

IN RE ARBITRATION BETWEEN:

LAW ENFORCEMENT LABOR SERVICES

and

ISANTI COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS #'s 13-PA-0531 and 0532

JEFFREY W. JACOBS

ARBITRATOR

March 11, 2014

IN RE ARBITRATION BETWEEN:

LELS,
and

DECISION AND AWARD OF ARBITRATOR
Holiday pay grievance
BMS #'s 13-PA-0531 and 0532

Isanti County

APPEARANCES:

FOR THE UNION:

Nick Wetschka, Business Agent
Lance Olson, grievant
John McCarty, grievant

FOR THE COUNTY:

Pam Galanter, Attorney for the County
Kevin Van Hooser, County Administrator
Kassandra Engberg, Deputy Auditor

PRELIMINARY STATEMENT

The hearing in the matter was held on January 29, 2014 at the Isanti County Government Center in Cambridge, Minnesota. The parties submitted briefs that were received by the arbitrator on February 21, 2014 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2011 through December 31, 2012. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a panel maintained by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues.

ISSUE PRESENTED

Did the County violate Article 12 when it did not issue holiday pay to the grievants for the holidays that occurred during the period they were in a non-work status receiving workers compensation weekly wage loss benefits? If so what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE III - DEFINITIONS

3.5 REGULAR EMPLOYEE: Employee who has completed the probationary period.

ARTICLE XII HOLIDAYS

12.1 Regular employees shall be entitled to the following 11 holidays off with pay:

New Year's Day	Veterans Day
Martin Luther King Day	Thanksgiving Day
President's Day	Day After Thanksgiving

Memorial Day	Christmas Eve – ½ day
Independence Day	Christmas Day
Labor Day	New Year's Eve day – ½ day

- 12.2 Holidays shall be paid in a lump payment between December 1 and December 15 payroll each year on a check separate from the regular payroll check. Beginning in 2007, Holidays will be cut off on November 30th each year. All employees' holiday pay shall be for the number of hours that employee is regularly to work. Employees may elect by mutual agreement with the Employer to receive days off in lieu of cash.
- 12.3 A regular employee who works on a paid holiday shall be paid at one and one-half (1½) times his regular straight time for all hours worked in addition to any pay earned pursuant to Section 12.2.

ARTICLE XVII LEAVE OF ABSENCE

- 17.1 Leaves of absence without pay may be granted for a period not to exceed one (1) year without loss of seniority or longevity benefits set forth in this Agreement provided:
- A. Such leaves may be limited to one employee at a time in any one department;
 - B. Such leaves shall be granted only when requested in writing and while the employee is actively employed by Isanti County;
 - C. An employee on leave who collects his accumulated PERA contributions shall be deemed to have severed his employment with the County and his leave shall be terminated.
- 17.2 Upon request, physical or mental illness may be extended for an additional six (6) months period upon the expiration of any one leave period.
- 17.3 An employee on an unpaid leave of absences shall accrue no benefits and shall not be allowed to utilize accumulated benefits.

ARTICLE XVIII INJURY ON DUTY

When an employee is injured in a job-connected accident, and receives benefits under the Workers Compensation Act, after five (5) days, the Employer shall pay the difference between the Workers Compensation Act and the employee's regular straight time earning, the employer contribution required under this Article shall be in effect for a period of thirty (30) working days after which the employee may use accumulated sick leave to make up the difference between his Workers Compensation benefits and his regular straight time earnings.

UNION'S POSITION

The union's position was that the County violated the agreement when it failed to pay the two grievants holiday pay while they were off due to work related injuries. In support of this position the union made the following contentions:

1. The union consolidated two grievances in this matter where both grievants were injured on duty and were both off work due to those injuries. In each case some of the listed holidays fell during the time they were out of work and the union asserted that they would have been paid in full for the holidays that fell in the relevant period.

2. The union clarified that the claim here was based on the alleged violation of article 12 only and did not involve any other matter or claimed loss of pay or other benefits under the CBA.

3. The union pointed out that both grievants are regular employees and are entitled to all of the holiday pay set forth in article 12. The union argued that the mere fact that the grievants were entitled to injury on duty pay does not obviate the requirement to pay them for their holidays even though they were off work due to work related injuries.

