Labor Arbitration Decision, Mich. State Univ., 2021 BL 147537, 2021 BNA LA 28
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Decision of Arbitrator

In the Matter of: Spartan Skilled Trades Union, Union, and Michigan State University, Employer.

March 15, 2021

Hide Summary

Case Summary

LABOR ARBITRATION

SUMMARY

[1] Holiday pay - EFMLA leave ►100.4815 ►100.5201 ►100.30 ►100.0235 [Show Topic Path]
Arbitrator Lee Hornberger ruled that Michigan State University violated its CBA by not paying holiday pay to the grievant for Memorial Day when he was on extended family medical leave provided by the Families First Coronavirus Response Act, and instead charging him an EFMLA day and paying him two-thirds of his regular rate according to the EFMLA statutory rate. When read together, two provisions of the CBA provide for the payment of holiday pay when an employee is, as here, on paid leave on the day of the holiday, and for no payment of holiday pay when an employee is on a leave of absence without pay. The grievant will keep the two-thirds pay he received and must be paid an additional two-thirds pay, representing holiday pay and reimbursement for one day of EFMLA leave, since the EFMLA paid leave requirements expired December 31, 2020 and there is no EFMLA bank to which his restored leave could be added.

Erin Hopper Donahue, White Schneider PC, 1223 Turner Street, Suite 200, Lansing, Michigan 48906, for the Union.

Richard W. Fanning, Jr., Director of Employee Relations, Michigan State University, 1407 South Harrison Road, Suite 240, East Lansing, MI 48823-5239, for the Employer.

LEE HORNBERGER, Arbitrator.

VOLUNTARY LABOR ARBITRATION
DECISION AND AWARD
INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the Spartan Skilled Trades Union (Union) and Michigan State University (Employer). The Union contends that the Employer violated the CBA by not providing holiday pay to Nicholas Martin (Grievant), and instead charging him an EFLMA day, on Memorial Day, Monday, May 25, 2020, when Grievant was on leave under the Emergency Family Medical Leave Act (EFMLA) as provided by the Families First Coronavirus Response Act (FFCRA). The Employer maintains that it did not violate the CBA by not providing holiday pay to Grievant, and instead charging him an EFLMA day, on Memorial Day, Monday, May 25, 2020, when Grievant was on leave under the EFMLA as provided by the FFCRA. In addition, the Employer claims that the Independence Day, July 2021, situation is not before me. The Union claims that the Independence Day situation is properly before me.

I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on January 27, 2021, in East Lansing, Michigan, via Zoom. The Zoom hearing went well. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. There was no court reporter or transcript. The dispute was deemed submitted on March 1, 2021, the date the last post-hearing submission was received by me.

Other than the Independence Day situation, the parties stipulated that the Grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients. All involved in the arbitration were courteous and professional. The post-hearing submissions were very helpful.

ISSUES
Procedural Arbitrability Issue

Is the Independence Day issue properly before me?

Substantive Issue

The parties stipulated that the substantive issue to be resolved is:

Did the University violate the CBA by not providing holiday pay to Grievant, and instead charging him an EFLMA day, on Memorial Day, Monday, May 25, 2020, when Grievant was on leave under the EFMLA as provided by the FFCRA?

RELEVANT CONTRACTUAL AND STATUTORY LANGUAGE
DIVISION C - EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT
SEC. 110. PUBLIC HEALTH EMERGENCY LEAVE

* * *

Section 110(a)(2) states:

... [T]he following definitions shall apply with respect to leave under [the EFMLA]:

(A) QUALIFYING NEED RELATED TO A PUBLIC HEALTH EMERGENCY. - The term 'qualifying need related to a public health emergency,' with respect to leave, means the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age of such employee if the school or place of care**[*2]** has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Section 110(b) states:

(b) RELATIONSHIP TO PAID LEAVE. -

(1) UNPAID LEAVE FOR INITIAL 10 DAYS. -

(A) IN GENERAL. - The first 10 days for which an employee takes leave under [the EFMLA] may consist of unpaid leave.

* * *

(2) PAID LEAVE FOR SUBSEQUENT DAYS. -

(A) IN GENERAL. - An employer shall provide paid leave for each day of leave under [the EFMLA] that an employee takes after taking leave under such section for 10 days.

(B) CALCULATION. -

(i) IN GENERAL. - Subject to clause

(ii), paid leave under subparagraph (A) for an employee shall be calculated based on-

(I) an amount that is not less than two-thirds of an employee's regular rate of pay ... and

(II) the number of hours the employee would otherwise be normally scheduled to work. ...

* * *

DIVISION E - EMERGENCY PAID SICK LEAVE ACT
SEC. 5102. PAID SICK TIME REQUIREMENT.

