VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. G86-72

THE STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	OPINION AND AWARD
	:	
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E. AFL-CIO	:	
	:	
The Union	:	

APPEARANCE BY BRIEF ONLY

For the Employer:

Robin Thomas

For the Union:

Daniel S. Smith

MARVIN J. FELDMAN
Attorney-Arbitrator
340 Western Reserve Building
1470 West Ninth Street
Cleveland, Ohio 44113
216/781-6100

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The parties filed their briefs in this cause and this matter was decided upon the stipulated fact and argument presented in those briefs. The parties further stipulated and agreed that this matter was properly before the arbitrator; that further answer briefs would not be filed and that the arbitrator should render results based upon the briefs as filed. It was upon the evidence and argument, therefore, as presented in those briefs, that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

It appears that the contract of collective bargaining by and between the parties for the period of 1986 through 1989 was the first such contract entered into by and between the parties. There had been prior many areas in the state statutes and in the administrative rules as well as in the administrative regulations and directives that were in conflict with one another. As a result, the parties stipulated and agreed at Article 43 of the contract to the following:

> "ARTICLE 43 - DURATION
>
> §43.01 - First Agreement
>
> The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting state statutes, administrative rules,

> regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws."

It might be noted that under Section 4117.10 of the Ohio Revised Code, that the following language appears:

> "...WHERE AN AGREEMENT MAKES NO SPECIFICATION ABOUT A MATTER, THE PUBLIC EMPLOYER AND PUBLIC EMPLOYEES ARE SUBJECT TO ALL APPLICABLE STATE OR LOCAL LAWS OR ORDINANCES PERTAINING TO THE WAGES, HOURS, AND TERMS AND CONDITIONS OF EMPLOYMENT FOR PUBLIC EMPLOYEES."

Article 26 of the contract of collective bargaining contains four sub-paragraphs. Article 26 states that certain holidays will be observed by the state and those holidays are ten in number. Certain further indications are stated in the contract under sub-paragraph .01, .02, .03 and .04. There is no specific language in the contract in Article 26 or elsewhere, establishing with any specificity, the payment of holiday pay for an employee when an holiday falls during the scheduled work week. The parties are in agreement however, that holiday pay will be paid to the bargaining unit employees when such holiday occurs during the scheduled work week. At Section 26.03, eligibility is established for the payment of holiday pay when the day off falls on a holiday. Thus practice and some language as well as the term of the contract do establish payment of holiday pay on each and every occasion.

Some restrictions to holiday pay entitlement do occur by the general administrative procedures stated in the Ohio Employment Security Manual found at paragraph 3015 paragraph B.1b which paragrpah reveals the following:

> "b. Holiday during absence without leave. Any employee who is absent without leave on a workday immediately preceding a holiday may be denied the holiday pay, unless the absence is subsequently approved by the Administrator or delegated agent. See item 3080."

There was also in use at the time of the instant incident, a procedure under Operations Directive number 2-86 at paragraph 3A which states the following:

> "3. Procedures
>
> A. Voluntary leave without pay policy. Effective May 19, 1986, non-supervisory claims personnel in central, district and local offices will be eligible for leave of absence without pay. Such requests will be granted with the permission of the local office manager, district manager, or in case of central office, department head, who must assure service to the public will not be greatly affected or that it will not impede prompt payments of benefits. Requests for leave without pay must be submitted, through the proper channels, on or before May 30, 1986. Such requests will be considered on a case by case basis with final approval by the Administrator."

"No pay status", under the Ohio Administrative Code at §123:1-47-01 at ¶51 states as follows:

"(51) 'No-pay status'-Means the conditions under which an employee is ineligible to receive pay, and includes, but is not limited to, leave without pay, the period an employee is receiving disability leave benefits, and disability separation."

In the present situation, the grievant requested and received a voluntary leave without pay for July 3, 1986. He thereafter did not receive holiday pay for July 4, 1986, one of the ten observed holidays under the contract of collective bargaining which holiday in 1986 would have fallen on a scheduled workday of the grievant. The request for that holiday pay was denied and a protest was filed. The following was stated by the union on that grievance form:

"What happened? Denied Holiday Pay for July 4, 1986.

My 728L form for leave-without pay because of Operative Directive 2-86 was approved through proper administrative channels. I am questioning my being denied holiday pay. I was on a prior approved authorized leave in conjunction with Directive 2-86. I honestly feel that the Administration should reconsider denying my holiday pay because I was on authorized leave. My first request for leave on the four Monday's of July was denied and I requested the Friday's of July for leave. The only reason I signed for leave was that I thought that this would beneficial in saving scheduled-work hours."

That claim was denied initially and again at Level III. The write-up by the employer at Level III reveals the following:

"In re:

George Cleggett GRIEVANCE DECISION OF LEVEL III

BACKGROUND:

Grievant has been employed for nine years with the bureau, over six of which have been as a Claims Examiner I in the Cleveland East office. On May 9, 1986, Operations Directive 2-86 informed District and Local Office Managers of the projected deficit in the Unemployment Compensation Administrative budget and stated effective May 19, 1986, personnel would be eligible for leave of absence without pay.

FACTS:

In accordance with Operations Directive 2-86, Grievant received approval for leave without pay on Thursday, July 3, 1986. He took the day of July 3rd off and also the holiday, Friday, July 4th. Subsequently, when he was not paid for July 4th, he filed this grievance seeking pay for the holiday.

DISCUSSION:

Grievant maintains he was not informed about the OBES Rule 3015B requiring an employee to be in pay status the day before a holiday in order to be paid for the holiday. He states he did not become aware of the rule until after returning to work following the holiday. As a longtime bureau employee, Grievant knew or should have known of Rule 3015B in the General Administrative Procedures Handbook.

DECISION:

Based on the foregoing, the grievance is denied.

Respectfully submitted,

/s/Keith F. Henley
Labor Relations Legal
Counsel"

The appeal from Level III by the union reveals the following:

"Grievant was denied at step III on the assumption he knew or should have known of rule 3015-B in the General Administrative Procedure handbook.

We are asking that this be reversed on the fact that rule 3015-B is not in procedures handbook; that they seem to think employees have copy of. Rule 3015-B is found in General Administrative Procedures manual, which employees do not have copy of. In denying grievance, it was stated he also took the holiday off. Because of July 4th being a legal holiday the offices of O.B.E.S. were closed, leaving grievant no choice as to working that day."

The grievance was again denied at step IV and the statement of the employer statement in that regard reveals the following:

"September 3, 1986

Mr. George W. Cleggett
3765 East 153rd. Street
Cleveland, Ohio 44128

RE: Step 4 Grievance Review
Grievance #G86-72

Dear Mr. Cleggett:

The OBES Rule 3015(B) mirrors the Ohio Administrative Code 123:1-44-02(A)(2) which states that 'An employee in no pay status shall not be eligible for holiday pay'. Since you were on a leave without pay which is a no pay status you were not eligible for holiday pay. Where the contract is silent Civil Service prevails.

Therefore, the grievance is denied for the above reason and the reason stated in Step 3.

Sincerely,

/s/Edward H. Seidler
Deputy Director"

It was on the basis of those facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

It appears that the parties have stipulated as to issue. That issue may be fairly stated as follows:

"STIPULATION OF THE ISSUE

> Does Section 123:1-44-02 (A)(2) of the Administrative Code conflict with Article 26 of the collective bargaining agreement? If so, did failure to pay holiday pay on the holiday immediately following grievant's day of approved leave without pay violate Article 26 of the collective bargaining agreement?"

Article 26 of the contract of collective bargaining does not establish a criteria for eligibility of holiday pay other than to indicate that an employee whose scheduled work day off falls on a holiday, will receive holiday pay for that day. That particular indication is not the issue in the instant matter. The situation in the instant matter is whether or not an employee who receives an authorized leave of absence for an otherwise scheduled day of work the day prior to holiday, should receive the holiday pay for the day subsequent.

The contract of collective bargaining as entered into by and between the parties does not state any eligibility requirement for payment of a holiday wage when that holiday falls on a scheduled work day. Both parties in their briefs indicated and stated that it was a practice to pay holiday wage when such falls during the scheduled work

day. Thus, the Ohio Administrative Code which states that an employee in a "no-pay" status is not eligible for holiday pay is not in conflict with the current contract between the parties since no language in the current contract reflects any eligibility requirements whatsoever other than for an individual whose day off falls on a holiday. With that thought in mind the language of Ohio Revised Code at 4117.10 indicates that where the agreement (contract of collective bargaining) makes no specifications about a matter, then the applicable law applies. If that be the case, then in that event the Ohio Administrative Code applies to the instant matter since the contract of collective bargaining is silent about that issue.

Thus, not only do the statutes apply as are indicated in the Ohio Administrative Code, but also, the rules thereunder. One such rule is found at 3015(B) of the Ohio Bureau of Employment Service Procedures which disallow payment of a holiday wage if in fact the individual involved is absent on a work day immediately preceding a holiday.

More importantly however, the general arbitral thought is that there be no pay for no work. In other words the general rule of arbitration is that one is entitled to a fair days wage for a fair day of work. Any exception to that must be indicated by clear and unambiguous language of the contract or must be the clear and consistent practice of the parties. In this particular case it appears that the contract of collective bargaining does not contain an indication that there be a wage paid for the holiday for those who do not work their regularly scheduled work load up the start of that holiday. Thus, the

rule that the employer followed in this case, as it was written, indicates and states by the very language of the rule, that non-work immediately prior to the holiday triggers no holiday wage.

On the other hand, if there was a clear indication in the contract that such wage would be paid, absence or not, then the grievant would be entitled to such payment. Thus it appears, that we have no clear language in the contract; no clear practice to show payment of holiday wage for those who do not work a day prior to holiday and no contractual language contrary to the rule of the shop as referred to in Administrative Code and the rules thereunder. Thus, the code is not inconsistent with the contract since the contract does not cover the problems sought to be resolved.

There was some indication that the grievant knew nothing of the exact rule involved in this particular case. The arbitrator cannot resolve a factual problem when such matter is brought before him by way of brief. I must presume the propriety of the rule since the grievant was a ten year employee and the rule had been in existence for several years prior to the instant matter. In that regard, therefore, I must presume that the rule was published and that the bargaining unit knew of its existence at the time the instant matter occurred. If the bargaining unit did not know of its existence, then an oral hearing should have been had and that issue resolved by way of evidentiary indication at that oral hearing. Absent a hearing, the issue of publication must be presumed since the rule had been in existence for a period of time and since there had been no indication in the briefs to the contrary.

Wages, benefits and fringes are a creature of the contract of collective bargaining. Such must be stated in the contract before payment may be made. In this case a holiday wage is granted but certainly on the promise and premise of maintaining a full work schedule otherwise. Such was not maintained and therefore, absent a specific clause to the contrary, such may not be granted. When such mainstream arbitral thought is taken in conjunction with the actual contract language in this case, the claim must be denied.

IV. AWARD

Grievance denied.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 30th day of
May, 1987.