4. Here Deputy Olson was injured responding to a call of a motor vehicle accident in November 2012. He was out of work and missed Veteran's Day, Thanksgiving and the Day after Thanksgiving that year. The union asserted that his pay stubs for that year showed that he was not paid his full pay for those dates.

5. Deputy McCarty was injured in 2012 as well and missed four holidays that year. Labor Day, Veteran's Day, Thanksgiving and the Day After Thanksgiving. The union also asserted that his pay stubs show that he was not paid for those dates as well.

6. The union also countered the claim that there is a past practice governing the result. The union argued that the language of the Injury on Duty provision, IOD, is clear and unambiguous and provides for payment of certain listed holidays – irrespective of whether the employee is out on workers compensation or not. There is no exception stated in the language.

7. The union asserted that the County offered no reason or evidence that the IOD Article is intended to provide anything less to injured employees than what they would normally receive as regular employees. More importantly, there is no limiting language specifically stating that those benefits should not be paid even if the employee is out on workers compensation.

8. The union also pointed to the holiday article set forth above, It argued that this too is clear and provides for pay for the listed holidays and that there is no limiting language in that article if the employee is on workers compensation.

9. The union argued that these employees remained in a paid status during the time they were on compensation and subject to the IOD clause and should therefore have been treated as if they were working – i.e. entitled to the holiday pay.

10. Further, the union argued that the elements for a past practice do not exist even if the arbitrator considers that part of the County's argument. The union pointed to *Independent School District No. 696, Ely and Ely Education Association*, BMS Case No. 12-PA-1204 (Orman, Nov. 1, 2012) and *Reynolds Packaging Group, Reynolds Consumer Products and Bellwood Printing Pressmen*, 38 LAIS 134 (Etelson 2010) and *City of Rochester and International Union of Operating Engineers, Local 49*, BMS Case No. 13-PA-0152 (Jacobs, April 23, 2013) and asserted that several elements must be present for a binding past practice to exist. The practice must be unequivocal, clearly enunciated and acted upon, reasonably ascertainable over a reasonable period of time and mutually accepted by the parties. Moreover, the mere failure to grieve a contract violation in the past should not be equated with a binding past practice.

11. The union asserted that the County failed to prove these elements and that there is thus no binding past practice – especially in the face of clear contract language. First, this has happened only a very few times in the past several years so there is no consistent longstanding or mutually accepted practice at play here. Further, the County failed to prove that the union was aware of the times when holiday pay was denied in the past. Thus there is no mutuality.

12. The union also provided several cases for other jurisdictions in support of the claim that holiday pay is payable where officers are out on work related injuries or IOD. See, *Trumbull County Sheriff's Dep't and Ohio Patrolman's Association*, 105 LA 545 (1995 Nelson). The union asserted that this case is virtually identical and involved injuries on duty and a very similar provision that contained no limitation of any kind on the payment of holidays during the time the employees were off work due to work related injuries.

13. The essence of the union's case is that the language of Article 12 provides for certain paid holidays for all regular employees and contains no exception or limiting language for employees who are on workers compensation. Further, the mere fact that these employees were on IOD, Injury on Duty, following their injuries does not control this result and provides only that the employee can use sick leave, after 5 days, to cover the 1/3 difference between workers compensation payments and their "regular straight time earnings."

Accordingly, the Union seeks an award sustaining the grievances and making both grievants whole, including back-pay for the loss of holiday pay.

COUNTY'S POSITION:

The County's position was that there was no violation of the agreement in this matter. In support of this position the County made the following contentions:

1. The County argued that this case is governed by the IOD provisions, Article XVIII, of the CBA because it is a far more specific provision that covers this exact scenario. The County asserted that resort to the holiday pay article is misplaced because it does not specifically address the injury on duty situation.

2. The County also asserted that Article 12.2 provides in part that, “All employees' holiday pay shall be for the number of hours that employee is scheduled to work.” This means employees receive holiday pay based on the length of their scheduled shift. Employees work 8, 10 or 12 hour shifts. The grievants received wages to make up the difference between their workers compensation wage loss benefits and “regular straight time earnings” for the first 30 working days of absence due to the injury.

3. The County pointed to the provision of Article XVIII that specifically calls for the employee to use sick time after 5 days to make up the difference between workers compensation payments and their “regular straight time earnings.” Holiday pay is not mentioned nor is it contemplated in this provision.

4. Further, the County argued that they were in fact paid for these holidays since they received their full pay pursuant to the IOD provision. The County introduced payroll documents that it argued showed that these grievants were in fact paid in full as the IOD and holiday pay provisions of the CBA require. They are not entitled to anything greater than that.

5. The County further asserted that there is a compelling past practice in favor of the County's position and pointed to several prior instances of deputies who have been injured on duty and received workers compensation yet were not paid for the holidays that fell in the period of time they were on workers compensation. The County noted that it has been consistent in its application of these provisions and that no holiday pay has ever been paid to any deputy in an IOD situation – as here – since at least 1991.

6. One of these instances was for deputy McCarty – one of the grievants in this matter. The County thus asserted that there is a very clear past practice that can be used to aid in the interpretation of the language at play in this matter. The County also asserted that it is disingenuous to claim that the union somehow did not know about this since Deputy McCarty was once a steward for the union. His situation occurred in 2009.

7. The County asserted that all of the necessary elements of a binding past practice are present in this case. It is longstanding - the County has not paid holiday pay to employees who are on IOD following a work related injury for many years. It is consistent – the County has never paid this benefit as noted above. It is mutual – the union cannot be heard to claim that it and its members did not know what they were being paid. The County noted that the holiday pay is given to the employees in lump sum in December of each year and that the affected employees would have known that they did not receive the holiday pay for any holidays that occurred during the non-compensated time they were on workers compensation. The County noted that while not terribly frequent, this situation has occurred frequently enough to meet the required elements of a past practice. The County cited several instances since 2008 involving employees who sustained work injuries and who have not been paid holiday pay for the holidays they missed during the non-compensated time off due to the work injury.

8. The County also cited state law in support of its claim that the union’s grievance cannot be sustained. Minn. Stat. 176.021 provides in relevant part as follows:

If employees of the state or a county, city or other political subdivision of the state who are entitled to the benefits of the workers compensation law have, at the time of compensable injury, accumulated credits under a vacation, sick leave or overtime plan or system maintained by the governmental agency by which they are employed, the appointing authority may provide for the payment of additional benefits to such employees from their accumulated vacation, sick leave or overtime credits. Such additional payments to an employee may not exceed the amount of the total sick leave, vacation or overtime credits accumulated by the employee and shall not result in the payment of a total weekly rate of compensation that exceeds the weekly wage of the employee.

The County asserted that the union is in effect asking for additional pay in excess of the grievants’ regular pay and this cannot be granted. The County asserted that the IOD provision must be interpreted consistent with the underlying principle set forth in the above statute. The union simply cannot claim holiday pay above and beyond the regular straight time pay of these employees.

9. The County cited *AFSCME v Ramsey County* in support of the argument that a past practice can even trump clear contract language to the contrary. While the county argued that the contract language supports its position, even if the contract is found to be unambiguous, the clear and longstanding and mutually accepted practice is that holiday pay is never paid in these circumstances.

10. The County asserted that these grievants are in effect seeking something beyond what the CBA calls for – Deputy Olson is looking for additional 20 hours of holiday pay and McCarty seeks an additional 50 hours of holiday pay. They were paid their full pay for all the days they missed during the time they were on workers compensation and are simply not entitled to any additional pay. Obviously they did not work the holidays in question so none of the other provision of the CBA would apply to grant them additional pay. Article XII calls for holiday pay for days off – these employees got their days off since they were off due to work related injuries – and received full pay for those days. They are not entitled to anything beyond that. In fact it was stipulated at the hearing that they received their full pay for the holidays that fell during their non-compensated time.

The County seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

FACTUAL BACKGROUND

The facts giving rise to these consolidated grievances were virtually undisputed. Deputy Olson and Deputy McCarty were both regular employees of the department and were both injured on duty while responding to calls in the scope and course of their employment.