(a) IN GENERAL. - An employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because:

* * *

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.

* * *

(b) DURATION OF PAID SICK TIME. -

(1) IN GENERAL. - An employee shall be entitled to paid sick time for an amount of hours determined under paragraph (2).

(2) AMOUNT OF HOURS.-The amount of hours of paid sick time to which an employee is entitled shall be as follows:

(A) For full-time employees, 80 hours.

A. CONTRACT PROVISIONS
Article 2 - Rights of the Employer, Paragraph 8

The Employer and the Union expressly agree that, except as abridged by this agreement, all powers, rights, and authority of the Employer are reserved by the Employer, and that the Employer retains sole and exclusive control over any and all matters concerning the operation, management, and administration of the University, the control of its properties and the maintenance of order and efficiency of the workforce, and complete authority to exercise those rights and powers, including, by way of illustration but not by way of limitation, the exclusive right and authority:

A. To determine the type, kind, and schedule of services to be rendered and the work to be performed by employees covered by this agreement;

B. To make all financial decisions;

C. To determine the number, location, or relocation of facilities;

D. To determine its organizational and business structure;

E. Whether to purchase services from others;

F. To discipline, suspend, or discharge employees for just cause;

G. To lay off employees;

H. To determine the amount and type of supervision;

I. To determine the method and means by which work shall be performed and services provided;

J. To determine the number and qualifications of employees;

K. To adopt and enforce policies, rules and regulations;

L. To determine**[*3]** quality and performance standards; and

M. To establish, modify and eliminate job classifications.

* * *

Article 16 - Presenting a Grievance - Paragraph 62.

Grievances within the meaning of the grievance procedure and this arbitration clause shall consist only of disputes about the interpretation or alleged violations of the Agreement. The Arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this Agreement, nor shall he/she substitute his/her discretion for that of the Employer or the Union where such discretion has been retained by the Employer or the Union, nor shall he/she exercise any responsibility or function of the Employer or the Union.

* * *

ARTICLE 19

PRESENTING A GRIEVANCE

* * *

E. Step IV

60 In the event the Office of Employee Relations' answer is not satisfactory, settlement may be determined by decision of the Arbitrator selected by the parties. The Union President or the Employer shall within twenty-one (21) calendar days of the Step III answer notify the other party or his/her designated representative in writing that they wish to appeal the grievance to arbitration. In the event they cannot agree upon an Arbitrator within ten (10) working days of the date of the appeal, the party appealing the grievance to arbitration shall within fifteen (15) working days thereafter file a Demand for Arbitration with the American Arbitration Association who shall select an Arbitrator and the Arbitrator shall establish a hearing date. In the event either party fails to appeal the grievance to arbitration within the specified time limit or the appealing party fails to file the Demand for Arbitration within the specified time limit, the grievance shall be considered settled based upon the last answer by the Employer's designated representative. The fees and approved expenses of the Arbitrator will be paid by the parties equally. The rules of the American Arbitration Association shall apply to all Arbitration hearings.

* * *

62 Grievances within the meaning of the grievance procedure and this arbitration clause shall consist only of disputes about the interpretation or alleged violations of the Agreement. The Arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this Agreement, nor shall he/she substitute his/her discretion for that of the Employer or the Union where such discretion has been retained by the Employer or the Union, nor shall he/she exercise any responsibility or function of the Employer or the Union.

* * *

ARTICLE 29
HOLIDAY PROVISIONS

88 The paid holidays are designated as:

* * *

	2019-2020	***2020-2021***
Independence Day	7/4/2019	7/3/2020

	2019-2020	***2020-2021***
Labor Day	9/2/2019	9/7/2020
Thanksgiving	11/28/2019	11/26/2020
Thanksgiving	11/29/2019	11/27/2020
Christmas	12/24/2019	12/24/2020
Christmas	12/25/2019	12/25/2020
New Year's	12/31/2019	12/31/2020
New Year's	1/1/2020	1/1/2021
Memorial Day	5/25/2020	5/31/2021

* * *

94 An employee who is on vacation or sick leave with pay when a holiday occurs will**[*4]** be paid for the holiday and no charge will be made against accrued vacation or sick leave credits.

95. There will be no holiday pay when the employee is on a leave of absence without pay, on layoff, or on Regular Workers' Compensation.

* * *

ARTICLE 30
VACATIONS

* * *

98. Vacation will not accrue during an approved leave of absence without pay, while on Regular Workers' Compensation, during an extended military leave of absence in excess of the Maximum Accrual, or while on layoff.

* * *

100. If a University designated holiday falls within an employee's vacation he/she will be paid for the holiday and will not be charged for the vacation. ...

* * *

ARTICLE 31
PERSONAL LEAVE HOURS

108. Personal leave with pay is granted to regular employees with the approval of their supervisors for attending to personal matters.

Leave is given during each fiscal year in accordance with the following schedule:

Employed	***Hours***
7/1-12/31	24
1/1-3/31	12
4/1-5/31	6
6/1-6/30	0

* * *

ARTICLE 32
SICK LEAVE

* * *

119. An employee using sick leave during a period that includes a scheduled holiday will be paid his/her base pay for the holiday. He cannot be paid for both on the same day, nor will he be charged for a day of sick leave.

* * *

ARTICLE 62
CONTRACT DOCUMENTS

278. The provisions herein contained constitute the entire Agreement between the parties.

REVIEW OF THE FACTUAL PRESENTATIONS

Employer Michigan State University is a public employer in East Lansing, Michigan. It has at least 50,000 employees.

The Union is a labor organization representing full-time skilled trades employees of the Employer. Grievant is a member of the Union and is employed by the Employer as a sheet metal worker.

FFCRA, EPSL and EFMLA

This case arises from the COVID-19 Pandemic that spread throughout the United States early in 2020. In response to COVID-19, the United States Congress passed the FFCRA. This package of laws included provisions for EPSL leave and the EFMLA. The FFCRA was signed into law on March 18, 2020.

EPSL provided for paid sick leave for six different reasons. These six reasons are listed on the form the Employer created after the passage of the law. The fifth listed reason, the need to care for a child under fourteen whose school or day-care provider has closed due to the pandemic, is the reason relevant in this case. The EPSL required employers to

provide two-thirds of an employee's normal pay, up to a $200 per day maximum, when employees took leaves for this reason.

The EFMLA modified the existing Family Medical Leave Act (FMLA). The EFMLA provided twelve weeks of leave, but only when employees needed to care for a child under fourteen whose school or day-care provider had closed due to the pandemic. The first two weeks of EFMLA leave were unpaid. During these two weeks, the employee would have access to partially paid leave under the EPSL. The EFMLA required employers to provide two-thirds of an employee's normal pay, up to a $200 per day maximum, for the remaining ten weeks of EFMLA leave.

This new legal framework took effect**[*5]** on April 1, 2020, two weeks after it was passed. It was mandatory that the Employer comply starting on April 1, 2020.

Employer's implementation of new laws

Approximately 50,000 Employer employees were impacted by the leaves created by the FFCRA. This included virtually all employees, including student employees, due to the low requirements to qualify for leave under the new law. The new law applied to non-union employees as well as those represented by the ten bargaining units. The law impacted different employee groups. Each of these groups had unique features concerning pay, hours, and leaves. The Employer had to program these complicated and overlapping new laws into its computer, payroll, leave, and other systems. The Employer had to create forms employees could complete on-line to request a leave. The Employer handles these technology systems in-house. Getting on top of this new law was a "very very heavy lift" for the Employer.

There is no allegation that employees were unable to use any FFCRA-related leave.

The limited time and complexity of the new law limited options for the Employer. The Employer could not allow employees to use accrued time, such as personal days, vacation, or contractual sick leave, to supplement their partially paid EPSL or EFMLA time. According to the Employer, it was administratively impossible to create a system in two weeks that could determine how much accrued time would be needed to supplement leave that paid two-thirds of an employee's normal compensation up to a fixed dollar cap. This problem does not exist under the FMLA where leave is unpaid, and employees use whole days of time to supplement their FMLA leaves. Employees are only permitted to use full days of accrued time to supplement leave under the FMLA.

Employees on Workers Compensation benefits are allowed to supplement their statutory benefit with partial days of accrued vacation and sick leave. This was in place at least fifteen years ago. The Employer changed HR computer systems approximately ten years ago. The issue of allowing employees to use partial days of accrued leave time to supplement Workers Compensation benefits was so complex it took computer programmers eight to nine months to configure the system to address this issue.

According to the Employer, the Employer was not able to stop paid time accruals when an employee is on EPSL or EFMLA leaves. The Employer's system allows employees receiving pay to continue to receive full accruals, even if they were not receiving full pay. This is how the computer is set up. The Employer had to issue paychecks to employees on leave under the EPSL and EFMLA at the two-thirds rate up to $200 per day. The Employer had to allow employees on EPSL and EFMLA to accrue personal, vacation and sick time or to significantly reconfigure the existing programming. Since the Employer had two weeks to implement**[*6]** these laws, the Employer had to allow accruals to continue. Grievant accrued eight hours of vacation and eight hours of sick time per month during his twelve week leave. Grievant accrued forty-eight hours of time during this leave.

The issue of holiday pay during EFMLA leaves was treated in the same manner as FMLA leaves. Employees on FMLA leave who are not using vacation or sick time are not paid for holidays that fall within the scope of their leave. According to the Employer, as employees were unable to use vacation or sick time to supplement their pay during their EFMLA leave,

employees were not given holiday pay for Employer recognized holidays during their leave. The Employer received approximately 100 requests for EPSL/EFMLA leave each week during April 2020.

Apparently the Union did not make a demand to bargain over the Employer's implementation of the EPSL and/or the EFMLA.

Grievant has been employed by the Employer for several years. Grievant's wife also works for the Employer. She is considered an essential worker during the COVID-19 pandemic. Grievant's young child needed care at home because her school was closed. Grievant's wife was an essential worker and Grievant's work cannot be performed remotely. Grievant needed to take time off in order to care for his child.

Grievant filled out a request for EPSL leave and a Request for EFMLA leave. He provided these forms to the Employer on April 6, 2020. In the EFMLA form, Grievant stated that his requested leave start date was Monday, April 13, 2020, and his estimated return date would be Friday, July 3, 2020. Grievant intended to take the full 12 weeks of leave allowed under the EFMLA. July 3, 2020, was the date on which his EFMLA leave would run out.

Grievant qualified for the leave. His leave started on April 13, 2020. The first two weeks of his EFMLA leave (April 13, 2020, to April 24, 2020) were paid pursuant to the EPSLA. Beginning Monday, April 27, 2020, Grievant was paid pursuant to the EFMLA, which would continue until his EFMLA time ran out on July 3, 2020. Grievant received a pay rate of two-thirds of his regular pay for both the EPSL and the paid EFMLA days. Grievant accrued regular sick and vacation time while he was on the paid EFMLA leave.

Memorial Day holiday and Grievance

CBA, Art. 29, Sec. 88, states that "Memorial Day, 5/25/2020" is a paid holiday. On May 25, 2020, Grievant was on paid EFMLA leave. According to Grievant, he assumed the holiday would be treated as a paid holiday under the CBA, and he would receive his regular pay. He did not realize that it was treated otherwise until he received pay for that day a couple of weeks later. At that point, he discovered that he received only the two-thirds pay for that day pursuant to the paid EFMLA leave. Shortly thereafter he realized he had also had one paid EFMLA day deducted for Memorial Day.

A Grievance was filed over the issue on June 30, 2020. The Grievance states, in part:

> On Memorial Day (May 25, 2020), Grievant was out of work on an approved**[*7]** leave of absence pursuant to the Emergency Family and Medical Leave Expansion Act (EFMLEA), a part of the Families First Coronavirus Relief Act (FFCRA). Grievant was being paid during his leave of absence pursuant to the requirements of the EFMLEA.
>
> The CBA provides employees are to receive Holiday Pay for each designated holiday listed in Article 29, Paragraph 88, including Memorial Day 2020. Article 29, Paragraph 94 provides that if an employee is out on a paid vacation or sick leave when a holiday occurs, the employee will receive the holiday pay and the date will not be charged against the employee's vacation or paid sick leave.
>
> Grievant was on a sick leave for which he was receiving pay on Memorial Day 2020. Grievant did not receive holiday pay for Memorial Day 2020, and the date was charged against his available leave time provided for under the EFMLEA. The paycheck was issued on 6/19/20 for the pay period 5/24-6/6/20. The Employer violated Article 29, Paragraph 94, by failing to provide Grievant with holiday pay for Memorial Day 2020. The Employer further violated Article 29, Paragraph 94, by charging Grievant's pay for Memorial Day 2020 against his leave time under the EFMLEA.

> Grievant requests the Employer pay holiday pay for the day in question and restore his leave time that was improperly deducted.

The parties agreed to process the Grievance at Step III. The parties met to discuss the Grievance on or about July 23, 2020, after which the Grievance was denied by the Employer.

In the Grievance denial, the Employer stated:

> A hearing regarding the instant matter was held on Thursday, July 23, 2020. (The parties agreed to an extension of the timeline for answering this grievance.) The Union argues that the Employer violated Article 29, paragraph 88 when it did not pay holiday pay to the Grievant for Memorial Day. At that time, the [Grievant] was on EFMLA leave due to the closure of his child's school or day care center due the COVID-19 pandemic. The Union clarified the Grievant was not [on] a sick leave as stated in the grievance. The Union also contends the Employer violated Article 29, paragraph 94 when it charged May 25, 2020 against the Grievant's allotment under the EFMLA. By way of remedy, the union is requesting the Grievant be made whole for holiday pay for May 25, 2020 and the day be re-credited to his EFMLA allotment.
>
> The Employer disagrees. Paragraph 94 specifies that an employee who is "on vacation or sick leave with pay when a holiday occurs will be paid for the holiday and no charge will be made against accrued vacation or sick leave credits." In this case, the Grievant was neither using sick leave nor vacation time but was on a partially paid leave created under federal law in response to the COVID-19 pandemic. The Grievant was treated consistently with applicable law and regulations and with how FMLA leaves have been administered in the past at the University.
>
> No violation of the contract occurred. Grievance denied.
>
> Thereafter, the Union filed**[*8]** for arbitration over the Grievance.

After the filing of the Grievance on June 30, 2020, concerning Memorial Day, another paid holiday occurred. CBA, Art. 29, Sec. 88, states that Independence Day, recognized on July 3, 2020, was a paid holiday. This was the day Grievant had initially listed as his estimated return date. When Grievant contacted the Employer to discuss his return shortly before his paid EFMLA time ran out, he was told that because Friday, July 3, 2020, was the day on which Independence Day was being recognized, his first day back to work would be Monday, July 6, 2020. According to Grievant, he assumed he would be paid for this holiday under the CBA.

Grievant received his paystub a couple of weeks later. He saw that the Employer had not given him holiday pay for Independence Day. He had a paid EFMLA day deducted for that holiday. According to Grievant, if he had not been charged a paid EFMLA day for each of the holidays, he would have extended his paid EFMLA two days longer.

According to Grievant and the Union President, it was their understanding that resolution of the pending Grievance would include not only Memorial Day, but any other paid holidays that may have occurred while Grievant was on paid EFMLA leave. According to the Union President, part of the reason for this belief was a discussion during the grievance meeting between the parties on July 23, 2020, during which the Employer's Director for the Office of Employee Relations discussed the application of Employer's interpretation of the CBA language on future holidays. According to the Union President, it was discussed that several more holidays would occur and possibly impact Union members using paid EFMLA time before the EFMLA was set to expire on December 31, 2020. Apparently there were 15 unit employees who were on paid EFMLA leave when a holiday occurred.

According to the Union, the remedy for the Grievance should include subsequent holidays under paid EFMLA time, as the Employer's position would constitute a continuing violation of the CBA, and any further issues that arose would be remedied by a finding affirming the Union's position on the Grievance.

Arbitration hearing

At the start of the hearing on January 27, 2021, the Union informed the Employer that it was raising Independence Day as an issue at this hearing. The Employer objected and this procedural issue was taken under advisement.

CONTENTIONS OF THE PARTIES

a. *For the Union*

According to the Union, this case presents a novel issue regarding the use of paid EFMLA time during the COVID-19 pandemic. The Union has submitted to arbitration the Grievance challenging the decision by the Employer to not give Grievant holiday pay while he was on paid EFMLA leave, and instead to charge him the use of one EFMLA day for the holiday. The Union filed a grievance after Memorial Day. Independence Day occurred while Grievant was on EFMLA leave. The Employer treated that holiday in the same way.

The Union asserts that under the terms of the CBA, the Employer should**[*9]** have treated the use of paid EFMLA leave the same as it treats other paid leaves, and therefore paid Grievant holiday pay instead of forcing him to use one of this EFMLA days. EFMLA was not anticipated when the CBA was negotiated because it did not yet exist, making the issue before me a novel one.

The impact of the instant matter is not limited to the Memorial Day holiday over which the Grievance was originally filed. If it is the case that the parties' CBA requires holiday pay for holidays which occurred while an employee was taking paid EFMLA time, then the Employer's failure to pay Grievant for Independence Day must be included in the remedy as well. Paid EFMLA time falls within the category of paid leave under the CBA for which holiday pay is given. The Union requests that I find in its favor and order the Employer to remedy its improper application of the CBA's holiday pay provisions.

b. *For the Employer*

According to the Employer the EFMLA was signed into law on March 18, 2020, and took effect fourteen days later on April 1, 2020. This act modified the FMLA and created a new kind of FMLA leave. It allowed up to 10 weeks of leave at 2/3rds pay to a maximum of $500 per day. It created a sub-category of FMLA leave that provided for partial - but not fully - paid leave. This was a new situation which the Employer had to implement for 50,000 employees in a two week period.

In terms of the issues in this case, the Employer treated those on EFLMA leave over an Employer-recognized holiday just as it has consistently treated employees on FMLA leaves. This meant that employees on EFMLA leave would not be permitted to receive holiday pay as they were not using their accrued vacation, sick leave, or personal time. In this case, Grievant was treated as if he were on a FMLA leave and was not paid for a holiday over the Memorial Day weekend. Rather, he used an EFMLA day and was paid appropriately under that law.

The Union filed a Grievance on June 30, 2020, pursuant to the 2018 to 2022 CBA. The matter was advanced to the Third Step in the parties' grievance process and the Step III meeting occurred on July 23, 2020. The Employer issued a written response denying the grievance in accordance with CBA. The matter was then forwarded to arbitration and the Arbitrator was mutually selected by the parties.

The Employer requests that I deny the grievance.

DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence**[*10]** of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

Burden of proof

The burden lies with the Union to identify a CBA provision which prohibited the Employer from acting as it did. Reynolds Metal Co., **62 LA 695** (Volz, 1974). As stated by Arbitrator Sears:

> ... in contract interpretation cases ... the grieving party has the burden of persuading the Arbitrator that its position is the correct one. Int'l Minerals & Chem. Corp., 62-1 ARB ¶ 8284 at p. 4074 (Sears, 1962).

The Union bears the burden of proof in this CBA interpretation case. *Elkouri & Elkouri, How Arbitration Works* (8th Ed), pp. 8-104 to 8-107.

Procedural arbitrability of Independence Day 2020 holiday issue

The Employer contends that the Grievance does not mention Independence Day. The Union did not assert the Independence issue before the arbitration hearing.

According to the Employer, in *RSR Corp., Murph Metals Div., 1982 WL 952852* (Dunn, 1982), Arbitrator Dunn ruled in favor of the Employer when the Employer argued that the Union was precluded from raising a matter at arbitration because the Union failed to meet the contractual requirements around the grievance procedure. This has been supported by other arbitrators that have disallowed the presentation of issues not raised until the hearing. National Educ. Ass'n, **86 LA 592** (Wahl, 1985); Florida Power Corp., **86 LA 59** (Bell, 1986); Federal Bureau of Prisons, **82 LA 950** (Kanzer, 1984). The same conclusion should be reached here. The Union's failure to raise Independence Day as a disputed holiday at the time the parties were proceeding through the grievance procedure prejudices the Employer and fails to meet the procedural requirements of the CBA. Not only is there a great impact on the Employer by expanding the Grievance to include Independence Day but the Union has not followed the CBA requirements to include this holiday in these proceedings.

The Independence Day issue is not within the scope of the issues that were framed for this case. An arbitration "decision that answers questions that were not fairly posed in the

issue may be vacated in later court proceedings for going beyond the arbitrator's authority." Elkouri & Elkouri, pp. 7-7 to 7-8. "The submission ... defines the jurisdiction**[*11]** of the arbitrator. If an arbitrator ignores the stipulated issue in rendering the award, it constitutes sufficient grounds to set aside the award." Abrams, *Inside Arbitration* (2013), p. 131. The Independence Day issue is not covered by the Grievance. Elkouri & Elkouri, pp. 7-8 to 7-9. It has been indicated that "[n]ormally the arbitrator may decide only those issues raised in the grievance process." Nolan, *Labor and Employment Arbitration* (1999), p. 304. Univ. of Chicago Med. Ctr, **128 LA 1578** , 1586 (Finkin, 2011).

The Independence Day holiday issue is not procedurally arbitrable.

Substantive issue

This is a CBA interpretation case.

The Union contends that the Employer violated the CBA by not providing holiday pay to Grievant, and instead charging him an EFLMA day, on Memorial Day, Monday, May 25, 2020, when Grievant was on leave under the EFMLA as provided by the FFCRA. The Employer maintains that it did not violate the CBA by not providing holiday pay to Grievant, and instead charging him an EFLMA day.

The CBA says:

> 94. An employee who is on vacation or *sick leave with pay* when a holiday occurs will be paid for the holiday and no charge will be made against accrued vacation or sick leave credits.
>
> 95. There will be no holiday pay when the employee is on a *leave of absence without pay,* on layoff, or on Regular Workers' Compensation.
>
> **VACATIONS**
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> * * *
>
> 98. Vacation will not accrue during an approved *leave of absence without pay,* while on Regular Workers' Compensation, during an extended military leave of absence in excess of the Maximum Accrual, or while on layoff.
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> * * *
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> 100. If a University designated holiday falls within an employee's vacation he/she will be paid for the holiday and will not be charged for the vacation. ...
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> * * *
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> **PERSONAL LEAVE HOURS**
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> 108. *Personal leave with pay* is granted to regular employees with the approval of their supervisors for attending to personal matters. Leave is given during each fiscal year in accordance with the following schedule:
>
> **SICK LEAVE**

* * *

> 119. An employee using sick leave during a period that includes a scheduled holiday will be paid his/her base pay for the holiday. He cannot be paid for both on the same day, nor will he be charged for a day of sick leave. Emphasis added.

* * *

According to the Employer, the Union cannot prove a violation of the CBA. In a CBA interpretation matter, there needs to be specific CBA language that the Union alleges has been violated. There is no such language. This matter arises from a federal program that the Employer implemented in a record two weeks. At no time did the Union request to negotiate the terms of that program or the effects of its implementation. No language or negotiation history exists related to EPSL, EFMLA, or holiday pay as it relates to those types of leaves. According to the Employer, even if I were to decide the issue before me, the current practice to not pay employees holiday pay when they are on a FMLA leave or regular Workers Compensation leave is dispositive to the current issue.

According to the Union, the most**[*12]** important factor to note when differentiating CBA Secs 94 and 95 is that Sec. 94 covers paid leaves and Sec. 95 covers unpaid and insurance-paid leaves. Regular paid leave leads to holiday pay. Unpaid and insurance-paid leave does not. When an employee is on a paid leave, including when they are using unpaid FMLA time but is running sick time concurrently, that individual is still entitled to holiday pay. If an employee were ill over the Christmas holiday, it would be illogical to charge the employee two sick days for Christmas Eve and Christmas Day when the employee would not normally work those days. It would be equally illogical to fail to give the employee holiday pay for those days, when the employee clearly would have received it had they not been ill. The list of paid leaves in Sec. 94 is not exclusive. Concerning Personal Leave Hours under Art. 31, Sec. 108, if an employee were to use their personal leave hours before and after a holiday, they would still be entitled to holiday pay and would not have to use their personal leave hours on the actual holiday. If an employee wanted to use three days of Personal Leave Hours before and after Christmas Eve and Christmas, that employee would receive pay for the whole week because they would get holiday pay and would not have had to use Personal Leave Hours, or any other type of paid leave, for the holidays. Sec. 94 is not an exclusive list of paid leave during which an employee is entitled to holiday pay. According to the Union, the Employer has not pointed to any provision in the CBA during which holiday pay would not be given during a non-insurance paid leave. Since Sec. 94 is not an exclusive list of paid leaves that require holiday pay, it is logical that the nature of paid leave itself is what requires the holiday pay.

Secs 94 and 95 must be construed together

CBA Secs 94, 95, and 98 provide that:

> 94 An employee who is on vacation or sick leave with pay when a holiday occurs will be paid for the holiday and no charge will be made against accrued vacation or sick leave credits.
>
> 95. There will be no holiday pay when the employee is on a *leave of absence without pay,* on layoff, or on Regular Workers' Compensation. …
>
> 98. Vacation will not accrue during an *approved leave of absence without pay,* while on Regular Workers' Compensation, during an extended military leave of absence in excess of the Maximum Accrual, or while on layoff.

While Grievant was on EFMLA leave, he was not on "on a leave of absence without pay" within the meaning of Sec. 95. He was on "leave of absence." He was "with pay." Ordinarily, all words used in the CBA should be given effect. Sec. 95**[*13]** does not deny Grievant the

Memorial Day holiday pay. Sec. 94 and Sec. 95 have to be construed together. Otherwise, there would be no need for Sec. 95 which defines circumstances when holiday pay is not paid.

It has been indicated that I must rely solely upon the terms of the CBA. Sec. 95 precludes holiday pay for an employee who is on a "leave of absence without pay." This implies that, if the employee is on a leave of absence with pay, the employee will receive holiday pay. There might be different kinds of leave with or without pay. But Sec. 95 says "leave of absence." Other than with pay or without pay, the language of Sec. 95 does not preclude one type of leave and include another type of leave. If the drafters of the CBA had wanted Sec. 95 to apply only to Sec. 108 personal leave, they could have said so.

Sec. 94 and Sec. 95 are specific as to when holiday pay is available to employees on leave, depending on their type of leave when the holiday occurs. The focus should be on Sec. 94 and Sec. 95. "When a general contractual provision arguably conflicts with a more specific provision on the same topic, the specific provision controls." Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd., **525 F.3d 409** , 420 (6th Cir. 2008).

The 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. Riley Stoker Corp., **7 LA 764** , 767 (Platt, 1947).

Is there a gap and, if so, should the gap be filled?

According to the Employer, the only way to rule in favor of the Union is to look beyond the CBA language and read terms into the CBA that do not exist and were not contemplated by the parties. Arbitrators should refuse to fill gaps when that gap filling would be CBA making as opposed to CBA interpretation or application. Labor Standards Ass'n, **50 LA 1009** , 1012 (Kates, 1968). Ava Foods, **87 LA 932** , 936 (Hunter, 1986); Independent Sch. Dist. No. 47, **86 LA 97** , 102 (Gallagher, 1985); McCreary Tire & Rubber Co., **85 LA 137** , 138 (Fischer, 1985).

Elkouri & Elkouri states that "[i]t frequently happens that there is no language in the contract applicable to a particular situation that has arisen." Elkouri & Elkouri, p. 9-15. "Many arbitrators have adopted the 'bargaining model' approach, and, where reasonably possible, arbitrators consider what the parties would have agreed on, within the general framework of the agreement, had the matter specifically been before them." *Id.* at 9-16 to 9-17. This is reviewed in depth at *Id.* 9-15 to 9-19. Smith, pp. 242-243.

Professor St. Antoine wrote:

> ... the arbitrator is the parties' officially designated "reader" of the contract. He (or she) is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial**[*14]** agreement. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 *Mich. L. Rev.* 1137, 1140 (1977). See generally Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M, **475 F3d 746** , 755-746 (6th Cir. 2007); and Boise Cascade Corp. v. Steelworkers Local 7001, **588 F2d 127** , 129 (5th Cir. 1979).

I have rendered a Decision and Award concerning the CBA allegations and issues. I am not making a determination concerning the gap issue.

The National Academy of Arbitrators, American Arbitration Association, and Federal Mediation & Conciliation Service, Code of Professional Responsibility for Arbitrators of Labor Management Disputes, C(1)(a), states:

C. Awards and Opinions

> 1. The award should be definite, certain, and *as concise as possible.*
>
> a. When an opinion is required, factors to be considered by an arbitrator include: *desirability of brevity,* consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and *avoidance of gratuitous advice or discourse not essential to disposition of the issues.* Emphasis added. Abrams, pp. 297-298.

All of the witnesses testified honestly and to the best of their recollections. To the degree there may have been differences in the testimony, it would have been because of differing recollections or perceptions.

What would have happened had Grievant requested different leave days?

We do not know what would have happened had Grievant requested different days or reasons for his leave. I am deciding this case based on what did happen, not what did not happen.

Relief

The Employer violated the CBA by not providing holiday pay to Grievant, and instead charging him an EFLMA day, on Memorial Day 2020 when Grievant was on leave under the EFMLA as provided by the FFCRA.

The Union requests that I find the Employer violated the CBA and order the Employer to make Grievant whole for the Employer's improper failure to pay him holiday pay, and the deduction of one paid EFMLA day for each holiday that occurred during Grievant's EFMLA leave, and, if it is the case that any other bargaining unit employees were also deprived of their right to holiday pay while on paid EFMLA leave, they too should be made whole for the Employer's improper application of the CBA language.

The Employer requested that I deny the Grievance in its entirety.

My authority to fashion an appropriate remedy includes ordering a party to cease and desist from continuing to do the act that I have ruled to be in violation of the CBA. I may include injunctive-type relief in the award. Elkouri & Elkouri, pp. 18-11 to 18-13. The default remedy in a CBA**[*15]** violation case is an order directing the employer to stop doing what it is doing in violation of the CBA. Abrams, p. 183.

I have ruled, *supra,* that the Grievance and the stipulated issue do not include Independence Day 2020. The Grievance does not indicate that it is a class action, group, or ongoing Grievance. Elkouri & Elkouri, pp. 5-20 to 5-21.

By way of remedy, the Union requested that Grievant be made whole for holiday pay for May 25, 2020, and the day be re-credited to Grievant's EFMLA allotment. Apparently EFMLA does not exist anymore and there is no EFMLA bank to add to. This being the situation, it appears that Grievant will keep the two-thirds pay he received for Memorial Day 2020 and be paid an additional two-thirds pay. One of these two-thirds represents the Memorial Day holiday and the other represents reimbursement for one day of EFMLA leave. This make whole remedy will ensure that Grievant ends up having been paid holiday pay for (1) Memorial Day 2020 and (2) compensation for the improperly deducted paid EFMLA day on

Memorial Day 2020. Because Grievant was being paid at the EFMLA rate, this would apparently be done at two-thirds of his regular pay. He is owed two-thirds of a day's rate for the Memorial Day holiday.

In addition, I issue a cease and desist order that the Employer in the future not deprive bargaining unit employees of their right to holiday pay while on paid EFMLA leave.

The crucial points in this case include:

1. concerning the procedural issue, the Grievance and the stipulated issue were limited to Memorial Day, 2020,

2. Grievant was on a paid leave on Memorial Day 2020,

3. When read together Secs 94 and 95 provide for the payment of holiday pay when an employee is on paid leave,

4. Clear and unambiguous language that is interpreted consistent with the parties' intent as reflected by clear and explicit terms,

5. Ordinary meaning given to words unless they are clearly used otherwise,

6. The totality of the circumstances, and

7. The wording of the CBA.

This decision neither addresses nor decides issues not raised by the parties.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the Grievance as to Memorial Day 2020.

I retain jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award. Elkouri & Elkouri, pp. 7-49 to 7-54.

Dated: March 15, 2021, Traverse City, Michigan.