
In the Matter of the Arbitration

between

AWARD

Village of Johnson City

PERB Case No. A2009-239

and

**Johnson City Professional Firefighters,
Local 921**

In accordance with their collective bargaining agreement the parties thereto submitted the following issue to me for arbitration:

Did the Village violate the Collective Bargaining Agreement when it failed to pay six firefighters 13 holidays for fiscal year 2009-2010?
If so, what is the remedy?

On December 8, 2009, a hearing on the above matter was held at the offices of the Village in Johnson City, New York. At this hearing both sides were represented and given full opportunity to present oral and documentary evidence. Both parties submitted briefs. Upon receipt of said briefs, and the transcript taken at the hearing, I declared the hearing closed.

FACTS LEADING TO THE GRIEVANCE

The facts underlying the instant matter are straightforward and, for the most part, not in dispute. On May 12, 2009, the Village Board passed a Resolution, which purported to "abolish six (6) firefighter positions effective May 31, 2009, at 11:59 pm pursuant to Civil Service Law Section 80." On May 13 each of the six firefighters

(hereinafter sometimes referred to as the "grievants") was sent a letter informing him of the "abolition." On May 14 the Union filed a grievance objecting to the Village's action as a "layoff" in violation of Section A of Article XVIII of the collective bargaining agreement. The Village denied the grievance, stating, *inter alia*, that it is "patently improper as it seeks relief on matters outside the CBA and the grievance is not arbitrable."

On May 29 the Union obtained an order from the New York Supreme Court (Hon. Ferris D. Lebus presiding) stating "that pending the hearing and determination of the issues raised in the petition, respondent is enjoined from terminating, laying off, or otherwise altering the employment status of" the six petitioning firefighters. Subsequently the Court continued the injunction conditioned upon the posting of an undertaking by the Union. The Union, however, did not secure the undertaking with the result that the Village removed the six firefighters from its payroll "effective July 7, 2009." Thereafter the Court vacated the aforementioned preliminary injunction, *nunc pro tunc*.

The grievance objecting to the alleged layoff is not at issue here. Rather, on July 21, 2009, the Union filed a grievance described simply as "Article VI Holidays Section D." On August 31 the Union, through counsel, notified the Village of its intent to arbitrate the grievance, describing it as the employer's "refusal to pay firefighters Christopher Gilfillan, Paul Bailey, Benjamin Savichky, Ryan Willis, Gregory Maney, and Michael Maney Holiday Pay pursuant to Article VI of the Collective Bargaining Agreement." While the Village apparently did not respond to the grievance, it proceeded to the instant arbitration wherein it agreed that the only

holiday for which it paid the six firefighters was July 4, 2009. The matter of whether the firefighters are entitled to any or all of the remaining 12 holidays has been submitted to me for my binding determination.

PERTINENT CONTRACT PROVISIONS

Article VI: Holidays

- A. Members shall receive Thirteen (13) Holidays listed below, and in addition, all other Holidays designated or observed as such by the Village:
1. January 1
 2. Martin Luther King
 3. February 12
 4. Third Monday in February (Washington's Birthday)
 5. Easter Sunday
 6. Last Monday in May (Memorial Day)
 7. July 4
 8. First Monday in September (Labor Day)
 9. Columbus Day
 10. First Tuesday after first Monday in November (Election Day)
 11. November 11 (Veterans Day)
 12. Fourth Thursday in November (Thanksgiving Day)
 13. December 25 (Christmas Day)
- D. All members of the Fire Department shall receive Fifty-Six (56) hours pay, whether the Holiday is worked or not and Forty-Eight (48) hours additional time in lieu of the above designated Holidays after the first full year of employment. Said Holiday Pay shall be paid on the second pay period of November. ...

Article VII: Sick Time

Section 2: Payment of unused Sick Days upon Retirement or in the Event of Death of Member

- A. The Village agrees to buy back any unused sick leave time, at a rate of One (1) Day for One (1) Day, up to One Hundred and Fifty (150) Days, at the time of retirement.

Article VIII: Vacation

- A. Vacation shall consist of Two (2) weeks after One (1) Year of service; Three (3) weeks after Five (5) years of service; Four (4) weeks after Ten (10) years of service; Five (5) weeks after Fifteen (15) years of service.

Article XXVIII: No Lay-Off Clause

- A. The Village shall not lay-off any member of the bargaining unit during the term of this contract.

POSITIONS OF THE PARTIES

The Union

The Union argues that the unambiguous language of the contract demonstrates the parties' mutual intent to pay the aforementioned firefighters all 13 holidays regardless of whether they were employed at the time of their occurrence. Thus Section D of Article VI states that firefighters "shall be paid" even when they don't work the holiday. Since the word "shall" is mandatory and the six firefighters were employees between June 1 and July 7, 2009, the Village lacks any basis for refusing to pay for the 13 holidays.

While the Village has argued that the only firefighters terminated before November who receive full holiday pay are retirees, the Union notes that the employer offered no examples of terminated firefighters who did not receive such pay. All that was shown was that the two who retired before November did receive it.

Additionally, the Village failed to explain why holidays should be treated differently from vacations, which were accrued on June 1, 2009 and paid to the six

firefighters upon their termination. Moreover, the contract, which states that only retirees will be paid for accrued sick leave, contains no such limit for holidays. The Union concludes that where the parties intended to limit such payments upon termination of employment they said so. Since there is no such limit on holiday pay, it should have been treated as vacation pay, which the six grievants accrued on June 1, 2009, and were paid upon their termination.

The Union further notes that the Village has argued that equity favored the employer's position. The Union, however, maintains that equity favors its own argument because the employer caused the instant grievance by laying off the grievants in violation of Article XXVIII of the collective bargaining agreement. Had the employer informed the Union of its intentions at negotiations, the Union could have bargained for language specifically guaranteeing holiday pay for employees in question. Additionally, the Village was temporarily enjoined from carrying out its actions with the result that the grievants were employed and available to work from June 1 until July 7, 2009. Because the grievants were employees during this period, the Union maintains that they are entitled to be paid for all 13 holidays set forth in Article VI.

For the reasons set forth above, the Union asks that the grievance be granted and that the Village be ordered to provide the six aforementioned firefighters "forty-eight (48) hours of holiday vacation that can be sold back to the Village immediately and pay the laid-off firefighters for the forty-eight (48) hours of holiday pay it improperly denied them.

The Village

The Village argues that while the collective bargaining agreement clearly grants holiday pay to "active" firefighters, it is silent regarding such payment to terminated employees. Moreover, it notes that Article VI provides that holiday pay "shall be paid in the second pay period of November." The employer concludes that the grievants' holiday pay did not accrue at the start of the fiscal year, but, at the earliest, in November of 2009, months after their employment had been terminated.

The employer further contends that the purpose of Article VI.D is to compensate firefighters for working on holidays. Here, however, the grievants performed no work between June 1, 2009, and the date of their termination. The only reason they were paid for July 4 was that they were "lucky enough" to be on the payroll before the temporary restraining order was rescinded. It would be unfair and inequitable, says the Village, to require holiday pay for employees who performed no work during the fiscal year in question. Such pay would also constitute a windfall attributable to the Union's temporarily successful attempt to delay the abolition of the grievants' positions before the start of the fiscal year.

The Village denies that there is any past practice regarding holiday pay in situations other than retirements. It emphasizes that while "Assistant Treasurer" Donna Cahill agreed that two retirees had received full holiday benefits, she went on to say that a firefighter who had resigned or been terminated "would not have been paid their 13 holidays upon termination."

For the reasons set forth above, the Village asks "that the Arbitrator deny the grievance in its entirety."

DISCUSSION AND OPINION

The Union incorrectly argues that the language of Section D of Article VII unambiguously demonstrates the parties' intent to grant holiday pay to firefighters who are not in the Village's employ at the time the holiday occurred. While the second sentence of the Section uses the term "shall be paid," the word "shall" refers to the point at which payment must occur. Thus the sentence reads: "Such Holiday Pay *shall be paid* in the second pay period of November." (Emphasis added) This sentence refers to the first sentence of the clause which commences, "All members of the Fire Department shall receive Fifty-Six (56) hours pay, whether the Holiday is worked or not...."

Read together these sentences do not say that firefighters are entitled to holiday pay regardless of whether or not they are employees at the time of the holidays listed in Section A of the Article. Instead they require payment regardless of whether they actually reported to work on the holidays in Section A. The contract is unclear as to the whether or not the right to 13 days of holiday pay accrues on the first day of the fiscal year or at some point thereafter.

This ambiguity is not clarified by the manner in which the Village has treated two retirees. The six grievants did not retire and, therefore, the parties' practice regarding retirees is not particularly relevant here. Neither is there any reason to expect the employer to explain, as the Union suggests, why holidays should be treated differently from vacations. If the parties intended the 13 holidays to be

treated in the same manner as vacations, they would not have needed different clauses to describe these different benefits. Moreover, Section A of Article VIII (Vacation) plainly states that vacation allotments accrue after a given number of years of service. Thus, for example, *after* working for one year an employee is entitled to 2 weeks of vacation. The result is that at the start of any year an employee has already accrued the vacation allotment set forth in the clause.

The Union is also incorrect in contending that the contract says "sick time is only to be paid to retirees." Section 2.A of Article VII (Sick Time) merely requires the Village to pay retirees for up to 150 days of unused sick leave. This hardly implies that the parties intended to grant holiday pay to other employees who resigned or were terminated.

Both parties have argued that the equities in the instant matter favor their respective positions. I cannot agree. The Village believes that it properly abolished the positions of the employees in question and the Union believes that it did not. As noted above the propriety of the termination of the six grievants is not before me. Whether or not that issue goes to arbitration is apparently in litigation. The Village attempted to terminate the employment of the grievants at the end of the 2008-09 fiscal year. It failed because the Union had the action temporarily enjoined by the New York State Supreme Court. Regardless of which side ultimately prevails with respect to the terminations, it is clear that, regardless of whether the Village chose to assign duties to the grievants during their few weeks of employment in June and July of 2009, they were employees during this period. The question here is whether any holiday pay, other than for July 4, accrued to them during this time.

While Article VI is, as the Village contends, silent on this issue, the second sentence of Section D states with reasonable clarity that the 56 hours of pay referenced in the first sentence of the Section will not be paid until November. The most reasonable conclusion to be drawn from this fact is that the 56 hours of pay do not accrue until November. Accordingly, I find that the grievants, who were terminated on July 7, are not entitled to be paid for these 56 hours.

Donna Cahill, who identified herself as "senior account clerk in the payroll and human resource office," was the only witness who testified at the hearing, and she was called by the Village. As the employer points out, she testified that terminations and resignations would not be treated in the same manner as retirements for the purpose of holiday pay. On cross-examination she was asked "Are the 48 hours (of holiday pay) available to be used at the first day of the fiscal year?" Her answer was "I believe they would be." Shortly thereafter she stated that the 48 hours of pay would "most likely" be granted to "someone who resigned or was terminated for cause." Later, on redirect, she stated that the reason that the 48 hours wasn't credited to the grievants was that, "Of course, we weren't sure if they were considered employees at that portion (sic) at that time."

As noted above, the six grievants were employed from June 1, 2009, until July 7, 2009. Regardless of whether they were assigned duties, they were "employees" during the commencement of the fiscal year. In essence Cahill testified that the 48 hours of holiday pay mentioned in the first sentence of Section D of Article VI accrues on June 1 of a given fiscal year. She further affirmed that "they're paid holidays if they haven't used them...referring to the 48 hours, not the 56 hours in

cash that gets paid." Since the grievants were employees on June 1, 2009, since Cahill testified that firefighters accrue 48 hours of holiday pay on this date, and since they were paid for July 4th, I find that they are entitled to 40 additional hours of holiday pay.

For the reasons set forth above the grievance is denied in part and granted in part. Accordingly the Village is ordered to pay each of the six grievants 40 hours of holiday pay. I note in passing that because of the unique circumstances of this case, I believe that it should not be considered to have precedential value.

February 27, 2010

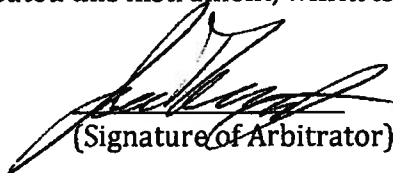


James R. Markowitz
Arbitrator

State of New York }
 } SS.:
County of Tompkins }

I, James R. Markowitz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

February 27, 2010
(Dated)



(Signature of Arbitrator)