

AMERICAN ARBITRATION ASSOCIATION
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In the Matter of the Arbitration X
 between X
NEW YORK CITY DEPARTMENT OF X
EDUCATION X
 "Department" X
 -and- X
UNITED FEDERATION OF TEACHERS X
 "Union" X
----- X

Re: Spring Recess
Case #A-079-C23132

APPEARANCES

For the Department

Karen Solimando, Executive Director

For the Union

David Campbell, Director

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

In this Union initiated ("UI") grievance, the Union protests the Department's refusal to compensate its represented employees for seven (7) extra days of work resulting from the cancellation of Spring Recess 2020. The Union contends the Department's decision in April 2020 to require schools remain in session during the previously scheduled Spring Recess resulted in seven (7) uncompensated school days and the lost opportunity for staff to take planned vacation time off and is in violation of Article(s) 3, 6 and 20 of the Collective Bargaining Agreement ("CBA") and corresponding articles of the CBAs of all other impacted titles. It asks for a determination compensating the impacted represented employees for these seven (7) days insisting the four (4) Cumulative Absence Reserve ("CAR") days provided by the Department are insufficient compensation.

The basic facts are not in dispute. New York City ("NYC" or "City") is now some twenty three (23) months into the COVID-19 pandemic. Throughout this period, the City and its municipal unions have worked collaboratively to provide needed services for the City's 8.8 million residents and, as most relevant here, its more than one million public school students. While at times experiencing issues, some of which I was called upon to resolve, the Department and the Union have worked together to transition

from in-person to remote learning to hybrid learning and then back to full in-person instruction. Throughout this period, and despite great strain from the pandemic, educators and administrators at all levels strove to deliver the best experience possible under challenging circumstances.

Most relevant to this matter, prior to the pandemic, on April 29, 2019, after consultation with the Union, the Department issued its "2019-2020 School Year Calendar," setting Spring Recess for Thursday, April 9th through Friday, April 17th, a total of seven (7) weekdays. (UFT Hearing Documents, pp 18-22). A revised calendar was issued on September 24, 2019, containing the same scheduled Spring Recess dates for the coming year. (UFT Hearing Documents, pp 23-27).

The weeks leading up to Spring Recess 2020 saw the Covid-19 pandemic in its initial surge. With cases rapidly rising, Mayor de Blasio, on March 12, 2020, issued Emergency Executive Order No. 98, declaring a state of emergency for the City. That Sunday, March 15, 2020, the Mayor and Chancellor Richard Carranza announced NYC public schools would be closed for all students from March 16-20, 2020. During this week, all staff prepared to engage in remote instruction/learning. All schools commenced remote instruction March 23, 2020.

On March 27, 2020, Governor Cuomo issued Executive Order ("EO") No. 202.11, which, *inter alia*, waived the one hundred eighty (180) instructional days requirement for school districts and directed schools continue to "first use any vacation or snow days remaining." (UFT Hearing Documents, pp 35-38).¹ On March 30, 2020, the State Education Department ("SED") issued a clarification "school districts must continue to provide remote instruction for students, meals for students, and childcare for essential workers every weekday between April 1, 2020, and April 14, 2020, even if the district is scheduled to be on spring break during that time" (UFT Hearing Documents, p 39).

On March 31, 2020, subsequent to SED's clarification, UFT President Michael Mulgrew wrote to UFT members via email that while schools would be open remotely beginning Monday, April 13, 2020, schools would be closed on Thursday, April 9 and Friday, April 10,

¹ The directive contained in Executive Order 202.4 indicated, relative to the closure of schools statewide, shall hereafter be modified to provide that all schools shall remain closed until April 15, 2020, at which time the continued closure shall be re-evaluated. No school shall be subject to a diminution in school aid due to failure to meet the 180 day in session requirement as a result of the COVID-19 outbreak, provided their closure does not extend beyond the term set forth herein. School districts must continue plans for alternative instructional options, distribution and availability of meals and child care, with an emphasis on serving children of essential workers, and continue to first use any vacation or snow days remaining.

2020, for the religious holidays, as standard in the school calendar. (UFT Hearing Documents, pp 45-47).

However, in order to be in compliance with the Executive Orders and NYSED directive and to avoid losing critical and much needed state funding, all Department staff continued to work remotely and school-based staff provided an alternative instructional program during the 2020 Spring Recess. On April 3, 2020, the Chancellor emailed all staff announcing schools would remain open remotely on April 9 and 10, 2020, in addition to Monday through Friday of the following week. This resulted in Union represented school-based employees being required to work through religious holidays in addition to the full Spring Recess. This added seven (7) days to the work year and required those who sought to observe the religious holidays to utilize existing CAR days.

On April 4, 2020, to resolve the issue of the right of employees to observe religious days without loss of earned days, the Union, along with other unions representing school-based employees, reached a Memorandum of Understanding ("MOU") with the Department that provided teachers and other school-based employees with four (4) additional CAR days that could be used for religious observance days or reserved to be used for sick days.² The MOU

² For twelve (12) months employees were to receive four (4) sick days or four (4) annually leave days, at the employee's option.

also included provisions reserving the unions' rights to pursue compensation for working during Spring Recess (Union Hearing Documents, pp 50-54: "Each Union expressly reserves its rights to seek additional compensation in order to make represented employees whole for time worked during the previously scheduled spring break").

After discussions to resolve the matter proved unsuccessful, the UFT filed the instant grievance on July 1, 2021, seeking full compensation for all employees for work during Spring Recess, April 9-17, 2020, in violation of Articles 3, 6 and/or 20 of the Collective Bargaining Agreement. A Remote Conference was held at the DOE on September 28, 2021. By decision issued December 9, 2021, the Department denied the grievance. (UFT Hearing Documents, pp. 55-57.) The UFT promptly sought arbitration of the matter by demand dated December 14, 2021. (UFT Hearing Documents, p. 58.)

I held pre-hearing conferences on November 17, and 24, 2021, and a hearing on December 15, 2021. At those times, both parties were afforded full opportunity to introduce evidence and arguments in support of their respective positions. They did so.

During these conferences and formal hearing, I made a series of interim determinations including that some form of compensation was due for the extra days worked. I directed the parties to consider draft language reflecting this ruling and also to provide

possible remedies. Even though I am familiar with the language of the current Collective Bargaining Agreement and related policies since I am a member of their permanent arbitration panel and have served as mediator and fact-finder during several rounds of bargaining, including most recently in connection with the implementation of a vaccine mandate, I concluded the parties are more familiar with Department policies and procedures and how leave and entitlements should be administered in tandem with prior agreements. As such, my determination reflects the parties' proposed language in response to my rulings.

DISCUSSION AND FINDINGS

The Issues:

The basic issues to be decided are:

1. Did the Department violate the parties' various Collective Bargaining Agreements in the way in which it treated employees represented of the Union regarding the Spring Recess in the school year 2020-2021?
2. If so, what shall be the remedy?

Positions of the Parties

The Union asserts employees who work additional days performing their duties should receive monetary compensation for those days. While employees can, under appropriate circumstances,

be ordered to work additional days, they cannot be ordered to work those days without compensation, insists the Union. The Union cites prior Awards by Arbitrators Jay Siegel and Carol Wittenberg in support of this proposition. Nor, urges the Union, is it relevant what specific instruction occurred on those days, for student instruction and activities varies throughout the year with some days allowing for special activities and some typical instruction. Whether directing enrichment or a math lesson, employees were required to perform their professional duties on those days and prevented from engaging in planned vacation activities, asserts the Union. Therefore, the Union insists additional compensation is appropriate.

The Union alleges a Spring Recess vacation is omnipresent on the school calendar and is incorporated into the Agreement pursuant to Article 20. Article 6 of the Agreement provides the Department set the number of school days and the dates of scheduled Vacation Days with the Union prior to the beginning of the school year. The school calendar, once finalized, establishes the workday schedule for that school year, maintains the Union. In its view, the only ability to deviate from the set calendar is in circumstances where snow days or school closure in response to other events require certain predetermined recess days (not beginning with Spring Recess) be converted to schooldays, where

there is a one (1) for one (1) exchange of a school closure day for a recess day. Additionally, Vacation Days may only be taken, in the agreed upon order of preference, to the extent needed to "meet the statutory minimum," Art. 6, C. Here, the statutory minimum was suspended.

The Union further argues the cancellation of Spring Recess not only resulted in additional work without pay, it also forced some employees to use accrued days for their religious observance, for there were certain holidays which fell during the Spring Recess. It is for this reason, urges the Union, the parties in recognition of the magnitude of the disruption to employees of being required to work not just during a scheduled vacation, but also during religious holidays, entered into an MOU. That MOU addressed solely the religious observance issue, granted each employee four (4) CAR days and explicitly recognized and reserved to the Union (and the other participating unions) the right to later bring claims for additional compensation such as this UI. As CAR days are limited use days, for employee illness and preapproved personal business, the Union contends CAR days do not provide equal value for the additional days worked and the loss of unencumbered paid Vacation Days. Accordingly, the Union seeks monetary compensation for the seven (7) days worked.

In the alternative, given my preliminary indication monetary compensation did not seem to be the only way to address the purported inequity suffered by the represented employees, I asked for other possible remedies to ensure employees receive equal value for the vacation time lost. In this regard, the Union believes an appropriate remedy is to provide credited paid Vacation Days to employees who worked during the Spring Recess. CAR days, as suggested during the hearings by the Department, would not provide equal value as they are limited use days that would not replace the lost unencumbered time to engage in self enriching, relaxing or family activities, insists the Union. The Union also notes CAR days would not provide equal value when paid out, should they not be utilized. Accordingly, the Union posits, a vacation pay remedy would provide for up to three (3) credited paid Vacation Days and up to four (4) CAR days converted to Vacation Days, for each day an employee worked during Spring Recess, if I declined to award the monetary remedy pressed by the Union.

While the Union understands a myriad of administrative factors go into properly staffing a school and providing instruction and services, to properly mirror the lost vacation time the scheduling of Vacation Days should be done with ample lead time for administrators, but with limited bases for denying the requested days. The Union asserts an appropriate balance can

be struck between administrative needs, fairness and transparency if employees are required to submit requests for the use of Vacation Days prior to commencement of each term and administrators were able to deny requests only if they exceeded an agreed upon cap. For example, the Union speculates if 10% of the employees in a school or program (or more than one (1) employee in a school or program with nine (9) or fewer employees) requested a Vacation Day this could be resolved by the existence of such a cap.

The Union also notes by providing a clear and streamlined process for use of the Vacation Days, employees will be encouraged to use the days, thereby reducing the cost of compensating employees for those days as the cost of substitute coverage is typically less than would be required to pay staff based upon a pro rata share of salary. Nonetheless, such Vacation Days should not expire and should be paid out on a one (1) for one (1) basis upon separation from service and to those who separated from service after Spring Recess but before determination of this grievance, urges the Union. In its view, this will also reduce the burden on the Department by spreading out payouts over several years.

Finally, the Union urges, employees whose circumstances resulted in their having used more than the four (4) CAR days allotted in the MOU during Spring Recess should not suffer a net

loss of CAR days because of the scheduling change. Accordingly, any CAR days beyond four (4) used during Spring Recess should be refunded to employee CAR accounts, lest an unfortunate employee who was out sick all of Spring Recess receive no Vacation Days and be out an additional three (3) CAR days beyond those allotted under the MOU.

The Union proposes any disputes under the program be directed on an expedited basis to Scheinman Arbitration and Mediation Services (SAMS).

The Department ("DOE"), on the other hand, submits the grievance should be denied on several bases. As an initial matter, the Department claims there is no contractual entitlement to Spring Recess. Article 6 of the Teachers' CBA specifically defines the work year as:

1. All teachers shall report to their schools to begin work on the Tuesday following Labor Day and will have a professional day on Brooklyn-Queens Day. The Tuesday following Labor Day may be an instructional day. Teachers shall be in attendance on duty thereafter on all days of the school year except for the last two weekdays of the month of June. The official school year calendar shall provide a one week February mid-winter recess which includes Washington's Birthday, without reducing the number of instructional days for students. In no event, however, shall the number of days worked in any school year under this work calendar be fewer than the number of days teachers would have worked had they reported, as before, on the Friday after

Labor Day and worked through the last weekday in June.

2. Emergency Closings

a. The Board of Education ("DOE") and UFT recognize that due to emergency conditions (including, but not limited to snow closings) there may be situations where the DOE may fall short of the minimum number of instructional days required annually by the Education Law.

b. Prior to opening of each school year, the DOE and UFT agree to jointly determine those Vacation Days during designated recess periods which shall be used in the event that there is a need to make up days in order to meet the statutory minimum and the order in which such days would be used.

c. In no event shall the number of make-up days exceed the number needed to meet the minimum required by the Education Law.

The Agreement specifically recognizes and guarantees a February mid-winter recess but is silent with respect to Spring Recess. Moreover, even if there is an entitlement to Spring Recess, the contract recognizes recess periods may be eliminated and used if "there is a need to make up days in order to meet the statutory minimum." Here, based on the Executive Orders and NYSED directive, there was an "emergency" which required the Department to continue instruction during the 2020 Spring Recess to meet the statutory minimum instructional days and avoid losing state funding, insists the Department.

Second, the Department and Union entered an MOU which provided all staff who worked during 2020 Spring Recess would receive four (4) days in their respective accrued leave banks. This additional time not required under the Agreement, maintains the Department, should satisfy any liability or obligation owed to Union members that worked during the 2020 Spring Recess. Although all staff were required to continue working remotely during the 2020 Spring Recess, the Department notes that work was different because a menu of options was provided.

The Department further contends if, however, additional compensation is due to the Union represented workforce for the lost vacation period, the days should be deemed CAR days and paid on a 1:2 basis upon separation from employment.

Moreover, with respect to the use of the days, the Union's remedy request staff have an "automatic right," without any supervisory oversight, to use any "make up" days (*i.e.*, the CAR days previously provided by the Department and if any addition days are provided in the instant matter) should be rejected based on the impact on Department operations. While the Department recognizes the commitment and critical role all staff played in maintaining an instructional program during 2020 Spring Recess, an "automatic right" to a day off (or consecutive days) without supervisory oversight would negatively impact staffing and

services to students. The Department fully expects, absent compelling circumstances, staff should be able to easily utilize the accrued time off to care for themselves, others or to recharge. However, the Department maintains school supervisors should have authority to reject an absence request to ensure appropriate staffing for students' instructional programs and school operations.

Opinion

After having carefully considered the record evidence, and having the parties present arguments and documentary evidence, as well as responding to my inquiries, I make the rulings set forth below. While some of the language has been drafted, initially, by the parties in response to my rulings, in the end the language set forth, herein, is mine alone. I hereby issue the following Award:

There is no dispute employees worked seven (7) days which had been scheduled for vacation for the 2019-2020 school year. When employees perform additional work, they are entitled to additional compensation. This principle is well established even as among these parties. For example, in UI SESIS 1, Arbitrator Siegel ruled the implementation of the special education reporting system known as SESIS required employees to work beyond their regular workday. Accordingly, he found the workday provisions of the CBA were violated when a significant portion of SESIS users worked beyond

their workday. Siegel ordered those employees be compensated at a pro-rata rate for all time spent working on SESIS outside of their regular workday.

In UI C-175, Arbitrator Wittenberg found educators teaching classes for credit outside of the school day must be paid pro-rata rather than per session. In so holding, Wittenberg relied on Chancellor's Regulation C-175, which describes per session work as "comprise[d of] any activity that is not part of, or an extension of, a pedagogic employee's primary job responsibilities." Regular classes held after school were an extension of the teacher's primary job responsibility and compensable at a pro rata rate commensurate with their salary.

