BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 655-D

and

CITY OF JEFFERSON

Case ID: 456.0000
Case Type: MA

AWARD NO. 7923

Appearances:

Dennis Hughes, Field Representative, AFSCME Council 32, appeared on behalf of the Union.

Susan Love and Brett Schnepper, Attorneys, Buelow Vetter Buikema Olson & Vliet, LLC, appeared on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, are parties to a collective bargaining agreement (hereinafter CBA) which provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on that grievance was held on January 19, 2016, in Jefferson, Wisconsin. The hearing was not transcribed. The parties filed briefs on February 26, 2016, whereupon the record was closed. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Does Article VI, Section 2, of the 2012-2014 CBA between the City of Jefferson and AFSCME Local 655-D entitle Mindy Stelse to time and one-half pay for her hours worked on November 27, 2014?

The City framed the issue as follow:

> Did the City violate the CBA when it did not pay the grievant overtime for hours worked on November 27, 2014?

I have not adopted either side's proposed wording of the issue. Based on the record, I find that the issue which is going to be decided is as follows:

> Did the City violate the CBA when it paid the grievant at straight time for working her regular shift on Thanksgiving, 2014? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

The parties' 2015-2016 CBA contains the following pertinent provision:

> **ARTICLE VI – ANNUAL PAID VACATION AND HOLIDAYS**
>
> Section 1. Vacation:
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> * * *
>
> Section 2 – Holidays. Each full-time employee covered by this Agreement shall be entitled to each of the following named paid holidays each year:
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> 1. New Year's Day
> 2. Presidents' Day
> 3. Good Friday
> 4. Memorial Day
> 5. July Fourth
> 6. Labor Day
> 7. Veterans' Day
> 8. Thanksgiving Day
> 9. Day after Thanksgiving Day
> 10. December 24th

11. Christmas Day

Holidays falling on a Saturday will be observed on the preceding Friday. Holidays falling on a Sunday will be observed on the following Monday. When a holiday falls during an authorized leave of absence for which an employee received compensation, the holiday will not be counted as part of the leave of absence. When December 24th falls on a Friday, it will be observed on the preceding Thursday; when December 24th falls on a Sunday, it will be observed on the preceding Friday.

Employees required to work on a holiday shall receive time and one-half (1½) pay in addition to their regular holiday pay. When a holiday falls during an employee's vacation period, another day off shall be granted at a mutually agreeable time.

BACKGROUND

Since at least 1976, the City and AFSCME Local 655-D have been parties to a series of CBAs. The parties' 1976 CBA contained the following sentence in the provision dealing with holidays (then, as now, Article VI, Section 2): "Employees required to work on a holiday shall receive time and one-half (1½) pay in addition to the regular holiday pay." As the following bargaining history will show, this sentence has been included in every CBA since then, up to and including the current 2015-2016 CBA. The only change is that, at some unidentified point in time, the word "the" was changed to "their."

The composition of the bargaining unit has evolved over time. Originally, the bargaining unit was "all regular full-time and regular part-time employees of the City of Jefferson, excluding law enforcement, professionals, Street Department, Sewage Department and Parks Department, supervisors, managerial, confidential and executive employees." This unit was sometimes referred to as the city hall unit. The City employed Emergency Medical Technicians (hereinafter EMTs), but they were not included in this bargaining unit.

In 2006, the City's two full-time EMTs were accreted to this bargaining unit. (Note: The City also employs some auxiliary EMT staff, but they were not part of the accreted group.) Afterwards, the parties negotiated specific terms regarding hours of work and wages for the full-time EMTs. In bargaining, the City proposed to treat the EMTs similar to the police department for purposes of work schedule, including a requirement to work on weekends and holidays. It did so because the EMT operation is a 24/7 operation like the police department. The Union ultimately agreed to that proposal. On October 10, 2007, the parties reached a tentative agreement with the assistance of mediator William Houlihan. The only part of that tentative agreement relevant here is the part dealing with holidays. The tentative

agreement said that holidays would be "per the new police contract." The "new police contract" just referenced was the CBA between the City and the Wisconsin Professional Police Association (WPPA). It provided in pertinent part:

> Employees covered by this Agreement shall be paid eight (8) straight hours straight time pay, or take eight (8) hours [or four (4) for one-half (½) day holiday] compensatory time off, at the Chief's option, in addition to their regular salary, for the above enumerated holidays.

The tentative agreement was initialed by representatives of the City, the Union and Houlihan. The record indicates that when the parties initialed this tentative agreement, they mutually understood that this language meant that if an EMT worked on a holiday, they would be paid at straight time for same, not time and a half.

After the tentative agreement just referenced was reached, City Administrator Tim Freitag informed the Personnel Committee of the City Council that an agreement had been reached for the EMTs. He summarized the tentative agreement as follows:

> Please note that the tentative agreement now requires covered employees to work a 5-2, 5-3 work schedule. This is the same schedule worked by our sworn police personnel. The major significance of this schedule is that employees now must work weekends and holidays.
>
> Covered personnel (two full time personnel) are compensated at the same rate as the Assistant Deputy Clerk Position, which is included in the bargaining unit. This provides for a significant increase for our EMT personnel. Wage rates will become retroactive to January 1, 2006 and will impact one of the two existing personnel.

The tentative agreement for the EMTs was subsequently ratified by both the Union and the City. The agreement covering the EMTs was considered to be part of the parties' city hall unit 2006-2008 CBA.

Although this tentative agreement reflected that the full-time EMTs would work a 5-2, 5-3 schedule, that schedule was subsequently changed by mutual agreement. The EMTs currently work three 12 hour shifts and one 4 hour shift each week.

After the new language for the EMTs was negotiated in 2007, the City began to administer it as follows. On January 1 of each year, the City gave the EMTs 88 hours of holiday time. This 88 hours of pay reflects 8 hours pay for each of the 11 recognized paid

holidays. Employees can use these holiday hours at any point throughout the year with supervisory approval. The 88 hours of pay just referenced is not mentioned in the parties' 2006-2008 CBA. Finally, if an EMT worked a regular shift on one of the 11 recognized holidays, they were paid at straight time, not time and a half.

In 2009, the parties negotiated a successor agreement to the one referenced above. In bargaining, there was no discussion about the holiday language or the way the City was administering it for the two full-time EMTs. Additionally, after a tentative agreement was reached, the tentative agreement document said nothing about holidays, but did say "all remaining items status quo." After this tentative agreement was reached, the Union drafted the new CBA (as it always did). The agreement which the Union drafted did not include the EMT holiday language which was agreed upon in 2007. This CBA was for the period 2009 and 2010.

After Act 10 was proposed in early 2011, the parties extended their CBA for the remainder of that calendar year. In bargaining, there was no discussion about changing either the holiday language or the way the City was administering it for the two full-time EMTs.

After Act 10 was adopted in 2011, the city hall employees decided not to recertify for 2012. The two full-time EMTs who fell under the Act 10 public safety employee exemption and retained their bargaining rights wanted to continue to have a collective bargaining relationship with the City. Accordingly, on November 16, 2011, AFSCME representative Neil Rainford notified the City that the Union would continue to represent a bargaining unit of two EMTs. The parties subsequently agreed that the City would voluntarily recognize the unit; that the parties would commence negotiations for a successor agreement; and that the current terms and conditions of employment would continue until a successor agreement was reached.

The parties subsequently had a single bargaining session wherein they negotiated a new CBA to cover the two full-time EMTs. In that bargaining session, there was no discussion about changing either the holiday language or the way the City was administering it for the two full-time EMTs. While that agreement changed the status quo on term, WRS contribution, health insurance, wages, residency, wellness and call outs, there was no change to either the holiday language or the way the City was administering it for the two full-time EMTs. On December 21, 2011, Rainford acknowledged the terms of the tentative agreement. The Union subsequently drafted the new agreement (as it always did). The agreement which the Union drafted did not include the EMT holiday language which was agreed upon in 2007. The City signed the agreement drafted by the Union. This CBA was for the time period of 2012 – 2014.

After the 2012 – 2014 CBA for the EMTs was signed, the City continued to administer holidays as it had since 2007. Specifically, the City gave the EMTs 88 hours of holiday time at the beginning of each calendar year. This 88 hours of pay reflects 8 hours for each of the 11 recognized paid holidays. Employees can use these holiday hours anytime throughout the calendar year with supervisory approval. The 88 hours of pay just referenced is not mentioned

anywhere in any of the parties' CBAs. Finally, if an EMT worked a regular shift on one of the 11 recognized holidays, they were paid at straight time, not time and a half.

* * *

In both 2011 and 2013, EMT Mindy Stelse – who has been a full-time EMT since 2010 – raised the issue with management of whether she was entitled to overtime pay when she worked on a holiday. It was her contention that when she worked a regular shift on a holiday, she was entitled to time and a half (rather than straight time) pursuant to the next to the last sentence in Article VI, Section 2. Both times that she raised the matter, City officials told her that notwithstanding the language in Article VI, Section 2, that says that employees who work on holidays are to be paid at time and a half, the parties had reached an agreement in 2007 that provided just the opposite for the EMTs (namely, that the EMTs who work on holidays are to be paid at straight time). City officials told Stelse that that agreement supported the City's decision to pay her at straight time when she worked on a holiday. Later, local Union officials and Union staff representative Rainford told Stelse the same thing. On neither occasion did Stelse nor the Union file a grievance seeking time and a half pay for Stelse for working a regular shift on a designated holiday.

It is set against this factual background that the following occurred.

FACTS

November 27, 2014 was Thanksgiving. Stelse was required to work that day from 6:00 a.m. to 6:00 p.m. That was a regularly scheduled shift for her. As in the past, she was paid straight time for her assigned work hours. She grieved, contending that she should have been paid time and a half for all the hours that she worked that day.

DISCUSSION

This contract interpretation case involves whether an EMT who worked on a holiday was entitled to be paid at straight time or at time and a half. Stelse was paid at straight time. The Union contends that payment was incorrect and should have instead been time and a half.

In support thereof, the Union hangs its proverbial hat on the following sentence in Article VI, Section 2: "Employees required to work on a holiday shall receive time and one-half (1½) pay in addition to their regular holiday pay." As the Union sees it, this language is directly on point and supports their position that when an employee works on a holiday, they are to be paid at time and a half.

The Union's interpretation has a simpleness and straightforwardness about it that is, on its face, appealing. When I first read that sentence and learned in the Union's opening statement that the grievant worked on a holiday, my initial reaction was that based on the plain meaning of the sentence just noted, the employee was indeed entitled to be paid time and a half for working on a holiday.

As the hearing progressed though, I heard detailed testimony about the parties' bargaining history that resulted in the parties' first CBA covering the EMTs. That bargaining history illustrated the old adage that things are not always what they seem to be. That is certainly the situation here. The reason I commented on the hearing at the beginning of this paragraph is to emphasize that the parties litigated a bargaining history case. That being so, I can't decide this case – as the Union essentially proposes – by just looking at the last paragraph in Article VI, Section 2, in and of itself and ignoring the bargaining history. I'd be remiss as an arbitrator if I did that. Obviously, I still need to address the City's contention that notwithstanding the contract language just noted, the parties have a long-standing agreement that EMTs are only entitled to their regular rate of pay when working on a recognized holiday. Consequently, I'm going to review the parties' bargaining history to help me determine the proper interpretation of the CBA.

The parties' bargaining history conclusively shows the following.

First, prior to 2007, the EMTs were unrepresented. In 2007, they were accreted to the city hall bargaining unit. In bargaining, the City proposed to treat EMTs differently than the city hall employees in the following respect. The EMT operation is a 24/7 operation and EMTs work 365 days a year. As such, the City proposed in bargaining to treat the EMTs like another group that works 365 days a year – the police. The Union agreed to that, and also agreed to the City's proposal to have EMT holiday pay be the same as the police. The record shows that police who work on a holiday are paid at straight time – not at time and a half. Thus, the parties explicitly agreed in 2007 that when the EMTs work on a recognized holiday, they would not be paid at time and a half but rather would be paid at straight time. They reached this agreement in a mediation session and then documented their agreement in writing. That agreement said in pertinent part that holidays were to be paid per the police contract. Everyone connected with that agreement understood that this meant at straight time.

Second, the record shows that when this agreement was reached in 2007, Article VI, Section 2, included the same language as it currently does. As already noted, that language said – and still says – that employees who are required to work on a holiday are to be paid time and a half (in addition to their regular holiday pay). Such language was common for employees in a city hall bargaining unit who traditionally do not work holidays. However, the EMTs do. The sentence just noted in Article VI, Section 2, plainly contradicts what the parties explicitly agreed to in 2007 for the EMTs.

Third, since the parties negotiated new holiday pay terms for the EMTs, they must have intended to subsequently include them in their next CBA. Otherwise, there would have been no point in negotiating the new terms. However, that simply didn't happen and no one apparently thought to make a specific notation in Article VI, Section 2 – or elsewhere – that notwithstanding that contract provision the EMTs were not going to get paid time and a half when they worked on a holiday. Instead, this matter simply fell through the proverbial cracks. When each subsequent CBA was negotiated, the status quo as it related to EMT holiday pay continued. Insofar as the record shows, neither side noticed that the agreement did not contain their agreed upon terms from 2007 that EMTs who work on holidays are to be paid at straight time – and not at time and a half. This mistake continued up to and including the current CBA.

* * *

It is set against this backdrop – where the contract language has not changed and the City has administered holiday pay since 2007 so that EMTs are paid at straight time for working holidays – that the Union now asks the arbitrator to apply the existing language of Article VI, Section 2, to the EMTs so that they are paid at time and a half for working holidays. I decline to do so.

Here's why. The language which the Union wants me to apply has been in the CBA since at least 1976. Originally, that language applied to city hall employees. Those employees though are no longer covered by this CBA. Additionally, it can be surmised that city hall employees do not usually work holidays. In contrast though, EMTs do and that's why the parties negotiated something different for them in 2007.

What they negotiated, of course, was that EMTs who work holidays are to be paid straight time – not at time and a half. There's no question that that was the parties' mutual intent at the time they negotiated that agreement.

As noted above, common sense dictates that the parties planned to incorporate their new EMT holiday pay terms into the CBA. However, for unexplained reasons, that never happened and the parties simply never got around to incorporating their 2007 EMT holiday pay agreement into either their 2009 – 2010 CBA or any subsequent agreement. As a result, the conflicting holiday pay language in Article VI, Section 2, remained in each CBA, including the present one.

The Union argues that since the 2007 EMT holiday pay agreement was never included in either the parties' 2009 – 2010 CBA or any subsequent agreement, it has expired and/or evaporated. To support that contention, it relies on the contractual zipper clause (which is found in Article XV, Section 1).

It would be one thing if the parties' bargaining history showed that the Union put the City on notice that it wanted the 2007 EMT holiday pay agreement to expire. However, that

never happened and the 2007 EMT holiday pay agreement was never discussed in bargaining by either side. Under these circumstances, it would circumvent the bargaining process to use the zipper clause as a basis to eliminate the parties' 2007 agreement because the parties themselves never took any steps to eliminate their 2007 EMT holiday pay agreement or have it expire.

The language which the Union wants me to apply here – Article VI, Section 2 – clearly did not, and still does not – reflect the parties' joint intent with respect to holiday pay for EMTs. When the parties' true intent is not reflected in their actual written agreement, arbitrators can reform the agreement to reflect the parties' true intent. The standard for applying the mutual mistake doctrine can fairly be stated thus: (1) the parties reached an agreement; (2) the parties intended that their agreement be included in a subsequent written agreement; and (3) the agreement was not included in a subsequent written agreement because of a mutual mistake by the parties. Here, all three of those elements were established, so it follows that the parties' current CBA is subject to reformation. Specifically, I find that notwithstanding the language currently contained in Article VI, Section 2, it was the parties' mutual intent that EMTs were to be paid at their regular rate (i.e. at straight time) when they work on a holiday. The CBA is thus deemed reformed to reflect that intent.

In so finding, I'm well aware that Article III of the CBA contains the common arbitral prohibition against adding to, deleting from, or modifying the terms of the CBA. However, clauses such as Article III are inapplicable in situations where, as here, the doctrine of mutual mistake applies. Here, I'm not adding or subtracting from the agreement. Instead, I'm simply reforming the agreement to give effect to the parties' original mutual intent because the parties' original mutual intent is not currently reflected in the terms of the CBA. Specifically, the parties negotiated a contract that was only supposed to pay EMTs their regular rate when working on a holiday, but that language was never incorporated into the CBA. Under these circumstances, reforming the agreement to provide that EMTs are only entitled to their regular rate of pay when working a holiday is consistent with the parties' original agreement and Article III of the CBA does not prevent reformation.

* * *

Even if I were to find that the mutual mistake doctrine does not apply here, there is another strong reason for denying the grievance. It's this. The parties' past practice since 2007 has been that EMTs who work a regular shift on a designated holiday do not get paid at time and a half; rather, they get paid at straight time.

Arbitrators have long held that a past practice can modify the terms of a written agreement when the practice was: (1) of a long duration; (2) mutually agreed upon; and (3) repetitive.

Here, the duration element has been met because the record shows that the City's practice of paying EMTs at straight time (and not at time and a half) dates back to 2007. From 2007 through the current CBA, the City has continually paid EMTs at their regular rate when working a holiday (meaning at straight time). Since the City's practice of paying EMTs at straight time for working holidays has continued without interruption or variance since 2007, I find that the City's practice meets the duration element.

With regards to the second element (mutuality of the practice), the record shows that the City's practice was agreed to by the Union. In negotiations in 2007, both sides agreed that EMTs would be paid at their regular rate when working holidays. The parties put their agreement in writing, although that agreement was mistakenly not included in the CBA. Additionally, the Union's consent to the City's practice is further evidenced by the fact that, prior to this matter, the Union has never filed a grievance over application of the existing holiday pay provision. What is particularly telling is that in both 2011 and 2013, Stelse complained to City officials about not receiving time and a half for working a holiday. Both times, City officials told her that the parties' 2007 agreement allowed the City to pay EMTs who work on holidays at straight time. Union officials subsequently told Stelse the same thing (namely, that the parties agreed in 2007 that EMTs who work on holidays are to be paid at straight time). Overall, these facts establish that the City's practice of paying EMTs at their regular rate (meaning at straight time) for working on holidays was mutually agreed to back in 2007.

With regards to the third element (repetitive), the record shows that the City has consistently repeated its practice regarding EMT holiday pay from 2007 through the present day. Given that the EMTs have been covered by a CBA containing the same language regarding holiday pay for no less than 6 years before this grievance was filed, and the EMTs have 11 holidays per year, EMTs have worked on numerous holidays. Without fail, those EMTs were paid by the City at their regular rate for each and every holiday worked since 2007. As already noted, the Union has never objected to or grieved the City's administration of holiday pay (until it filed the instant grievance). Additionally, when subsequent CBAs were negotiated, there were no proposals to change the EMT holiday pay process that was agreed to in 2007 or any discussion on holiday pay. The foregoing facts persuade me that the City's practice meets the last element. Accordingly, I find that the parties modified the written terms of their CBA – specifically Article VI, Section 2 - through a longstanding, consistently followed, and previously unchallenged practice of paying EMTs at their regular rate (i.e. straight time) when working on a holiday.

* * *

Since nothing has changed with respect to the parties' original intent or the City's practice regarding EMT holiday pay, I find it would be a circumvention of the bargaining process to allow the next to last sentence in Article VI, Section 2, to be applied as written to the EMTs. Instead, when that sentence is considered in the context of the parties' bargaining

history, it becomes apparent that that sentence applied to non-EMTs. As to the EMTs, the parties agreed in 2007 to terms that conflicted with the sentence just noted in Article VI, Section 2. What the parties agreed to at that time was that EMTs are to be paid at their regular rate (i.e. straight time) when working on a holiday. That agreement is entitled to contractual enforcement. Accordingly, Stelse was not entitled to time and a half pay for working Thanksgiving, 2014 and no contract violation occurred.

In light of the above, it is my

AWARD

That the City did not violate the CBA when it paid the grievant at straight time for working her regular shift on Thanksgiving, 2014. Therefore, the grievance is denied.

Signed at the City of Madison, Wisconsin, this 6th day of April 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator