

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 SHEBOYGAN COUNTY :  
 (HIGHWAY DEPARTMENT) :  
 :  
 and : Case 123  
 : No. 43760  
 : MA-6066  
 SHEBOYGAN COUNTY HIGHWAY DEPARTMENT :  
 EMPLOYEES, LOCAL 1749, :  
 AFSCME, AFL-CIO :  
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Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME,  
Mr. John E. Boren, Personnel Director for Sheboygan County, on behalf of

AFL-CIO  
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ARBITRATION AWARD

According to the terms of the 1987-89 collective bargaining agreement between Sheboygan County (hereafter the County) and Sheboygan County Highway Department Employees, Local 1749, AFSCME, AFL-CIO (hereafter the Union) the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the County's having failed to call in employe Dennis Raeder from vacation for overtime work available on his State Patrol beat on December 29 and December 30, 1989. The undersigned was designated arbitrator and made full disclosures in writing to which no objections were raised. Hearing was held at Sheboygan, Wisconsin on May 9, 1990 and no stenographic transcript of the proceedings was taken. The parties filed their written briefs by June 8, 1990 and they were exchanged thereafter by the undersigned. The parties waived the right to file reply briefs herein.

ISSUE:

The parties were unable to stipulate to the issue or issues herein but they agreed to allow the undersigned to frame the issue(s). Based upon all of the relevant evidence herein, and the parties' arguments thereon, I find and conclude that the issues shall be as follows:

- 1) Did the County violate the collective bargaining agreement or past practice when it did not call Dennis Raeder into work for overtime available on his State Patrol beat on Friday, December 29 and Saturday, December 30, 1989 because Raeder had taken vacation time off on December 26 through December 28, 1989?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

There is no provision of the contract which directly addresses itself to the specific issues in this case. The following provisions, however, are relevant here:

XII

TIME AND ONE-HALF

All authorized overtime services worked in excess of eight (8) hours per day or forty (40) hours per week or on Saturday or Sunday shall be paid for at the rate of one and one-half (1 1/2) times the employee's regular hourly rate of pay.

All authorized work performed on a holiday recognized in this agreement (in addition to holiday pay therefor) shall be paid at the rate of two (2) times the employee's regular hourly rate of pay.

If time is lost during the regular work week for unexcused absences, then overtime pay shall not be made until forty (40) hours is exceeded.

Whenever overtime work is required it must first have been approved by the employee's immediate supervisor.

XXI

HOLIDAYS

All employees except as herein provided shall be granted eleven and one half (11 1/2) paid holidays each year. They are as follows:

HOLIDAY	1987	1988	1989
New Years Day	Thurs., Jan. 1	Fri., Jan. 1	Sun., Jan. 1
Good Friday Afternoon	Fri., April 17	Fri., April 1	Fri., April 14
Memorial Day	Mon., May 25	Mon., May 30	Mon., May 26
Independence Day	Sat., July 4	Mon., July 4	Tues., July 4
Labor Day	Mon., Sept. 7	Mon., Sept. 5	Mon., Sept. 4
Thanksgiving Day	Thurs., Nov. 26	Thurs., Nov. 24	Thurs., Nov. 23
Day After Thanksgiving	Fri., Nov. 27	Fri., Nov. 25	Fri., Nov. 24
Christmas Eve Day	Thurs., Dec. 24	Sat., Dec. 24	Sun., Dec. 24
Christmas Day	Fri., Dec. 25	Sun., Dec. 25	Mon., Dec. 25
New Years Eve Day	Thurs., Dec. 31	Sat., Dec. 31	Sun., Dec. 31
Floating Holiday			
Floating Holiday			

If the holiday falls on a Sunday, the following Monday shall be observed as the holiday. If a holiday falls on a Saturday, the Friday before shall be observed as the holiday.

XXII

VACATIONS

All permanent employees shall be entitled to a vacation. Each employee shall earn annual vacations in the following manner:

- Two (2) weeks (10 working days) -After one (1) year of continuous service.
- Three (3) weeks (15 working days) -After five (5) years of continuous service.
- Four (4) weeks (20 working days) - After ten (10) years of continuous service.
- Five (5) weeks (25 working days) -After eighteen (18) years of continuous service.

(A week shall be defined as forty (40) hours, and a day shall be defined as eight (8) hours.)

- h. Vacation on Holiday: In the event that a holiday falls on a regular work day within the week or weeks taken, such holiday shall not be charged as vacation. For any day on which work is suspended, such suspension shall not be construed to extend any vacation to an employee in such status at the time.

XXX

GRIEVANCE PROCEDURE

Any dispute between the Union and the County or between any employee and the County concerning the effect, interpretation, application or claim of breach or violation of this Agreement shall be termed a "grievance". . . .

BACKGROUND:

The Grievant, Dennis Raeder, has been employed by the County in its Highway Department since May of 1970. In 1987, based on his seniority, Raeder bid into and won the job of State Patrolman for Section #3 out of the Elkhart Lake Shed, then being vacated by a retiring employe. Section #3 consists of portions of State Highways 67 and 57 from the North County line to Plymouth and (in the Summer), State Highway 32 from the North County line to County Highway MM.

In general, a State Patrolman's job is to keep the State highways in his/her Section (or beat) groomed, maintained and safe for travel at all times. A State Patrolman's duties are to grade shoulders, patch roadway holes, pick up trash and junk along the beat, fix signs, clean up after accidents and, in the Winter, plow snow, sand and salt on beat highways as necessary.

Sheboygan County maintains six Highway Department Sheds and 16 employes work out of each Shed; of those 16 employes, usually two employes are State Patrolmen and the remainder are County road employes.

The evidence here demonstrated that the Highway Department employes who

normally work on County roads do not ordinarily get called in to work overtime on State Highways. Normally, County road employes are called in by the Shed supervisors on a seniority basis and, additionally, the County attempts to equalize the available overtime among all County road employes. In contrast, State Patrolmen are normally called in by Highway Superintendents Taddler or Schorer for overtime work on their beats. Superintendents Taddler and Schorer decide whether a particular winter storm should be classified as a "snow emergency".

It is also generally true that if a State Patrolman is absent on a day when work on his beat must be covered, the County normally assigns another employe working out of the same Shed as the absent Patrolman. It is unusual for the County to assign an employe from a different Shed to perform work on an absent State Patrolmen's beat, although if the State Patrolman is sick, on vacation or on a floating holiday, the County can and has assigned other County road employes or State Patrolmen to cover the State Patrolman's beat. The County may assign a State Patrolman to a different State beat while another County road employe or State Patrolman performs work on the transferred Patrolman's beat. This is rarely done. It is also true that as a general rule, the County will call in all employes -- even employes who are on vacation -- in a snow emergency. In a snow emergency, State Patrolmen usually work their own beats because they are most familiar with those beats although the County could assign them elsewhere. Finally, although State Patrolmen are ordinarily assigned to work with specific trucks and equipment, they have no recognized right to use any particular equipment in an emergency and equipment may then be reassigned as necessary.

Finally, the record demonstrated that State Patrolman Robert Koepke was called to work on December 29 although he was on vacation that day. This was done, according to Koepke's Shed Supervisor, Torke, because Torke was then short-handed at the Shed. Also, State Patrolman Richard Schipper was also on vacation on December 29 and he was not called into work that day or on December 30. Schipper had previously told his Shed Supervisor that he did not wish to be called to work overtime during his December vacation period.

FACTS OF THE INSTANT GRIEVANCE:

The facts underlying this case are essentially undisputed. December 21, 1989 1/ was a regular work day for the Grievant and he worked it. December 22nd was a paid holiday and Raeder was not called in and did not work (nor did any Department employes), On the Christmas Holiday, December 25th, Raeder was called to work and he performed plowing and salting on his beat. Raeder had vacation selected and he took it on December 26 through December 28.

Prior to the start of his vacation, Raeder spoke to Superintendent Taddler and told him that he (Raeder) was not going out of town and that he could be called for overtime if needed. Friday, December 29, 1989 was a paid holiday, and employe Richardson, out of the Plymouth Shed, performed overtime work on Raeder's beat for a total of 15.25 hours. Richardson also performed overtime work on Raeder's beat on December 30, 1989 for a total of 11.5 hours (at time and one-half).

On December 29th, Raeder called the Elkhart Lake Shed and spoke to Don Bender (grader operator). Raeder asked Bender if he (Raeder) would be needed to work that day. Bender (not a supervisor) replied that Schorer had told Bender that the County was going to use State trucks on county roads that day and that Raeder would not be needed. Raeder did not speak to any supervisors with authority to deal with his complaints/inquiries on December 29th.

On December 30 at about noon, Raeder stopped at the Elkhart Lake Shed and spoke to Superintendent Schorer. Raeder asked Schorer why he (Raeder) had not been called in to perform available overtime on his beat on December 29 and 30.

Schorer responded that he didn't know why. Raeder asked Schorer whether the County had taken away his State beat and Schorer responded that he did not think so. Raeder then had a conversation with Taddler wherein he asked Taddler essentially the same questions he had asked of Schorer. Taddler responded that he thought Raeder was on vacation on those days. Raeder responded that his vacation had ended at 3:30 p.m. on Thursday, December 28 and that he (Raeder) was entitled to and should have been called to work on both the Holiday, December 29th and the weekend day, December 30th.

It should be noted that neither December 29 nor 30 were declared snow emergency days by Superintendent Taddler and Schorer, and, therefore, less than all Department employes were called in on those days. Notably, all State Patrolmen were called in on these days with the exception of the Grievant and employe Richard Schipper who was on vacation. On December 29th, it snowed early on, leaving a four inch accumulation, but it was windy all day which caused the snow to blow and drift.

EVIDENCE REGARDING THE DISPUTED PAST PRACTICE

Eleven witnesses testified during the course of the hearing in the instant case. Their testimony regarding the assertion of an effective past practice which controls (or fails to control) this case can be summarized as follows:

1) Grievant Raeder: State Patrolman Since 1987.

a) A vacation is over at 3:30 p.m. on the last weekday taken as vacation so that any overtime work on his beat occurring after 3:30 p.m. on December 28, 1989 should have been assigned to Raeder;

b) State Patrolmen are always called to perform overtime on their beats;

c) Employes may notify their Shed foreman that they will be available during their vacation should overtime work be necessary;

d) Employes going on vacation may also tell their Shed supervisor that they do not wish to be called in to work overtime during their vacation and the supervisors will honor those requests unless there is a snow emergency and all employes must be called in.

2) Jerome Thiel: Union President and once a State Patrolman for the County:

a) Corroborated Raeder at parts 1 b), c) and d), above;

b) If an accident occurs on a State beat in the Summer, the

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1/ All dates hereafter are in 1989 unless otherwise stated.

State Patrolman is normally called in not because he is the beat man or because of his seniority but because he is usually the closest person to the accident scene.

3) Richard Schipper: Currently a State Patrolman.

a) That Schipper has notified his Shed foreman that he does not wish to be called in off Winter vacation and he has not been called in.

4) Ken Hintz: Formerly Shed supervisor of Elkhart Lake Shed prior to his March, 1989 retirement - never worked as a State Patrolman for County.

a) Corroborated Raeder at parts 1 c) and 1 d);

b) On a paid holiday, if overtime is available on a State Beat, the State Patrolman on that beat is called in.

5) Arnie Taddler: Currently County Patrol Superintendent.

a) Taddler considers weekend days after vacation to be included in an employe's vacation time and he would only have called Raeder in on December 29 and 30 if there had been a snow emergency on those days requiring all employes to work.

6) Harold Stolper: Currently Plymouth Shed Supervisor - never worked as a State Patrolman for the County.

a) Corroborated Taddler at part 5 a);

b) Corroborated Hintz at part 4 b) regarding call-ins on paid holidays but added that he would not call in a man off a floating holiday.

7) Wayne Schorer: County Patrol Superintendent (with Taddler).

a) If an employe is on vacation, Schorer would not call him in unless he needed everyone to work (in an emergency).

8) Gerald Thiel: Northside Shed Supervisor.

a) Corroborated Schorer at part 7 a);

b) Thiel does not classify weekends as a part of vacation and believes that an employe's vacation ends on Friday (or the last work day of vacation) at 3:30 p.m.;

c) Corroborated Raeder at 1 d) indicating he does not call in employes who have stated they do not want to be called in on a weekend.

9) Douglas Torke: "8L" Shed Supervisor, was a State Patrolman for the County.

a) Only in an "extreme" emergency or if the Shed is short-handed would he call in an employe on vacation - and in a snow emergency he may not even call in a vacationing employe;

b) Torke agreed that weekends should be considered a part of a vacation.

10) Dale Moreau: Shed Supervisor for Section 2 - never worked as a State Patrolman for County.

a) Corroborated Torke at part 9 a);

b) He would only call in an employe who is on a floating holiday in an extreme emergency.

11) Roger Laning: Highway Commissioner for past 10.5 years.

a) If an employe is on vacation, the County honors this and calls in an employe on vacation only when the County cannot get anyone else to do the work.

POSITIONS OF THE PARTIES:

Union:

The Union argued that the County should have called Grievant Raeder to work 15.25 hours (at double time) on the Holiday, December 29th and 11.5 hours (at time and one-half) on December 30th on his state beat, based upon past practice. The Union claimed that this past practice required that State Patrolmen be called in, whether or not they are on vacation, for any overtime work available on their assigned State beats; and that a part of this practice provides that the employe can indicate to his supervisor, before leaving on vacation, whether or not he will be available to work overtime during his scheduled vacation.

Further, and in any event, the Union asserted that Raeder was no longer on vacation as of 3:30 p.m. on December 28th and he should have been offered the overtime on his beat which arose thereafter on December 29 and 30th. The Union asserted that even if Raeder is found to have been on his vacation as of December 29 and 30, Raeder followed the effective past practice of expressing his availability and he should, therefore, have been called to work on both December 29 and 30th.

The Union asked what difference there could be between the facts surrounding the instant grievance and the fact that the County did not hesitate to call in Raeder on December 25, when his last regular day of work had been December 21st. The Union asserted that given the number of people who worked on the December 29th holiday, the County must have considered it an emergency situation at least as serious as the December 25th situation. Finally, the Union asserted in some detail that both its employe witnesses and the Employer's witnesses affirmed the past practice, as the Union described it. The Union therefore urged that the grievance be sustained in its entirety.

County:

The County asserted that no provision of the agreement has been violated in this case and that the Union has never seriously claimed that such a contractual violation has occurred.

The County also asserted that the Union has failed to prove that a clear and mutually accepted past practice exists and has been violated here. In this regard, the County noted that both Raeder and employe Richard Schipper admitted that the County can transfer them off their State beats to another section or beat to fill in for someone who is on vacation, holiday and/or sick leave and that other County employes could then be assigned a State beat. Thus, the County contended that the Union failed to show that State Patrolmen have an exclusive right to perform certain work or to use certain equipment in County employment. The County asserted that Union President Thiel also admitted that employes have generally been called in from their vacations only in emergency situations, and, the County contended that since no snow emergency existed on December 29 and 30, the County acted properly and followed its normal procedure by calling in employes not on vacation on those days. The County pointed out that evidence showing that vacationing employe Richard Schipper was not called in off vacation on December 29 and 30 merely supports the County's case, not the Union's. Finally, the County asserted, the Employer's supervisors testified without deviation in support of the propriety of the County's actions here. Therefore, the County urged that the grievance be denied and dismissed.

DISCUSSION:

The contract here is silent on the particular point in issue in this case. In the absence of contract language on a point, it is a generally accepted arbitral principle that an arbitrator may apply a clear, long-standing and mutually agreeable past practice to essentially fill in the blanks in the agreement.

The evidence, above summarized, indicates that there is no clear-cut County past practice of calling in employes who declare their availability to work overtime during their vacation time off, as the Union has claimed. On the contrary, it appears to be the Highway Commissioner's policy to honor employes' vacations unless there is an emergency necessitating that all employes be called in to work. This policy was confirmed by every Highway Department Supervisor 2/ who testified (with the exception of Kenneth Hintz, the Grievant's former Shed Supervisor who retired in March, 1990). In addition, it is clear that the County has had a practice whereby if an employe told his supervisor that he did not wish to be called to work during his vacation, the supervisor would only call in the vacationing employe in an emergency. 3/

The remainder of the evidence in this case is conflicting and contradictory. As such, this evidence cannot form the basis for any applicable past practice by the very definition of such a practice. For example, the Grievant, Union President Thiel, former Shed Supervisor Hintz and employe Schipper stated that State Patrolmen are asked to work all of the overtime on their beats. This evidence was specifically contradicted by every other witness who testified. In addition, the Grievant, Union President Thiel and former Shed Supervisor Hintz testified to the existence of a "practice" whereby employes going on vacation could state their availability to work during their vacation to their supervisor and thereafter expect to be called in for any available overtime, and whereby State Patrolmen, even if on vacation, would always be called upon to perform any overtime work on their individual beats. Contrary to this testimony was the testimony of several witnesses, including the Grievant, who stated that they had replaced State Patrolmen on their beats over the years who were on sick leave or vacation and that they had also performed work on different State beats while other County employes performed work on their individual State beats.

In light of this conflicting evidence, I conclude that the Union has failed to prove its assertion that the Grievant should have been called in for overtime work on December 29 and 30, 1989 in violation of any clear, mutually understood and long-standing past practice. 4/

The question then arises, whether the Grievant should have been called in

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- 2/ The Union mischaracterized the thrust and content of Supervisor Moreau's testimony in its brief herein.
  - 3/ This addition to the practice was confirmed by employe Schipper, Union President Thiel and Shed Supervisors Hintz, Stolper and G. Thiel.
  - 4/ The Union contended that Shed Supervisor Torke's act of calling in State Patrolman Robert Koepke off his vacation on December 29th supported its case. I disagree. Torke made clear that he (Torke) would not have called Koepke in off vacation but for the fact that Torke's Shed was short-handed and Torke could not avoid calling in Koepke.

to work overtime on December 29 or 30 based upon any provision of the agreement. Article XXII, Vacations, defines vacation in terms of weeks off which equal a certain number of "working days" off in each instance. Article XXII also states:

. . . (A week shall be defined as forty (40) hours, and a day shall be defined as eight (8) hours.) . . .

In my view, this language supports the testimony of the Grievant (corroborated by Union President Thiel and Shed Supervisor Thiel) that an employe's vacation ends at the end of his eight hour shift (undisputedly at 3:30 p.m.) on the last day of his vacation. In addition, there is no other provision of the agreement which provides for any different measurement of a vacation day. Furthermore, there is no clear past practice indicating that an employe on vacation until 3:30 p.m. on a particular day cannot be called for overtime after 3:30 p.m. on the last day of his/her vacation. In this regard, I note that Supervisors Hintz and Stolper specifically contradicted and denied the validity of Superintendent Taddler's statement that weekends must be considered part of an employe's vacation. Significantly, the Union presented evidence herein to show that weekend days or holidays falling before an employe's scheduled vacation are not considered part of that vacation for purposes of overtime. This evidence tends to undercut the County's asserted policy of honoring vacations except in an emergency situation. Indeed, County supervisory employes G. Thiel and Kenneth Hintz stated that since December 29, 1989 was a (contractual) holiday, the Grievant should have been called in to work on that day in any case. I note, in addition, that nothing in the agreement either addresses or prohibits calling in employes for overtime who had been on vacation immediately prior to the holiday. 5/ Finally, I note that many of the County's supervisory employes who testified affirmed that the County generally prefers to utilize the State Patrolmen on their own beats (no matter what the season) because they are most familiar with those beats.

Given the facts of this case as well as the above-quoted language of Article XXII, it is reasonable to conclude that a weekend day which is adjacent to or tied to vacation should not be considered a vacation day. Rather, such a weekend day should be treated as a normal off day, whether or not it is tied to vacation time off. Thus, the facts of this case demonstrate that on normal off days, all the Employer needs to do is attempt to reach employes at their homes to offer them overtime work and if an employe is not home or does not wish to work overtime (in non-emergency situations) the employe apparently need not accept the overtime work offered. In the instant case, I note particularly that the Grievant made it clear to management before he went on vacation that he would be available to work if overtime arose. Thus, in all of these circumstances, I conclude that the County should have offered the Grievant the overtime work on his beat which was available on the holiday, Friday, December 29th.

At this point, the question arises whether the County was obliged to offer the Grievant overtime work available on his beat on Saturday, December 30th. On this point, the County asserted that there is a consistent past practice extant whereby the County has always considered the weekend days after an employe's vacation to be a part of that vacation. Yet, I note, that the County's own supervisory employes did not agree on this point. Thus, I cannot find that such a past practice exists, as the County claimed. In addition, as discussed above, I have interpreted Article XXII, Vacations to define the vacation day and week to generally exclude weekends as well as the time after 3:30 p.m. on the last day of an employe's vacation. In these circumstances, I conclude that the County should have also offered the Grievant the overtime work available on his beat on December 30, 1989.

Based upon all of the relevant evidence and arguments herein and my analysis thereof, I conclude that the County has violated the agreement and I must sustain the grievance and order the County to pay the Grievant for the overtime he was available to perform and which he should have been offered on December 29 and 30, 1989.

#### AWARD

The County violated the collective bargaining agreement when it did not call Dennis Raeder into work for overtime available on his State Patrol beat on Friday, December 29 and Saturday, December 30, 1989.

The County shall immediately make Dennis Raeder whole for the pay he should have received for work that was available on his beat on those days (15.25 hours at double time and 11.5 hours at the time and one-half rate).

Dated at Madison, Wisconsin this 10th day of August, 1990.

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5/ I note that Article XXII (h) appears to indicate that an employe cannot be considered to be on vacation when a holiday falls on a work day during the employe's vacation week. This further supports the Union's assertion here.



By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator