BEFORE
EDWIN H. BENN
ARBITRATOR

In the Matter of the Arbitration

between

CITY OF O'FALLON, ILLINOIS

and

ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL

CASE NOS.: FMCS No. 090113-52906-A
Arb. Ref. 09.181
(Holiday Pay)

OPINION AND AWARD

APPEARANCES:

For the City: R. Michael Lowenbaum, Esq.

For the FOP: Rob Scott, Esq.

Date of Award: May 15, 2010

CONTENTS

I. ISSUE

Whether or not the City of O'Fallon ("City") violated Section 20.01 of the relevant collective bargaining agreements ("Agreement") between the City and the Fraternal Order of Police Labor Council ("FOP") and, if so, what shall the remedy be?

II. FACTS

The FOP represents patrol officers and certain civilian employees in the City's Police Department.[1]

Article 20 of the Agreement provides:

ARTICLE 20 - HOLIDAYS

Section 20.1. Holidays Identified. The following days shall be recognized and observed, as paid holidays:

New Year's Day	Labor Day
Martin-Luther King's Birthday	Thanksgiving Day
President's Day	Thanksgiving Friday
Memorial Day	Christmas Day
Fourth of July	

Any other day recognized as a holiday by the City for any non-bargaining unit City employee, or any day during which City offices are closed for business and non-bargaining unit employees are given the day off with pay will also be recognized as a holiday for this bargaining unit.

* * *

The day before Thanksgiving is not an identified holiday in Section 20.1 On Wednesday, November 21, 2007 — the day before Thanksgiving 2007 — department heads in some City departments released employees after lunch for the remainder of the day, with pay, if the department heads were satisfied that the employees' work had been completed.[2]

Officer Brian Gimpel testified that during the afternoon of November 21, 2007, he went to City Hall, Parks and Recreation and Public Works and found the doors locked. According to Officer Gimpel, there was a sign on the door at City Hall indicating that City Hall was closed at noon for the Thanksgiving Holiday.

Patrol and civilian employees in the Police Department were not given time off with pay in a similar fashion. The FOP grieved and this proceeding followed.

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[1] The employees are represented under two agreements (patrol and civilian employees) containing the same language relevant for this dispute. City Brief at 1; FOP Brief at 1. For ease of discussion, the two agreements shall be referred to in the singular. Because of the two agreements, separate grievances were filed and consolidated into one proceeding. FOP Brief at 1. The hearing in this matter was held by phone conference on February 22, 2010. Briefs were filed by the parties, the last received on April 7, 2010.

[2] Employees who desired to take the whole day off did so through use of accumulated benefit time.

III. DISCUSSION

A. The Burden

This is a contract dispute. The burden is therefore on the FOP to demonstrate a violation of the relevant contract language.[3]

B. The FOP's Showing

1. Does Clear Contract Language Support The FOP's Position?

The threshold question in any contract interpretation dispute is whether clear language exists in the contract which resolves the dispute?[4] If clear contract language resolves the dispute, "... I need go no further to resolve the issue ...."[5]

The FOP has the burden in this case. The FOP argues that the relevant language is clear and supports its position.[6] I disagree. Instead, the relevant language clearly supports the City's position.

Language is clear if it "... convey[s] ... a distinct idea ...."[7] For the sake of discussion and to give the FOP the benefit of the doubt, I will assume that by the City's allowing certain non-bargaining unit employees in other departments to leave early on the day before Thanksgiving 2007 (which is not a identified holiday under Section 20.1), the offices in which those employees worked were "... closed for business ..." under Section 20.1 — at least for the part of the day after the employees were released.

However, Section 20.1 provides that "... any day during which City offices are closed for business and non-bargaining unit employees are given *the day* off with pay will also be recognized as a holiday for this bargaining unit" [emphasis added]. Non-bargaining unit employees were not given "... the day off with pay ..." on the day before Thanksgiving 2007. Instead, some non-bargaining unit employees were

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3 *The Common Law of the Workplace* (BNA, 2nd ed.), 55 ("In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof"); *Tenneco Oil Co.*, 44 LA 1121, 1122 (Merrill, 1965) (in a contract case, "... [t]he Union has the burden of proof to establish the facts necessary to make out its claim.").

4 *See I-T-E Imperial Corp.*, 67 LA 354, 355 (Weiss, 1976):

> The threshold question in this case is whether the language of ... the collective bargaining agreement is so clear and unambiguous that I need go no further to resolve the issue herein.

5 *Id.*

6 FOP Brief at 3.

7 Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 470.

given *part of* "... the day off with pay ..." when they were allowed to leave early on that day, albeit, with pay for the rest of the day.

The parties use of the phrase "... the day ..." in Section 20.1 "... convey[s] ... a distinct idea ..." that they did not intend partial days as well as full days to be included in their agreement to extend the paid time off benefit of a declared holiday not listed in Section 20.1 to the covered employees under the Agreement.[8] "... [T]he day ..." means just that — the whole day. Because non-bargaining unit employees were not given "... the day ..." off on the day before Thanksgiving 2007, clear language does not support the FOP's position, but supports the City's position that bargaining unit employees were not entitled to the benefits claimed under Section 20.1.

2. The Rules Of Contract Construction

However, for the sake of discussion and to give the FOP the further benefit of the doubt, I will assume that the relevant language is ambiguous. That being the case, I can turn to the rules of contract construction.[9] The rules of contract construction do not support the FOP's position.

First, two of the fundamental rules of contract construction which are utilized in attempting to discern the intent of ambiguous language are: (1) contracts should be interpreted as a whole; and (2) to express one thing is to exclude another.[10]

Applying the first of those two rules (contracts should be interpreted as a whole) means that I can look to other provisions of the Agreement to see whether the par-

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8 *How Arbitration Works*, *supra* at 470.

9 "If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators." *Id.*

10 *How Arbitration Works*, *supra* at 492, 497:

> ... [T]he "primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word or part with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions."
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> * * *
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> Frequently arbitrators apply the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. To expressly state certain exceptions indicates that there are no other exceptions. To expressly include some guarantees in an agreement is to exclude other guarantees.

ties addressed how to compensate employees for partial days for circumstances related to holidays. To answer that question, the journey through the Agreement is not a long one.

Section 20.2 of the Agreement immediately following the provision having the language in dispute (*i.e.*, Section 20.1) addresses how employees are to be paid if they have to work on a holiday [emphasis added]:

> **Section 20.2. Rate of Pay for Regular Scheduled Off Workday.**
>
> * * *
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> When an employee is called in from his regular day off on the actual day of a holiday he shall be paid at his overtime rate for all *hours* worked in addition to his Holiday pay.

Looking to the second of those two rules (to express one thing is to exclude another) shows that in Section 20.1, the parties agreed to convert days not identified in that section as holidays into holidays if non-bargaining unit employees "... are given the day off with pay ...", but in Section 20.2, the parties agreed to pay employees who are called into work on a holiday "... for all hours worked ...." Reading those two clauses together (the first rule of contract construction) shows that the parties knew how to distinguish between full days ("... the day ..." in Section 20.1) and parts of a day ("... hours ..." in Section 20.2). Given those distinctions and now using the second rule of contract construction (to express one thing is to exclude another) the conclusion is that the parties intended to exclude hours, or partial days, from consideration in Section 20.1 and days from consideration in Section 20.2.

Using these two rules of contract construction, a fair reading of Section 20.1 is that for the benefits of that section to be triggered, non-bargaining unit employees must be given "... the day off with pay ..." (*i.e.*, the whole day) — and not just "... hours ..." (*i.e.*, part of the day). By excluding part of the day from Section 20.1 and requiring that non-bargaining unit employees take off "... the day ..." before a non-holiday is converted into a holiday, the parties therefore appeared to have intended to exclude partial days from Section 20.1.

In very simple terms, these parties knew how to distinguish between full and partial days. The parties made that distinction clear in the way they addressed the benefits in Sections 20.1 and 20.2. Had the parties intended partial days off with pay to trigger the benefits in Section 20.1, the relevant portion of

that section would have read [additional language underscored]:

> ... Any other day (or part thereof) recognized as a holiday by the City for any non-bargaining unit City employee, or any day (or part thereof) during which City offices are closed for business and non-bargaining unit employees are given the day off with pay will also be recognized as a holiday for this bargaining unit.

The parties did not provide for parts of days in Section 20.1 — they limited the benefit to situations where non-bargaining unit employees get "... the day off with pay ...." Because non-bargaining unit employees did not get "... the day off with pay ....", but only were given part of the day off on the day before Thanksgiving 2007, under these two rules of contract construction, the FOP's position that the City violated Section 20.1 lacks merit.

Second, there is another rule of contract construction which also weighs against the FOP's position. "An interpretation giving a reasonable meaning to contractual terms is preferred to an interpretation that produces an unreasonable .... result."[11] Taking the FOP's position to its logical extent, if the workday ends at 5:00 p.m. and on the day before Thanksgiving 2007 (or, for that matter on any ordinary day not identified as a holiday in Section 20.1), a supervisor in Public Works told one employee at 4:55 p.m. to take the rest of the day off with pay and calls from the public could not be answered during that last five minutes of the day (making the department "closed for business"), all members in the bargaining units represented by the FOP would be entitled to the same benefit on each day that happened. That is not a reasonable result. But although taken to its extreme, that is *exactly* where the logic of the FOP's position leads. It is more reasonable to interpret Section 20.1 to require that non-bargaining unit employees be given "... the day off with pay ..." — *i.e.*, the *entire* day off with pay — before the benefit of Section 20.1 is triggered.

3. Past Practice

Past practice is also an important tool for unscrambling the intent of ambiguous language.[12] The City presented evidence and argued that

[11] *The Common Law of the Workplace*, *supra* at 81.

[12] *How Arbitration Works*, *supra at* 507 ("One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of custom or past practice of the parties.").

a past practice existed which allowed individual department heads to make determinations to release employees early on certain holidays with pay.[13] The FOP argues that no such practice existed.[14]

To be a past practice, the conditions in dispute must be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties".[15]

For purposes of this case, the City's attempt to demonstrate the existence of a past practice is really not material. That is because the burden is on the FOP. To give the FOP even further benefit of the doubt, I will assume that the City has not demonstrated the existence of a past practice consistent with the City's position.

However, with respect to past practice, what is material is what happened in the Police Department in the past — something which *the FOP* must show, both in terms of existence of a past practice and that the demonstrated practice is sufficient to carry it position in this case.

Captain Jeff Wild testified that in the past, "non-essential" employees in the Police Department were allowed to go home early (with pay) on the day before holidays (particularly Christmas). Captain Wild further testified that non-essential employees included detectives, records clerks and support service personnel. However, according to Captain Wild, patrol and communications division employees were not allowed to leave early in that fashion. Wild also testified that under the current Chief John Betten, the practice of allowing non-essential employees in the Police Department to leave early on the day before holidays dwindled around 2005 or 2006 and ended in 2007.

What happened in the Police Department with respect to non-essential employees does not satisfy the FOP's obligations for demonstrating a past practice sufficient to prevail in this case. At most, Captain Wild's testimony shows that in the past "non-essential" employees in the Police Department (*e.g.*, detectives, records clerks and support

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[13] *See* City Brief at 12-13 ("... the City proved that for the last decade the City has allowed Department heads the discretion of permitting employees to leave a few hours early on the day before Thanksgiving and Christmas and such actions have never been viewed as entitling the police personnel to have a full day off with pay.").

[14] FOP Brief at 3-4.

[15] *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954).

service personnel) were allowed to leave early on the day before a holiday such as Thanksgiving or Christmas.

But this dispute is not just about the non-essential employees in the Police Department. The FOP made it clear that the dispute is about *all* of the covered employees — "non-essential" and "essential". On November 26, 2007, the FOP advised the City that [emphasis added]:[16]

> ... City Hall employees as well as Public Works employees were give[n] one-half day off with pay on Wednesday, November 21, 2007. The City offices were closed for business during this time. As such *members of the Police and Civilian bargaining units* are entitled to holiday compensation for that time periods as well. ...

The FOP clearly seeks the relief for all members of the bargaining units — essential and non-essential. This would include patrol and communications employees who, according to Captain Wild, were *not*, in the past, released early with pay on the day before holidays. To prevail on the factors demonstrating the existence of a past practice, the FOP would have to show that all bargaining unit members — *including* patrol and communications employees — were released early on those days and that practice ceased. There is no evidence that patrol and communications employees were allowed to leave early on the day before holidays which could rise to the level of a past practice. Instead, the evidence shows the opposite.

To the extent that non-essential employees (*e.g.*, detectives, records clerks and support service personnel) are no longer allowed to leave early on days before holidays with pay, the evidence shows that, as in other departments, the decision to allow those employees to leave early was discretionary with the department head. But, nevertheless, it does appear from Captain Wild's testimony that there was a past practice whereby those non-essential employees were allowed to leave early on the day before a holiday (Captain Wild emphasized Christmas).

That is still not enough to sustain the grievance on behalf of the limited subset of the bargaining unit of non-essential employees. Past practice is an important tool for unscrambling the intent behind ambiguous language. But as discussed *supra* at III(B)(1), the language in Section 20.1 is clear and against the FOP's position, requiring that before the benefit of that section is trig-

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[16] Joint Exh. 2.

gered for bargaining unit employees "... the day ..." and not part of a day be given as a day off to non-bargaining unit employees. Past practice in the Police Department for those "non-essential" employees is therefore irrelevant in the face of that clear language in Section 20.1.[17]

But even if that language is ambiguous, past practice is not the only tool for unscrambling the intent of ambiguous language. I have earlier discussed the rules of contract construction which also do not support the FOP's position. The FOP's theory is premised upon a violation of Section 20.1. But the rules of contract construction show that before the benefits of Section 20.1 come into play, employees in other Departments must be given the entire day off with pay. That did not happen here. Therefore, because non-bargaining unit employees in other departments were not given the full day off on the day before Thanksgiving 2007, Section 20.1 cannot be used to support the FOP's position with respect to the non-essential employees in the Police Department.

IV. CONCLUSION

It is understandable that encountering locked doors on City offices on a regular work day and also seeing a sign on a City Hall door indicating that the offices were closed as of noon for the Thanksgiving holiday would raise questions of the application of Section 20.1 to employees in the Police Department who were not similarly given time off with pay. But these cases are decided on burdens met and rebutted. In analyzing the language, I have given the FOP the benefit of all possible doubts. The FOP has the burden to show that language of the Agreement has been violated. Specifically, the burden is on the FOP to show that under Section 20.1, the phrase "... the day ..." in the clause "... any day during which City offices are closed for business and non-bargaining unit employees are given the day off with pay will also be recognized as a holiday for this bargaining unit" means part of a day and not a full day. The FOP has not

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[17] *How Arbitration Works*, *supra* at 651 ("While custom and past practice are used very frequently to establish the intent of contract provisions that are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision which is clear and unambiguous."). And, evidence of past practice "is wholly inadmissible where the contract language is plain and unambiguous." *Penberthy Injector Co.*, 15 LA 713, 715 (Platt, 1950).

met that burden. Indeed, under the circumstances of this case and particularly given the language of Section 20.1, the FOP cannot meet that burden.

Notwithstanding the strong efforts by the FOP on the employees' behalf, the City's position must prevail. The grievances shall be denied.

V. AWARD

The grievances are denied.

Edwin H. Benn
Arbitrator

Dated: May 15, 2010