This case is analogous. Employees worked additional regular school days. They performed their typical and primary duties during that time, albeit remotely. This work was an extension of their primary job responsibilities. On a practical level, the days were essentially paid Vacation Days during which employees were required to work. Indeed, the Agreement refers to them as "Vacation Days." Article 6 C. The Department's argument employees are not entitled to compensation for extra days worked because the Spring Recess was cancelled as a result of an order from the Governor (with clarification from SED) is unavailing. While employees may be ordered to work additional hours or days during

an emergency, they cannot be ordered to do so without compensation. Furthermore, the parties already indicated something additional was in order when it agreed to the MOU.

While additional CAR days might be a possible resolution of this grievance, I find them inadequate. CAR days are of a different nature than the Vacation Days that were lost. The use of CAR days is limited and does not serve the recognized need for time to disconnect, decompress and restore. Then Chancellor Carranza recognized in his original message to educators, and the Department acknowledged during the hearing, the need for the days off and the impact on educators for having lost them: "We recognize this may feel like a disappointment to many students and schools as we have all been working tirelessly in our transition to remote learning and very reasonably want a break. Many of our educators are parents themselves, and this has been an especially challenging time for them. We hear you and recognize the need... We thank all of our educators for the sacrifices they're making in advancing the health, safety and wellbeing of our city." (UFT Hearing Documents, p 50.)

Thus, appropriate compensation for the additional time worked requires either cash compensation or some restoration of the lost Vacation Days.

Having found compensation is due and additional CAR days would not provide equal value, I need to determine what form the compensation should take. The Union argued in the first instance the proper means of compensation is to pay employees who worked during the Spring Recess 1/200 of their annual salary at the time of payment for each additional day worked. The Department estimates this remedy will cost hundreds of millions of dollars. While I understand the rationale for this approach in light of the ongoing pandemic, the need to continuously respond to changing circumstances and consideration of the potential cost to the Department, I find restoration of the lost, unencumbered paid Vacation Days is the more appropriate remedy for what the employees lost, namely, rest time.

Had I ordered direct compensation to make employees whole for the lost use of the schedule Vacation Days, as the Union contended, it would require the Department to pay all eligible employees for seven (7) full school days. It would also require that those who separated from service on or after April 10, 2020, be paid the same rate. This amounts to a substantial sum and would be burdensome to the system. Moreover, it would not equalize what the employee actually lost, namely, vacation time. At the same time, limiting the remedy to a few additional CAR days, as urged by the Department, would not provide employees with the full value

of what was lost. Arguments regarding what specific work was performed on those days miss the point; employees were required to perform the duties the Department asked of them as part of their jobs. Accordingly, crediting employees with paid Vacation Days that can be used in the future would both limit the cost to the Department (as the cost of substitute coverage is generally lower and any payments after separation would be spread out) and more accurately reflect the loss opportunity to spend time away from work in whatever manner the employee chose when Spring Recess was cancelled.

A paid Vacation Day benefit allowing staff to take off on days school is otherwise in session does not currently exist in the Agreement. Rather, teachers have "Vacation" days during periods of school recess, *i.e.* Spring Recess. Accordingly, certain procedures need be adopted in order to provide credited Vacation Days in a manner which will provide equivalent value to employees at issue. Further, while these employees already received four (4) CAR days pursuant to the MOU, a CAR day is different from a Vacation Day. The use of CAR days is limited to self-treated or medically certified absences (illness) or pre-approved personal business, including the care of a sick family member, that cannot be conducted outside the school day. Employees cannot use CAR days to take a trip, go to the beach, run an errand, or otherwise

spend quality time with family. Unused CAR days are also cashed out at a two (2) for one (1) basis, rather than at the full value of the day.

Accordingly, the Department is ordered to provide paid "Vacation" days for each day a qualifying employee actually worked during the 2019-2020 Spring Recess. No employee shall receive more Vacation Days than they actually worked. For clarification purposes, the CAR days provided under the MOU shall be converted into Vacation Days together with three (3) additional Vacation Days, up to the total number of days actually worked during Spring Recess. Days already utilized as CAR days shall count against the seven (7) Vacation Days being granted.

Pursuant to the program outlined below, the credited days shall be available for use beginning February 1, 2022. Unused Vacation Days shall be paid out on a one (1) for one (1) basis as described, below. I find this program will provide employees with the full value of the lost days while balancing other issues raised by the Department regarding coverage and the ability to fully provide students the education and services they are entitled to receive.

1. Scope and Entitlement:

a. For purposes of the Vacation Day program, an eligible "Employee" shall refer to any Union represented employee who was directed to work during the previously scheduled 2020 Spring Recess and shall not include any employee who works in a title that normally works during the Spring Recess.

b. Employees who were on payroll during the period of April 9, 2020, to April 17, 2020, shall receive one (1) Vacation Day for each day they worked during that period. No employee shall receive more than seven (7) Vacation Days. Employees shall first receive a maximum of three (3) Vacation Days credited to their Vacation Bank and then shall have up to four (4) of their CAR days converted to Vacation Days, subtracting CAR days actually used which were provided pursuant to the MOU. There shall be no minimum CAR balance to allow for the conversion. For example, if an employee worked five (5) of the seven (7) days, the employee would receive three (3) credited Vacation Days and two (2) converted CAR days that would be deducted from their CAR Bank, for a total of five (5) Vacation Days.

c. Employees shall be credited with Vacation Days effective February 1, 2022.

2. Vacation Bank:

a. The Department shall establish a Vacation Bank to which the credited Vacation Days shall be deposited. The Vacation Days/Banks shall be separate and distinct from CAR days/Banks, and Vacation Days shall not count toward maximum CAR accruals.

b. Vacation Days shall not expire. Employees who separate from employment shall be paid for any unused Vacation Days on a one (1) for one (1) basis, at the rate of 1/200 of the annual salary for each unused Vacation Day at the time of separation.

c. There shall be no minimum service requirement for administrative employees who wish to, upon separation from the Department, receive payment for any unused Vacation Days.

d. Employees who separated from service on or after April 10, 2020, shall be paid out for unused Vacation Time without additional application.

e. Vacation Days may be used as CAR days only after all CAR days have been exhausted and when the Employee explicitly requests a Vacation Day be used for this purpose.

3. Vacation Day Use:

a. Employees may take any unused Vacation Days individually, consecutively, and/or on any workday.

b. No Employee shall be subject to discipline for the use of Vacation Days.

c. Vacation Day Scheduling/Compelling Reason Denial:
Employees shall provide notice of scheduling of Vacation Days as soon as possible but no later than ten (10) school days prior to the requested date. Vacation Day(s) requests ordinarily are to be granted. However, if the Supervisor determines there is a compelling reason to deny the Vacation Day(s), the Supervisor shall notify the employee in writing, the Union and central Department no later than forty eight (48) hours after the employee request describing the compelling reason for the denial. Central DOE then shall consult with a Union designee within forty eight (48) hours of the compelling reason denial. If the Union does not agree a compelling reason exists, either the Vacation Day(s) shall be scheduled or the Union may submit the dispute to Scheinman Arbitration and Mediation Services (SAMS) for expedited resolution. SAMS shall convene a hearing as soon as possible (which may be virtual), but no later than three (3) days after the submission is received. SAMS shall issue a determination of the dispute within twenty four (24) hours. The parties shall share in

the costs of these services. Any other disputes arising under this program shall be determined by SAMS. These hearings may be virtual and the parties shall share the costs of these services.

To minimize the need for dispute resolution, I state the following:

- Should the compelling reason for not scheduling be the number of notifications that are made for a given day, a reasonable number of those employees will be scheduled, based on seniority.
- When there is a small number of employees in a given title or license, the lack of colleagues in that title or license shall not necessarily be considered a compelling reason for not scheduling. For example, if there is one (1) Physics teacher in a school, the lack of another Physics teacher in and of itself is not a compelling reason for not scheduling. However, the existence of a single teacher in that title or license may be relevant as to the timing of the Vacation Day(s) the employee seeks to take.
- The proximity of a Vacation Day to a holiday or recess that is already on the DOE Calendar ordinarily shall not be considered a compelling reason for

