the amounts of temporary total disability made by the insurance carrier and social security payments and unemployment benefits of any other kind and nature whatsoever shall first be deducted in determining the amount of said supplemental payment." This provision specifically provides that the employee receives 80% of their salary, with appropriate reductions for temporary total disability, social security and unemployment compensation. Normally, one's salary includes holiday pay which is not excluded by the terms of Section 28.01.

Section 14.02 regarding sick leave provides: "If the Employee accrues more than one-hundred twenty (120) days sick leave, in such cases, the village will keep a record of all days over one-hundred twenty (120) days to be used only for catastrophic illness or injuries that go beyond one-hundred twenty (120) days, provided however, that days over one-hundred (120) [sic] shall not be provided to an Employee in the case of injury or illness covered by Worker's Compensation." This language is quite specific in providing that a benefit available to other employees is not available to employees who are off work on worker's compensation. This language demonstrates that when the parties, in drafting their collective bargaining agreement, wanted to limit a benefit so that those on worker's compensation would not be entitled to it, they were capable of so doing.

Section 14.04 provides "Any sick days on which the Employee would not have been scheduled to work will not be counted against sick leave." The Employer argues that because the parties included this language in the agreement, and did not include similar language in the paid holiday section, it demonstrates that they did not intend for persons on disability to receive holiday pay. To the undersigned, this language is of no consequence inasmuch as in the normal course of business, if one is ill when one is not scheduled to work, one's sick leave accruals would not be affected. The failure of the parties to include similar language in the holiday pay section does not lead to the conclusion that holiday pay is forfeited if unable to work due to an on-the-job injury. This is especially so because Section 28.01 defines the rights of employees on worker's compensation unless there is a specific provision elsewhere, such as in Section 14.02.

The Association refers to Section 17.07 regarding the interplay between vacation time and holiday time, "If a holiday occurs during the vacation period of any Employee, such Employee shall receive his holiday pay in addition to his regular vacation pay." The Association argues that if an employee is on vacation when a holiday occurs, that employee does not forfeit holiday pay. Since this section provides

that employees who are off work on vacation before or after a holiday receive vacation pay on excused absences, it logically follows that an employee out on worker's compensation should also receive holiday pay. Although Section 17.07 demonstrates that the parties have included language as to what happens with holiday pay when an employee is on vacation, it does not follow that the failure to include the same language in Section 18.02 results in a forfeiture of holiday pay for persons on worker's compensation. It is the vacation section of the contract that provides for payment of holiday pay while on vacation. Thus, it is necessary to look at the worker's compensation section, not the holiday section, to determine how worker's compensation is to be treated. Section 28.01 does not provide for forfeiture of holiday benefits.

The undersigned is persuaded that the parties, while bargaining the terms of the collective bargaining agreement, did not contemplate the question of whether an employee who is off work, on worker's compensation, the day before and the day after a holiday, should be paid for that holiday. There is nothing in the language of the collective bargaining agreement that specifies that such an employee should not receive holiday pay. The parallel between being on vacation and on worker's compensation is such that the Employer is aware that the employee is not available for regularly scheduled work and is, therefore, not scheduled. The language in section 17.07 makes clear that while on vacation, an employee is entitled to vacation pay and holiday pay. Section 14.04 makes clear that if an employee is ill when not scheduled to work, the employee's sick leave bank will not be reduced. If not scheduled to work, one does not suffer forfeiture.

Most persuasive, however, is the provision of Section 28.01 which provides for certain reductions from salary which does not specify a reduction for holidays. The language of Section 28.01 makes clear that the parties contemplated an employee on worker's compensation would be made whole, up to 80% of his or her salary. Denying the Grievant pay for holidays would be in direct contradiction to this provision. Accordingly the Grievant is entitled to receive holiday pay while on Worker's Compensation.

**Was the grievance timely pursuant to the terms of the collective bargaining agreement?**

The collective bargaining agreement provides that grievances are to be filed within ten (10) working days from the date that the grievance arises. The Grievant herein filed a grievance on December 7, 2008, seeking payment for Good Friday (March 21), Easter (March 23), Memorial Day (May 26), Fourth of July (July 4), Labor Day (September 1) and Thanksgiving (November 27). From the limited information before the arbitrator, it would appear that the only portion of the grievance that is timely is the claim with respect to Thanksgiving.

As indicated above, this matter was submitted to the undersigned on stipulation. Although the collective bargaining agreement in its entirety was attached to the stipulation and the language of Article IX regarding Grievance and Arbitration was included as a particular matter stipulated to, the parties did not stipulate to, or even reference, the issue to be decided until their respective briefs were submitted. Although the original grievance was attached to the stipulation, the answer to the grievance was not attached. The undersigned does not know if the question of timeliness was first raised in the Employer's brief or if it was raised earlier in the grievance procedure. Inasmuch as the Association did not address timeliness in its brief, the undersigned would presume that the issue of timeliness was not addressed before the briefs were submitted. If the issue of timeliness was raised for the first time in the Employer's brief, this procedural objection will be deemed waived and the Employer is directed to pay the Grievant for all of the holidays enumerated in the grievance and any subsequent holidays while she was still off work while on Worker's Compensation. If the timeliness issue was raised by the Employer in its initial response to the grievance, the objection is sustained and the Grievant is only entitled to pay for Thanksgiving and subsequent holidays.

The stipulation in this case does not indicate whether holiday pay is paid to employees during the pay period in which the holiday occurs, or whether holiday pay is provided to employees once a year, as it is in some jurisdictions. The answer to the question of timeliness also turns on the practice of the parties in this jurisdiction. For all these reasons, the undersigned will retain jurisdiction on the question of timeliness (and therefore remedy) for a period of 60 days from the date of this award.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

### AWARD

The grievance is sustained. The Employer is to make payment to the Grievant for Thanksgiving and any holidays thereafter during which the Grievant was on Worker's Compensation. I will reserve jurisdiction for a period of 60 days with respect to the other holidays to decide the question of timeliness and remedy in the event the parties should be unable to resolve that question themselves.

Dated at Madison, Wisconsin, this 3rd day of November 2009.

Susan J.M. Bauman /s/

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Susan J.M. Bauman, Arbitrator

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