

**American Arbitration Association
Voluntary Labor Tribunal
Case No. 01-21-0002-5329**

IN THE MATTER OF ARBITRATION BETWEEN

UNITE HERE, LOCAL 26

AND

TUFTS UNIVERSITY/DINING

AWARD OF THE ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, the grievance is sustained. The appropriate remedy is to review the time and pay records for that week, and for any hours that Legacy employees were actually on campus working, they must receive flex time, or compensatory time to be taken before June 30, 2022

February 22, 2022
Boston, Massachusetts



Gary D. Altman

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ARBITRATION DECISION AND AWARD

Introduction

Tufts University ("Employer") and Unite HERE, Local 26 ("Union") are parties to a Collective Bargaining Agreement. Under the Collective Bargaining Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration under the rules of the American Arbitration Association. The parties presented their case in Arbitration in a virtual proceeding before Gary D. Altman, Esq., on November 18, 2021. The Union was represented by James Hykel, Esq., and the Employer by Joseph P. McConnell, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties filed post hearing briefs after the conclusion of the hearing.

Issue

The parties agreed that the issue to be decided is as follows:

Did the Employer violate the parties' Collective Bargaining Agreement when it failed to pay recess pay or give flex days from January 11, 2021, to January 17, 2021?

If so, what shall be the remedy?

Facts

In 2018 the Union began representing employees working in the University's dining services. The bargaining unit consists of full and part-time employees who work in the College's Dining facilities, in several retail locations on Campus, in the main production kitchen, and also in catering services. Positions in the Union range from sous and pastry chefs, at the higher end of pay scales, to Dining Services Attendants, who are called DSAs, and they are general kitchen workers and the largest group of employees in the bargaining unit. Bargaining unit employees are scheduled to work the academic year.

██████████████████ has worked at Tufts Dining Services for more than thirty years, and she explained that for time periods such as Thanksgiving Break, Winter Recess and Spring Break, Dining Services are closed, employees would not work, but would receive their regular rate of pay for their regularly scheduled hours during these time periods. This practice came to be known as "recess pay". There was no set number of days for these recess breaks as they would depend on when holidays fell and when the school breaks were scheduled. Employees received recess pay during breaks when students were away from campus, but since dining services provided food on holidays when students were on campus, the practice was that employees did not receive overtime or additional pay when they worked holidays during the academic year.

██████████████████ stated that the Winter Recess usually began a day or two after the last final exam, and employees

would be scheduled to return to work two days before classes were scheduled to begin, which was usually around the Martin Luther King Holiday in mid-January. [REDACTED] also stated that there are times when dining services were provided during the Winter Recess, such as if one of the sport teams had to be on campus before the Spring Semester started. [REDACTED] testified that in these situations employees could choose to work and if they did so, they would be paid and also receive a "flex day", an additional day off to use during the remainder of the School Year.

[REDACTED] testified that Dining Services would send a letter to employees sometime in November informing them of the recess dates for the academic year. One such letter was introduced for the 2107-2018 academic year. On November 3, 2017 [REDACTED], Director of Dining Services, sent a letter to employees informing them of the dates of the University's breaks and Winter recesses for the 2017-2018 academic year. In her letter she explained the background of recess pay.

Tufts Dining created the Recess policy many years ago as a way to compensate employees during certain pay weeks when the University is out of session, in exchange for working on University holidays at regular pay. The University needs to have dining facilities available to students on University holidays throughout the year and to close facilities when students are away from campus in order to be of service to the students and to be fiscally responsible.

[REDACTED] in her letter indicated that, for that year, Winter Recess would begin on 12:01 am on Saturday December 23, 2017 and end at 12:01 pm on Sunday, January 15, 2018.

The parties negotiated their first Collective Bargaining Agreement that was ratified on April 3, 2019. One of the issues in the negotiations was whether to change the current practice with respect to paying employees recess pay when the University was out of session, over Thanksgiving, Winter Recess, and the Spring break. [REDACTED] testified that the University wanted to do away with recess pay and instead provide employees with a set number of paid days, which employees could use during recess periods and to do away with the practice of recess pay. The Union opposed the University's proposal and sought to continue the recess pay practice for bargaining unit employees.

The University eventually withdrew its proposal to do away with changing the recess pay practices and the parties agreed that they would continue the recess pay practices for employees hired before April 3, 2019, so called "Legacy Employees". Employees hired after that date did not receive recess pay but were instead provided with a set number of paid days, and also were paid additional pay when they worked holidays. With respect to recess pay the parties codified their agreement in Section 16 of the new Agreement.

In the Spring of 2020 the world was upended due to the COVID pandemic. All but essential services closed; for higher education, such as Tufts, students, for the most part left their campuses, and continued with remote learning. The departure of students had significant impact on Dining Services, there was a dramatic decrease in the number of meals that had to be served, as only a small number of students remained on campus. [REDACTED] testified that as a result, Dining Services needed about 25% of the

bargaining unit to continue to provide some form of food services. The Union and University entered into a Memorandum of Agreement as to how to schedule workers to provide the limited number of food services during the time that the University was closed, and the University agreed to pay bargaining unit employees their regularly scheduled wages even if they were not scheduled to work.

Students returned to in-person instruction for the Fall of 2020. ██████████ testified that approximately 75% of students returned and there were various changes to the dining services offered for the Fall semester. ██████████ explained that the Commonwealth had implemented various directives as to what kind of food service operations could be provided. The University decided that meals would only be available for take-out, and the dining halls were not open for sitting and eating meals.

██████████ testified that the need for Dining Services continued to fluctuate during the fall semester, as Dining Services continued to assess the changing need to provide food services to students. ██████████ testified that sometime in the late Fall, the University decided to start classes for the Spring semester two weeks later than normal,¹ since the University had to create an on-boarding process, in which students would come back to campus before classes started, be tested for COVID, and be quarantined if they tested positive. ██████████ testified that during this on-boarding process, students were on campus and had to be fed.

¹ The 2020-2021 calendar indicated that final exams ended on December 22, 2020 and classes were scheduled to resume for the Spring semester on February 1, 2021.

On November 6, 2020 a letter was sent to Dining Service employees stating that the recess period for Winter Recess for workers would be from December 23, 2020 to January 11, 2021. [REDACTED] stated that Dining Services wanted employees back to work on January 11, one week before students were scheduled to return to campus, in order to ensure that Dining Services would be ready and able to support the return of students to campus the following weeks for the student's on-boarding process.

[REDACTED] explained that staff also had to be tested for COVID, and that Dining Services had to ensure that there would be sufficient staff to be able to provide food to the students when they returned. Dining services wanted to review COVID safety protocols, provide training for all employees, and perform additional cleaning where necessary.

[REDACTED] further stated that most employees did not actually work their regular schedules as Dining Services staggered the work times so that there would be a smaller number of employees on site. [REDACTED] stated that all employees were paid for their regular work schedules even if they did not work their full hours of work that week.

[REDACTED] stated that students returned the week of January 18, so they too could begin the onboarding process for COVID testing.

[REDACTED] testified that students were not scheduled to return to campus until January 18, the week following when dining employees had to return, and believed that ending the Winter Recess one full week before the students were scheduled to return violated the parties' past practice for when the Winter Recess period would end. Ms.

[REDACTED] stated that although the University had the management right to schedule classes and the Winter break,

and could schedule employees to work during the Winter Recess, the University was obligated to provide a flex day, an additional day off, to use during the academic year. Ms. [REDACTED] explained that she brought this matter up with Dining Services, but no changes resulted, and employees did not receive additional flex days for having to report to work the week before students had to report back to campus.

Relevant Provisions of the Collective Bargaining Agreement

ARTICLE 16 - RECESS PAY

This Article shall apply only to bargaining unit employees hired on or before April 3, 2019, (which is the Ratification date of the initial Collective Bargaining Agreement between the Parties and Long-Term Temps who convert to regular full-or part-time employment status pursuant to the Side Letter Agreement executed concurrently with this Agreement (the "Legacy Employees").

Section 1. RECESS PAY FOR LEGACY EMPLOYEES. When University dining operations close during the week of Thanksgiving, the Winter recess, and Spring break, employees shall receive recess pay equivalent to their regularly scheduled hours at their regular rate of pay for the duration of the closure, consistent with past practice. Nothing herein shall prohibit mutually agreed upon flexible Recess scheduling (substituting an alternative day off for a Recess day) for Legacy employees.

In exchange for maintaining the Recess pay benefits for Legacy Employees described above, all other paid time off benefits including holidays, vacation blackout periods and essential personnel closure rates (1.5X the regular rate for employees who are called into work and perform essential duties during a closure; straight time for all other employees), shall remain consistent with the status quo in effect prior to Ratification of the initial Collective Bargaining Agreement for all Legacy employees.

Position of the Parties

Summary of the Union's Position

The Union maintains that this grievance can be answered by reviewing the plain language of the parties' Agreement. The Union states that University, in the most recent round of negotiations, sought to end the practice of recess pay for all bargaining unit employees, and the Union did not agree. The Union states that the parties then specifically agreed that the recess pay practices would continue for Legacy Employees, those employees hired before April 3, 2019. The Union further states that the Agreement and past practice is that if Legacy Employees were called to work during the Winter Recess, they would receive a flex day, an additional day off, to be used before the end of the fiscal year.

The Union states that it does not challenge the University's right to create the academic calendar or set the date when students return to school for the beginning of the Spring Semester. Further, the Union acknowledges that the University could direct employees to return to work the week prior to when students were scheduled to arrive on campus. The Union, however, contends that employees, when they were called back to work during a period that has traditionally been considered as part of the Winter Recess, should have received flex time for the days that they worked, since the week of January 11 should still have been considered as part of the Winter Recess.

Specifically, the Union states that the Winter recess has always been considered to be the time period that students are off campus, and the dining halls are closed and not providing food services to students. The Union argues that since students were not on campus and not

scheduled to return until the following week, the week of January 11 was still part of the Winter Recess, and Legacy Employees, who worked this week should have received flex time as was the established practice of the parties.

The Union maintains that the work performed by employees during the week of January 11 was similar to work performed by bargaining unit employees in the past; that is, they report to work during the Winter Recess to start cleaning, training and set-up operations for the re-start of dining operations for when students return to campus. The Union states that in the past employees have received a flex day when they have actually worked during the Winter Recess period. The fact that the University scheduled classes to start later, and the food operations changed during COVID, does not negate the undisputed fact that employees were required to report to work during the Winter Recess.

The Union concludes that the University violated Article 16, Section 1 by denying Legacy Employees flex time for the days they worked during the Winter recess period between January 11-17, 2021, at a time when dining operations were closed, and students were not on campus. The Union maintains that the University must make the Legacy Employees whole by requiring the University to give the affected employees flex days for each day they worked during the week of January 11-17, 2021.

Summary of the University's Position

The University maintains that it had the managerial right to set the academic calendar, and to establish the time periods for the employees' breaks and Winter Recess. The University states that it had a practice of providing, what came to be known as Recess Pay, to employees during

these academic recesses to ensure that employees would continue to receive their full pay, and not go unpaid when the University was not in session. The University states that it sought to do away with recess pay, and instead provide employees with a set number of days off, but that its proposal was not agreed to by the Union. Instead, the parties agreed that employees who were hired before April 13, 2019, "Legacy Employees", would continue to receive recess pay during the academic recesses.

The University contends that in November of 2020 it decided that the recess period for Dining Services employees would end on January 10, and employees would return on January 11, 2021. The University argues that it followed the contract and provided recess pay to legacy employees, for the period of December 23 through January 10, and employees were then paid their regular rate of pay for the week of January 11 to 18, the week before the students returned to campus. The University states that there were legitimate reasons to bring back dining employees to work the week before students arrived in order to perform COVID testing and employee training. The University thus asserts that employees were not economically harmed, they received recess pay when they were not scheduled to work, and when they returned to work on January 11, they were paid their regular wages for the entire week, even if they did not actually work every day of the week.

The University states that there can be no dispute that there has never been a set number of days for the Winter Recess, that the time period of the Winter Recess varied based on when exams ended, and when the holidays fell. The University states that in contract negotiations

it proposed that employees have a set number of paid days off, and the Union rejected the proposal and wanted to continue the practice of recess pay, and this practice provides for no set number of days off during the Winter Recess. The University contends that the Union's grievance seeks double pay for Legacy employees - pay for the services they performed during the week of January 11 - January 17 and pay for an additional week of "recess," which was neither contemplated nor agreed to in the Agreement. The Employer states that the Union is attempting to obtain through this arbitration something that they specifically rejected during negotiations.

The University maintains that the purpose behind Recess pay was to ensure that employees who are hourly employees were paid during the time that dining services were not needed. The University contends that maintaining income for employees, who otherwise would not have been paid, was the practice. The University argues that it was this practice of ensuring that employees continued to be paid when they were not working that was codified in the parties' Agreement, and there was never any agreement that employees would be paid recess pay and their regular wages at the same time. The University maintains that the grievance must be denied.

Discussion

At the outset it is important to state what is not at issue in this case. The University retains the right to set the academic schedule, it retains the right to determine when students are on campus, the weeks that classes are held, and the times dining services are open or closed. Nor does the Union challenge the University's management right to direct employees to return to work the week of January

11, 2021, the week before students returned to campus. Moreover, there can be no question that in the present case the purpose of having dining employees return to work the week before students, returned was necessary and a legitimate management right.

Thus, this dispute is not about the University exercising its management rights to schedule work, this is a dispute about what is meant by the terms "Winter Recess". Specifically, the undisputed testimony is that if a Legacy Employee works during the Winter Recess period, they are paid their regular rate of pay, and in addition they receive flex days, essentially a compensatory day off to take later during the year. This practice of working during a recess period, and then receiving a paid day off to use in the year also appears to have been codified in Article 16.1 that provides that "nothing herein shall prohibit mutually agreed upon flexible Recess scheduling (substituting an alternative day off for a Recess day) for Legacy employees."

The University contends that recess pay is a practice of income maintenance; employees will continue to be paid during periods of time dining services are not needed, such as during the Winter Recess, and should it direct employees back to work, the Winter Recess ends, and then recess pay is no longer provided, as employees are then paid their regular wages. Under the University's view it could decide that Winter Recess for employees was one day, and then declare that the recess has ended and direct employees back to work, and if it paid employees the one day of recess pay for the one day employees were not working, and then began paying employees their regular wages, it will have fulfilled its obligation of ensuring full pay for

employees, the supposed purpose of recess pay. I cannot agree that this was what the parties bargained when they agreed to continue the recess pay practices for Legacy employees.

Unquestionably recess pay ensures income maintenance for employees for those times when dining services are closed. It is too simplistic, however, to state that the Winter Recess period ends whenever the University directs employees back to work. Recess pay is clearly an economic benefit, employees are paid and they do not have to work. It is crucial to determine what the parties intended by the terms "Winter Recess". It is true, as the University argues, there are no set number of days for the Winter Recess. The fact that there were no set number of days and that the days of Winter Recess may vary, does not mean that there is no period of time associated with the Winter Recess. The evidence clearly demonstrates that the Winter Recess period was that period of time when students are off campus, and dining services was not providing food to students. [REDACTED] in her 2017 memo to dining employees stated that this included time periods "when the University is out of session" and the times when facilities are closed "when students are away from campus." This is the time period for the Winter Recess that the parties incorporated into Article 16.1.

There were examples when the University did provide dining services during the Winter Recess, such as when sport teams or groups were back on campus before students were scheduled to arrive back on campus. In those instances employees were paid their regular wages, and were then permitted to take an additional day off later during the year.

There can be no dispute of the many challenges faced by the University during the 2020-2021 academic year due to COVID. Nonetheless, it must be concluded that the week of January 11 to 17 was in fact still part of the Winter Recess period. Students were not back on campus and no dining services were being provided to students. Legacy employees are contractually entitled to additional time off for the time that they actually worked during the week of January 11 to 17, when the University was still in the Winter Recess. The testimony was that many employees did not work the full week, and employees should not receive flex days for time that they did not work during the week. The appropriate remedy in this case is to review the time and pay records for that week, and for any hours that Legacy employees were actually on campus working, they must receive flex time, or compensatory time to be taken before June 30, 2022.

Conclusion

Based on all the factors, the grievance is sustained. The appropriate remedy is to review the time and pay records for that week, and for any hours that Legacy employees were actually on campus working, they must receive flex time, or compensatory time to be taken before June 30, 2022

February 22, 2022
Boston, Massachusetts


Gary D. Altman