
In the Matter of the Arbitration between *

*

Yarmouth Firefighters Union, Local 2122 *

*

and *

*

Town of Yarmouth *

*

(Grievance: Holiday Pay) *

AAA# 01-20-0000-3136

Decision & Award

BEFORE: Beth Anne Wolfson, Arbitrator

APPEARANCES

For the Union: Patrick N. Bryant, Esq.

For the Town: Paul G. King, Esq.

WITNESSES

The parties agreed, based on the stipulations contained in their “Joint Submission of the Parties Pursuant to July 17, 2020 Pre-Hearing Order,” that witness testimony was not necessary for this Arbitrator to decide the issues(s).

A virtual hearing in this matter was held on August 13, 2020, via Zoom, before the undersigned Arbitrator, who was designated by the parties pursuant to the provisions of their collective bargaining agreement. The parties were afforded full opportunity to present evidence and make argument in support of their respective positions. Both parties submitted post-hearing briefs, and the hearing was declared closed on October 19, 2020.

ISSUE

Did the Town of Yarmouth violate Article 19 of the collective bargaining agreement when it did not provide a paid holiday to fire fighters for December 24, 2019?

If so, what shall be the remedy?

PERTINENT CONTRACT PROVISION

ARTICLE 19 HOLIDAYS

It is agreed that the eleven (11) days in such fiscal year designated as follows constitute paid Holidays:

Independence Day*
Labor Day*
Columbus Day*
Veteran's Day*
Thanksgiving Day
Christmas Day

New Year's Day
Martin Luther King Day
President's Day
Patriot's Day
Memorial Day

Any other day that is officially declared a holiday by the State or Federal Government during the fiscal year shall be added to the above list and compensated accordingly.

The holidays specified shall be on the days that they are observed within the Commonwealth of Massachusetts.

All holidays will be paid on the basis of one-fourth (1/4) of a week's salary for each holiday. Holiday hours, so called, are from 8:00 A.M. on the day of the holiday until 8:00 A.M. the following day as now practiced.

*Members may choose to have up to four (4) vacation days in lieu of up to four (4) of the first four (4) paid holidays. Selections must be made by June 1st of the previous fiscal year. Note: Holiday to vacation language continues to be a separate section not affected by the wording of Article 18.

Jt. Ex. 1

FACTS and EXHIBITS

Prior to the commencement of the hearing, the parties provided this Arbitrator with a "Joint Submission of the Parties Pursuant to July 17, 2020 Pre-Hearing Order," containing the: Stipulated

Facts; Joint Exhibits; Witnesses;¹ and Stipulated Issue(s); The Stipulated Facts and Joint Exhibits are as follows²:

AGREED-UPON STIPULATIONS OF FACT³

1. On December 17, 2019, President Trump issued Executive Order 13900, "Providing for the Closing of Executive Departments and Agencies of the Federal Government on December 24, 2019.
2. The Town did not provide a paid holiday for December 24, 2019 to firefighters in the December 31, 2019 paycheck.
3. The Union filed a grievance on January 6, 2020.
4. The Fire Chief denied the grievance on January 14, 2020.
5. The Union appealed the grievance to the Town Administrator on January 15, 2020.
6. The Union and the Town Administrator met to discuss the grievance on January 24, 2020.
7. The Town Administrator denied the grievance on January 28, 2020.
8. The Union filed a demand for arbitration on January 29, 2020.
9. The Provisions of Article 19 (Holidays) of the July 1, 2019 - June 30, 2022 Collective Bargaining Agreement between the Parties have remained unchanged since at least 2004.
10. The Chief Human Capital Officers Council issued CPM 2019-24, "Excusing Federal Employees on Tuesday, December 24, 2019." The Town did not consult this memorandum prior to denying the grievance.

¹ As noted above, the Parties agreed, based on the stipulations outlined in their "Joint Submission of the Parties Pursuant to July 17, 2020 Pre-Hearing Order," that witness testimony was not necessary for this Arbitrator to decide the issues(s).

² The Issue in Dispute is noted above.

³ All Stipulated Facts were received into evidence.

11. On December 18, 2018, President Trump issued Executive Order 13854, "Providing for the Closing of Executive Departments and Agencies of the Federal Government on December 24, 2018."
12. The Town did not provide a paid holiday to firefighters for December 24, 2018.
13. On December 5, 2014, President Obama issued Executive Order 13682, "Closing of Executive Departments and Agencies of the Federal Government on Friday, December 26, 2014."
14. The Town did not provide a paid holiday to firefighters for December 26, 2014.
15. On December 12, 2008, President Bush issued Executive Order 13482, "Closing of Executive Departments and Agencies of the Federal Government on Friday, December 26, 2008."
16. The Town did not provide a paid holiday to firefighters for December 26, 2008.
17. On December 6, 2007, President Bush issued Executive Order 13453, "Closing of Executive Departments and Agencies of the Federal Government on Monday, December 24, 2007."
18. The Town did not provide a paid holiday to firefighters for December 24, 2007.
19. On June 6, 2004, President Bush issued Executive Order 13343,⁴ "Providing for the Closing of Government Departments and Agencies on June 11, 2004."
20. The Town did not provide a paid holiday to firefighters for June 11, 2004.
21. With respect to the executive orders outlined above in Paragraphs 11-20, the Union did not grieve the lack of holiday pay for the identified dates.

⁴ At the hearing, a typographical error concerning the proper numbering of this Executive Order was corrected (from 12243 to 13343).

AGREED-UPON JOINT EXHIBITS⁵

1. Collective Bargaining Agreement (CBA), dated July 1, 2019 -June 30, 2022, between the Town of Yarmouth and the International Association of Firefighters, Local 2122
2. Executive Order 13900
3. Executive Order 11582⁶
4. Executive Order 13854
5. Executive Order 13682
6. Executive Order 13482
7. Executive Order 13453
8. Executive Order 13343
9. Chief Human Capital Officers Council memorandum CPM 2019-24
10. M.G.L. c. 4, § 7, definition of "Legal holiday"
11. 5 U.S.C. § 5546
12. 5 U.S.C. § 6103
13. Grievance and Fire Chief's Denial, dated January 6, 2020
14. Town Administrator's Denial of Grievance, dated January 28, 2020

POSITIONS OF THE PARTIES

Union

The Union asserts the Town violated the CBA when it failed to provide holiday pay for December 24, 2019 because President Trump's Executive Order 13900, which closed federal

⁵ All Joint Exhibits were received into evidence.

⁶ At the hearing, I took Arbitral Notice of the two (2) footnotes or Editorial Notes that were inadvertently left off of the copy of Executive Order 11582 that was submitted by the parties.

offices. Constituted an official holiday. This follows the CBA language requiring payment for “[a]ny other day that is officially declared a holiday by the State or Federal Government during the fiscal year.” The issue of whether a Presidential Executive Order closing federal offices for either a day of memory or an attendant holiday qualifies as a declaration of a “legal holiday” has been resolved in the affirmative by federal courts and local arbitrators. The 7th Circuit has held when the President closes the government for celebratory or commemorative purposes, rather than because of a budgetary crisis, snow emergency, terrorist act, or some other force majeure, the presumption is that he has declared a legal holiday. Executive Order 11582 of February 11, 1971, and 5 U.S.C. §5546(b) affirm the authority of the President, by Executive Order, to declare a holiday. That Executive Order concerns how federal employees will be compensated on legal holidays. Section 5546(b) sets forth compensation for “an employee who performs work on a holiday designated by Federal statute [or] Executive order.” The Judge in the 7th Circuit case dismissed the omission of the word “holiday” from the Executive Order at issue, closing the government on the day after Christmas 2003, as a pedantic formality.⁷

Courts and arbitrators have since affirmed this reasoning. The *sin qua non* in determining whether a day qualifies as a “holiday” remains a declaration by the President to close federal offices, not simply whether federal offices are closed. The 1st Circuit, in a 2004 case, ruled New Year’s Eve was not a “legal holiday” for purposes of the Federal Rules of Civil Procedure because the federal clerk’s office was closed by the Chief Judge. In 2006, an arbitrator relied on the 7th Circuit case and similar cases in determining that Lexington Firefighters were entitled to holiday pay for the day declared by Governor Romney and President Bush to honor President Reagan. That CBA provided, “not more than one (1) additional holiday if such additional legal holiday be

⁷ *Hart v. Sheahan*, 396 F.3d 887 (7th Cir. 2005).

declared by the Governor of the Commonwealth, General Court, Federal Government, or Board of Selectmen.” In his decision, the arbitrator stated, “There is no question that the President of the United States has the authority to declare a legal holiday by executive order.”

The Union contends even without guidance or reliance on the 7th Circuit case, arbitrators have adopted the same reasoning that closure of federal offices by Executive order constitutes a holiday. Those decisions noted that the right claimed was based on the parties’ CBA language. All of these authorities are unanimous that U.S. Presidents have authority to declare a holiday by Executive Order, that a “holiday” is functionally if not actually declared when an Executive Order requires closure of federal offices, and “holidays” extend to such non-sentimental purposes as providing employees with a ‘long weekend.’ These days are in addition to the day a holiday is officially declared, such as what happened with Executive Order 13900.

The Union argues the Town’s defenses raised with respect to the omission of the word “holiday” from the Executive Order or the lack of past practice are without merit. Numerous tribunals have noted the omission of the word “holiday” from the Executive Order is of no moment because the practical effect is the same. The federal human resources agency interpreted the Executive Order as declaring December 24 a holiday. In addition, the practical force of the Executive Order disposes of any contention that the phrase “officially declared” in CBA Article 19 requires the word “holiday” be used in any closure. This argument also exalts form over substance. The “officially declared” component is satisfied by the Executive Order, which renders the day of closure as an official act, rather than one caused by informality or acts of a subsidiary official. Furthermore, the CBA language requires a holiday be “declared” rather than “enacted,” and the declaration may come from “the Federal Government” not a specific branch or process. The CBA language also refers to a holiday officially declared “during the fiscal year” which

demonstrates an intent to recognize ad hoc or non-recurring events. If the CBA intended to limit the benefit to recurring holidays, there would be no need to cabin the officially declared holiday to the “fiscal year.” In addition, there is no mention that any new officially declared holiday automatically is awarded in subsequent fiscal years.

The Union also asserts the absence of past practice in support of the Union’s interpretation is not dispositive to a case relying on CBA language. It is axiomatic that the failure of a party to enforce contract language is no bar to future enforcement. Furthermore, the Town’s interpretation renders the CBA language a surplusage. If it does not apply to extended leaves or National Days of Mourning one is hard-pressed to think of a situation where the Town would agree that the CBA language applies. To apply the language only when a new holiday is placed on the calendar, which can only occur by enactment of legislation at the state or federal level, would impose more procedural rigor than required by the CBA’s simple language. The parties specifically agreed to provide compensation for holidays that are declared within a fiscal year, regardless of whether it continues for the rest of the term of the CBA or beyond.

Finally, the Union contends firefighters do not have the luxury of being relieved of duty for a holiday. The holiday article provides an additional day of compensation in recognition that they may be required to work on days most other employees are relieved of work obligations and yet are paid as if they had worked. Once the Executive Order officially declared December 24 a legal holiday in all but name, the Town was obligated to provide holiday compensation to firefighters because of their comparative sacrifice by working. For these reasons, the Union requests that its grievance be upheld, and the Town be obligated to compensate firefighters appropriately, with interest, for the holiday.

Town

The Town contends President Trump's Executive Order No. 13900 did not officially declare that December 24, 2019 was a holiday. Article 19 does not define what is a "holiday." There is also no language in that article that addresses days that are treated as holidays for pay purposes but do not operate as legal holidays. Without language to clarify the meaning of the term, the ordinary meaning of "holiday" must be applied. That term is commonly understood as an annual event for a day of recognition. The parties intended to use the ordinary meaning, as evidenced by the eleven days appearing at the top of Article 19. All those days share the same characteristic: they are recurring events made generally applicable to classes of people beyond just certain subgroups of federal employees. In addition, the parties agreed that "holidays specified shall be on the days that they are observed within the Commonwealth of Massachusetts." This plainly contemplates including only those holidays observed within Massachusetts, whether declared "by the State or Federal Government." The Union failed to present any evidence of the parties ever treating a similar one-off day as a paid holiday in line with the eleven paid holidays. Without such evidence the phrase "officially declared a holiday" cannot reasonable be interpreted to encompass a day which, in form and function, does not align with the commonly understood meaning of "holiday." Because the Union bears the burden of proof in this matter, the grievance should be denied.

The Executive Order's text also does not support the Union's position. It does not even use the word "holiday". If, as the Union suggests, the Executive Order "officially declared a holiday" as that term is commonly understood, one would expect that word to appear. In addition, the Executive Order contains self-limiting language in that its application is strictly limited to pay and leave of employees of the federal government. The Office of Personnel Management's implementing memorandum confirms that "[f]or pay and leave purposes, December 24, 2019, will

be treated as falling within the scope of statutes and Executive orders governing holidays.” By its own terms then this order was not an officially declared holiday.

Furthermore, the Town argues Executive Order 13900 refers to Executive Order 11582, which is expressly limited to “all executive departments, independent agencies, and government operations, including field services.” In addition, that order’s definition of “holiday” lists days that match the holidays listed in Article 19, with the limited exception of President’s Day and Patriot’s Day, which are unique to Massachusetts. These are days that are commonly understood as holidays and are not limited in application to only federal employees.

The Town also asserts Executive Order 13900’s reference to 5 U.S.C. 5546 and 6103(b) further drives home the point and undermines the grievance. Section 5546(b) simply states a federal employee who works on a holiday designated by federal statute or Executive order is entitled to premium pay on top of basic pay. This undercuts the notion that December 24, 2019 is a holiday in the ordinary sense because that section is only concerned with pay for certain federal employees. Most apparent is that in enacting Section 6103 Congress dedicated subsection (a) to ten days explicitly defined as “legal public holidays.” These days are, as the Town suggests, days that have been “officially declared a holiday by the State or Federal Government” as those terms are used in Article 19. Executive Order 13900 did not treat December 24, 2019, as falling within subsection (a). Rather, it treated the day as falling under subsection (b), which is dramatically different in form and substance. Subsection (b), like the other statutes and executive orders at issue here, deals only with pay practices for certain federal employees, a limitation that does not appear for the legal public holidays in subsection (a). Taking the entire statutory framework together, it is clear the action and effect of Executive Order 13900 did not “officially declare a holiday” as those terms are commonly understood. It did something very different, which could

not possibly have been what the parties intended to include within the scope of Article 19. For these reasons, the grievance should be denied.

Finally, the Town contends the grievance should be denied because there is no evidence that the parties ever applied Article 19 to analogous executive actions. Executive Order 13900 was far from the first time executive action was taken to create a paid holiday for certain federal employees. On December 18, 2018, President Trump issued Executive Order 13854, which like 13900, closed executive departments and agencies of the federal government on December 24, 2018. It contained the same limitations and statutory references, yet the Town did not provide a paid holiday for December 24, 2018, and the Union did not grieve it as a violation of Article 19. The same can be said for numerous other executive orders that have been issued since 2004. In 2014 President Obama issued Executive Order 13682, which took analogous action for certain federal employees on December 26, 2014. President Bush took the same executive action in 2008 and 2007. None of these days were grieved under the same language of Article 29. In short, the undisputed evidence over an extended period of time overwhelmingly shows the parties have never treated these one-off days for federal employees as being within the scope of Article 19. Particular attention should be paid to President Bush's Executive Order 13343 issued on June 6, 2004, "as a mark of respect for Ronald Reagan..." following his death. Section 1 of that order contains the exact same reference to considering the day "as falling within the scope of Executive Order 11582 of February 11, 1971, and 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States." If the theory advanced by the Union is to be accepted, that would mean the day of June 11, 2004, recognizing President Reagan's passing, was a "holiday" as that term is commonly used. The Town asserts that is not the case. It

may fairly be characterized as a day of recognition, however, that is not the language the parties agreed to in Article 19. For these reasons, the Union's grievance should be denied.

DECISION

The issue before me is whether the Town violated the parties' CBA by failing to provide a paid holiday to firefighters for December 24, 2019. The resolution of this matter depends the language in Article 19, Holidays, in the parties' CBA. If words of an agreement are plain and clear, and convey an unambiguous meaning, there is no need to resort to technical rules of contract interpretation. An agreement is not unambiguous, however, if plausible arguments can be made for more than one construction. There is no evidence in the record that the parties dispute Article 19 of the CBA, in addition to providing for eleven (11) listed paid holidays, also provides for compensation for "[a]ny other day that is officially declared a holiday by the State or Federal Government during the fiscal year...." They do not agree, however, on what is meant by "officially declared a holiday by the ... Federal Government." The Union asserts that the President has the power to declare a holiday and that Executive Order 13900 issued by President Trump on December 17, 2019, declared December 24, 2019, a holiday. The Town argues, in essence, that Executive Order 13900 did not officially declare December 24, 2019, a holiday, the CBA language does not support such a finding, and there is no evidence that the parties ever applied Article 19 to analogous actions.

Analysis of the issue must begin with the language of Executive Order 13900. Executive Orders are signed, written, and published directives from the President of the United States. They

are published in the Federal Register to inform the public of federal actions and have the force of law.⁸ Executive Order 13900 states, in relevant part:

By the authority vested in me as President by the Constitution and the law of the United States of America, it is hereby ordered as follows:

Sec. 1. All executive departments and agencies of the Federal Government shall be closed and their employees excused from duty on Tuesday, December 24, 2019, the day before Christmas Day.

...

Sec. 3. December 24, 2019. shall be considered as falling within the scope of Executive Order 11582 of February 11, 1971, and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

As stated above, Executive Order 13900 references the fact that it comes within the scope of Executive Order 11582 of February 11, 1971, and 5 U.S.C. §§5546 and 6103(b). Executive Order 11582 – Observance of holidays by Government agencies, states, in relevant part,

Sec. 2. As used in this order:

(a) *Holiday* means... or any other calendar day designated as a holiday by Federal statute or Executive order. [Emphasis added]

5 U.S.C. §5546, Pay for Sunday and holiday work, states that “An employee who performs work on a holiday designated by ... Executive order,” [Emphasis added] is entitled to premium pay in addition to basic pay. Finally, while 5 U.S.C. §6103, Holidays, Subsection (a) lists legal public holidays, Subsection (b), the subsection cited in Executive Order 13900, states,

(b) For the purpose of statutes relating to pay and leave of employees, with respect to a legal public holiday and any other date declared to be a holiday by Federal statute or Executive order, the following rules apply: [Emphasis added]

⁸ <https://www.americanbar.org/groups/public.education/publications/teaching-legal-docs/what-is-an-executive-order-/>

I conclude that the language of Executive Order 13900, along with Executive Order 11582 and the cited sections of the U.S.C. from which Executive Order 13900 draws its authority, supports the conclusion that President Trump designated December 24, 2019, a holiday.

The question of whether a President, by Executive Order, has the power to declare a holiday has been addressed by the 7th Circuit in *Hart v. Sheahan*, 396 F.3d 887 (7th Cir. 2005). That case concerned in part whether a post-judgment motion under Fed.R.Civ.P. 59(e) was filed within 10 days after entry of judgment because, with the exclusion of Christmas and weekend days, the motion was filed on the eleventh day unless December 26, 2003, was also excluded from the computation as a “legal holiday” within the meaning of Fed.R.Civ.P. 6(a). “Legal holiday” was defined in the rule to include enumerated holidays and “any other calendar day designated as a holiday by Federal statute or Executive order.” On December 2, 2003, then President Bush issued an Executive Order relying, as did Executive Order 13900, on Executive Order 11582 and 5 U.S.C. §5546(b). In addressing that issue, Judge Posner wrote,

The clincher is the superior simplicity of a rule that says that when the President closes the government for celebratory or commemorative reasons (see, e.g., Executive Order 13343, 69 Fed.Reg. 32,245 (June 6, 2004), closing the government for a day of commemoration of President Reagan), rather than because of a budgetary crisis (see “Federal Workers Bear Brunt of Budget Shutdown,” Nov. 14, 1995 http://www.cnn.com/US/9511/debt_limit/11-13/employees/index.html), or for a snow emergency, terrorist act, or some other force majeure, the presumption is that he has declared a legal holiday. The presumption has not been rebutted.

The 7th Circuit’s decision provides guidance and has precedential value. Furthermore, the Town cited no cases to refute the federal court’s conclusion that there is a presumption that a sitting president, through an Executive Order such as 13900, has declared a legal holiday. I conclude, given the above, coupled with the fact that Article 19 acknowledges “[a]ny other day that is officially declared a holiday by the State or Federal Government during the fiscal year shall be

added to the above list and compensated accordingly,” as well as the fact that “holiday” is not otherwise defined in the CBA, that December 24, 2019 was a “holiday” within the meaning of the parties’ CBA. I find, therefore, that the Union sustained its burden of proving that December 24, 2019 should have been paid to the fire fighters as a holiday.

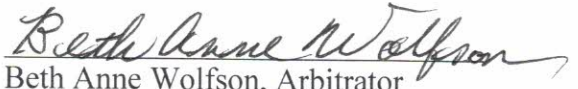
The Town’s arguments to the contrary are not persuasive. The parties negotiated the language of Article 19, which apparently has remained unchanged since at least 2004. Given the fact that they affirmatively chose to include the reference to “[a]ny other day that is officially declared a holiday by the ... Federal Government,” I deem it preferable to consider judicial precedent construing similar language in regard to the effect of presidential executive orders rather than a purported “ordinary,” yet unstated and undefined meaning of the word “holiday.” Furthermore, as Judge Posner so aptly explained in the 7th Circuit’s decision, when the President closes the government for celebratory or commemorative reasons, rather than because of a budgetary crisis, or for a snow emergency, terrorist act, or some other force majeure, the presumption is that he has declared a legal holiday, therefore, the absence of the term “holiday” from Executive Order 13900 is not dispositive. Although the Town replies in part on 5 U.S.C. §6103(a) in its argument, it is not that subsection, but subsection (b) that Executive Order 13900 cites. Finally, nowhere in the parties’ CBA does it state that if the Union, for whatever reason, does not challenge or grieve the Town’s action or inaction on a prior occasion it has waived its right to raise such a challenge to a future occurrence.

AWARD

The Town of Yarmouth violated Article 19 of the parties’ CBA when it did not provide a paid holiday to fire fighters for December 24, 2019. The Union’s grievance is, therefore, sustained.

The Town will compensate fire fighters for the December 24, 2019 holiday, pursuant to the terms of Article 19. Interest is **NOT** awarded.

Dated: 11/5/20


Beth Anne Wolfson, Arbitrator