Grievant McCarty was off work due to a work-related injury from August 28, 2012 through November 27, 2012. See, Employer Exhibit 3. He received workers compensation wage loss benefits for his lost time from work. See, Employer Exhibit 4.

In accordance with Article XIX, Injury on Duty, Grievant McCarty received wages to make up the difference between his workers' compensation wage loss benefits and his regular straight time earnings for the first 30 working days of his absence due to the injury. Thereafter, he used accrued paid sick leave benefits to make up the difference between his workers' compensation wage loss benefits and his regular straight time earnings. He missed four of the listed holidays in the CBA: Labor Day, Veteran's Day, Thanksgiving Day and the day after Thanksgiving.

Grievant Olson was off work due to a work related injury from November 7 through 21, 2012. He worked his full shift on November 7 and received wages for the hours worked. His regular days off were November 8 through 13, 2012. He too received workers compensation wage loss benefits for the time he was off work due to his work-related injury and missed three of the listed holidays in the CBA, all of which fell in the 5 to 30 day period under the CBA: Veteran's Day, Thanksgiving and the day after Thanksgiving.

The evidence showed that each received their full pay for these periods either paid by the County or through use of sick leave to supplement the workers compensation wage loss benefits pursuant to the IOD provision. The union however filed grievances seeking 50 hours of holiday pay to be reimbursed to grievant McCarty and 20 hours of holiday pay to be reimbursed to grievant Olson. See Joint exhibits 1 and 2.¹

¹ At the hearing the union attempted to amend its grievance to seek reimbursement of other claimed benefits. The County objected to this and the ruling in limine was to limit the grievance and this decision to the grievance as set forth in Joint exhibits 1 and 2 and not allow evidence or assertions based on other claims or portions of the CBA. This decision will therefore have no bearing on any other claimed benefits due the grievants or to defenses the County may interpose as a result.

The evidence also showed that Deputy McCarty was injured in 2009 as well and that during his absence due to that injury he received workers compensation benefits but did not receive any pay, holiday or otherwise, beyond what was called for in the IOD provisions of the CBA. He received no additional holiday pay for the holidays he missed at that time. It was also shown that he was a union steward and has been for several years.

The evidence also showed that there were other employees in a similar situation in that they were injured on the job and missed holidays during their non-compensated/workers compensation time off due to the work injury. Deputy Meyer, Connolly and McCarty were all involved in work related incidents and were in a non-compensated status and missed holidays during that period. None were paid holidays.

The evidence further showed that the county has consistently applied the practice of not paying holiday pay for employees who were out on workers compensation for more than 20 years. It was clear that the grievants were paid correctly pursuant to the IOD provisions – using accrued sick leave to make up the difference between their workers compensation benefits and their regular straight time pay. It is against that factual backdrop that the analysis of the case proceeds.

CBA LANGUAGE

As in any matter involving the interpretation of disputed language the starting point is the language itself. Here there are two seemingly inconsistent provisions in the labor agreement – the holiday pay article and the IOD provision.

The union asserted that the clear language of the holiday pay article calls for the listed holidays to be paid without regard to whether an employee is on workers compensation or not. The union asserted that the County is in effect creating a separate category of employee – one of non-work status. The union asserted that the sole requirement for holiday pay is that the employee be “regular.”

Frankly, without more, that argument would have had considerable merit. There is no limiting language in the holiday provision allowing holiday pay under only certain circumstances. It provides simply that all “Regular employees shall be entitled to the following 11 holidays off with pay.” There was no dispute that the grievants were regular employees and that they were in a non-compensated status on workers compensation benefits. The union asserted that this requires all regular employees to be paid holiday pay whether they are on workers compensation or not.

Two things militated against this. First, the grievants were paid their regular straight time pay. The union did not provide sufficient evidence that the contract calls for employees to get more than their regular pay if they do not work the holiday. See Testimony of Ms. Engberg and County exhibit 2. Article 12.3 provides for additional pay but only if the employee actually works the listed holiday. There is nothing in the labor agreement requiring the employer to pay more than the employee’s regular straight time in instances such as this.

Second, the provisions of the IOD clause are more specific than the holiday pay provisions and directly relate to this specific situation. It is axiomatic that more specific language generally takes precedence over more general language in a labor agreement unless it is clearly specified otherwise. The IOD clause calls for the County to pay the employee’s regular pay between 5 days and 30 days following the time when the employee is off on workers compensation benefits. After that, the employee may use accumulated sick time to make up the difference between the workers compensation wage loss benefits and the “regular straight time earnings.” This does not call for the employee to receive more than that.

Further, Article 12.3 is clear and calls for additional pay if the employee actually works the holidays. Under this language, it would not matter if the employee had been regularly scheduled to work that holiday but was not able to due to a work related injury. Here neither of the grievants worked those holidays.

The union asserted that the IOD provision both by its letter and the underlying purpose of such a clause is to treat an employee on workers compensation no differently than an employee who is not. The union failed to show by a preponderance of the evidence that these employees were in fact treated differently. See Testimony of Ms. Engberg and County exhibit 2.

Further there was merit to the County's argument that pursuant to Minn. Stat. 176.021, the County is prohibited by statute from paying more than that. The operative language provides as follows: [the additional payments from accumulated leave] "shall not result in the payment of a total weekly rate of compensation that exceeds the weekly wage of the employee."

There was also some merit to the County's assertion that if the grievance is granted, the grievants would in effect have been paid their full pay for the time in question and holiday pay, which is in effect a wage supplement, of the 50 or 20 hours as alleged, and that this would be to grant them pay in excess of their weekly wages.² Clearly they did not work on the holidays in question so they are not entitled to anything additional under the holiday provisions of the IOD provisions on these facts.

At the end of the day however, there was enough latent ambiguity in the two provisions that resort to extrinsic evidence is necessary. Here the clear evidence showed that the County has never paid holiday pay to employees in this situation. The question now is whether the ambiguity in the application of these two articles can be resolved using the evidence of the practice.

PAST PRACTICE

It is axiomatic that practice can be used to aid in the interpretation of ambiguous language. Here as noted above, there is a latent ambiguity in the application of the provisions at issue here and resort to practice and extrinsic evidence is appropriate and necessary on these facts.

² As noted above, this case is over whether the grievants are entitled to have additional holiday pay paid to them for the time in question and is not about whether another claim may be involved such as the reimbursement of sick time used for the holidays in question. That is a separate claim and no decision is or can be made on that question here.

The County argued that the history shows a clear understanding that employees in this situation are not entitled to additional holiday pay – they are entitled to the IOD provisions and to use accumulated sick leave after 30 days of being on workers compensation up to their regular straight time earnings but not beyond that.³

Past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ See Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). Elkouri states it in slightly different terms as follows: In the absence of a written agreement, ‘past practice,’ to be binding 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.” Elkouri and Elkouri, *How arbitration Works*, 6th Ed at 632 citing to *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

A past practice is thus nothing more, or less, than a custom or an accepted way of doing things between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement.

Perhaps the best known case in Minnesota is *Ramsey County v AFSCME*, 309 N.W.2d 785 (Minn. 1981). There the arbitrator found that the parties’ practice with respect to vacation accrual rates differed from the clear language of the contract.

³ Elkouri notes that “the non-exercise of a right does not amount to a ‘negative past practice’ and thus become a forfeiture of it once changed. Arbitrators consistently hold that even if a party has not done so in the past, the party retains the right to police the agreement at any point.” Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at page 239-240.

Elkouri also noted as follows: A related rule is that a party’s failure to file grievances or to protest past violations of a clear contract rule does not bar that party, after notice to the violator, from insisting upon compliance with the clear contract requirement in future cases. See also, Elkouri, 5th Ed at page 652.

Obviously a unilateral practice, even one that has gone on for years, is not binding on the other party unless there is evidence that the other party knew of it and accepted it as a part of the labor agreement, or at least as a part of the labor relations culture within a bargaining unit. See Elkouri 5th Ed at page 633, n. 14 and cases cited therein. Here there was substantial evidence that the union and the employees were aware of this practice yet no grievance was ever filed over it until this one.

The matter arose when it was discovered that employees had for years been receiving vacation accruals and payments upon their departure from the County that were very different from what the clear language of the contract indicated. The County had argued that the clear language of the contract, and it was, indicated that the County had simply been paying the incorrect accrual rates for years and that it was simply done in error. The County also argued that the clear language of the contract must always govern lest the whole process of negotiations be threatened with too liberal a use of past practice.

The Supreme Court held in *Ramsey County* as follows:

“past practice has been defined as a ‘prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.’ Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. 709 N.W.2d at 788, n. 3 (Citing from *Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961)).

Thus, the essential feature of any award, whether it is derived from reliance on past practice or not, is whether it “draws its essence from the labor agreement.” See, 709 N.W.2d at 790-91. It appears thus clear that in Minnesota at least, it is well settled that custom and practice of the parties may be used to provide interpretation of existing language or it may be used to establish that the practice is binding even in the face of contrary and clear contract language, as in *Ramsey County*.

The union claimed that it was not aware of the County’s practice of not paying any additional holiday pay under these circumstances. The facts though showed that one of the grievants here was both a union steward and had this occur before. While it may be somewhat confusing to employees when they receive their holiday checks in December of each year, the records show quite clearly what they were paid and what they were not paid in terms of holidays.

If there was any question, the employees could certainly have raised this in the past but have apparently not. Thus, the argument that the union did not know of this rang somewhat hollow on these facts.

The union asserted that many essential elements necessary to establish a binding past practice were missing. This situation has indeed not arisen that frequently but as one might imagine, this is a small department and work injuries are, fortunately, not all that common. When they have occurred though, the evidence was clear that additional holiday pay has not been made in these instances and that this practice has been in place and consistently applied for over 20 years.

The evidence of prior cases and the testimony from County witnesses that this was always the way they have done it going back some 20+ years was taken into account here, despite the infrequency with which this scenario has arisen. There was little question that the County's practice has been consistent and longstanding having been applied this way for over 20 years. While the County's records only go back to approximately 2008, there have been several instances where this exact scenario has occurred.

The union cited several arbitral awards in support of its assertions here. Reliance on the Rochester matter set forth above is misplaced. There the question was whether the City of Rochester had been violating the contract for a lengthy period of time by using so-called part-time workers and pay them a wage rate set unilaterally by the City – which was far below the contract rate. The City also stipulated that the work performed by these “part-time/seasonal” workers was bargaining unit work. The issue there was whether these individuals were “public employees within the meaning of PELRA” when they were employed for more than 67 days per year.

The City argued that they were not due in part to a longstanding practice of hiring them at a rate set by the City. There the ruling was that past practice A. did not exist because the union was unaware of the number of days these people were employed and B. because past practice cannot trump state law. This case is different. The union knew or should have known of this practice and yet demurred to it. Second, this case is not about state law but rather about contract language.

The union also cited *Trumbull County Sheriff's Dep't and Ohio Patrolman's Association*, 105 LA 545 (1995 Nelson). A review of that case, despite its similarities in the arguments regarding past practice and holiday pay, reveals different contract language and a different set of facts. There, the injury leave provisions called for "full pay" and required the employee to turn over their workers compensation check to the employer so full pay could be made. The arbitrator reasoned that such IOD provisions were intended to protect injured employees from being treated differently than other employees. Here the IOD provision allows an employee to use accumulated sick leave to make up the difference between workers compensation benefits and their "regular straight time earnings."

Moreover, the other apparent difference is that there was no evidence in that case of a more than 20 year history and practice of not paying holiday pay for holidays that fall during the time when the employee is off work on workers compensation. As always, each case must be decided on its own unique facts. Here the practice as shown in this case and on this record provided strong evidence of contractual intent.

While that evidence may or may not have arisen to the level of a binding past practice it was certainly one factor that showed a clear understanding of the County's practice over the course of several contract periods. The fact that the contract has remained essentially unchanged for a long period supports the claim that there was an understanding that the County has been applying the contract consistently with its terms. Any changes must thus come from negotiation and not arbitration.

Accordingly, the grievance as stated on these facts must be denied.

AWARD

The grievance is DENIED.

Dated: March 11, 2014

LELS and Isanti County - award

Jeffrey W. Jacobs, arbitrator