

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 OUTAGAMIE COUNTY PROFESSIONAL POLICE : Case 192
 ASSOCIATION : No. 44604
 : MA-6359
 and :
 :
 OUTAGAMIE COUNTY :
 :

Appearances:

Mr. Frederick J. Mohr, Attorney, appearing on behalf of the Association.
Davis & Kuelthau, S.C., by Mr. Lon D. Moeller, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and the Association above are parties to a 1988-89 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the Association's grievance concerning overtime for tactical squad members.

The undersigned was appointed and held a hearing on November 29, 1990 in Appleton, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on December 27, 1990.

STIPULATED ISSUES:

1. Was the County's payment for spearfishing duty not in accordance with Sheriff Drootsan's letter of March 27, 1990?
2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE VII - GRIEVANCE PROCEDURE

7.02 - Only matters involving the interpretation, application or enforcement of this Agreement which may arise between the County and employee (employees) or the County and the Association shall constitute a grievance and shall be processed in the following manner by the aggrieved employee or the Association Board of Directors Individual grievances shall be signed by the aggrieved party. Association grievances shall be signed by the Association Grievance Committee. The written grievance shall include a listing of the section violated, the details of the violation and the remedy requested. If these items are not listed, the grievance will be returned for the items to be included.

. . .

Step 4. The Grievance shall be considered settled in Step 3, unless the Association notifies the personnel Director in writing within five (5) days of receipt of the written determination of the Personnel Director or last date due, of its intent to appeal the matter to arbitration. At the same time, the Association shall request the WERC to submit a panel of five (5) arbitrators to the parties. The parties shall alternately strike names from the panel until one remains, who shall be appointed the arbitrator. The Association shall make the first strike. The decision of the arbitrator shall be final and binding on the parties and the arbitrator shall be requested to issue a decision in writing within thirty (30) days of the conclusion of the testimony and argument. In rendering his decision, the arbitrator shall neither add to, detract from nor modify any of the provisions of the Agreement.

FACTS:

The facts are not substantively disputed. The parties stipulated to the following:

1. The 1990-91 collective bargaining agreement has been settled, and has not changed any applicable language from the prior agreement submitted as an exhibit in this proceeding.
2. Sheriff Drootsan's letter, entered in the record as Jt. Exhibit 6, constitutes a side agreement to the collective bargaining agreement, and governs the terms and conditions of spearfishing work in 1990.
3. In 1988 the County paid 20 hours pay per day to employes involved in spearfishing (8 hours straight time and 8 hours overtime) without regard to how many hours were actually worked. The Union filed a grievance claiming 24 hours pay for each day. (i.e. 32 hours at straight time -8 hours straight, 16 hours at overtime rate.) This grievance was settled during contract negotiations on the basis of 8 hours at straight time and 8 hours at overtime rate.
4. In 1989 the parties met and agreed that 8 hours at straight time plus 8 hours at overtime rate would be paid. In 1988, 89 and 90 the "8 + 8" was treated as a minimum guarantee and any employe who worked more than 16 actual hours in a day was paid at overtime rate for the additional hours.

Like a number of other Wisconsin counties, the County sends annually a team of officers to assist in controlling potential disputes at spearfishing sites in other counties. In 1988, 89 and 1990 the County has sent a tactical team for this purpose, which has required officers to spend a number of days sequentially away from home, potentially working substantial amounts of overtime. The County is reimbursed for the expense involved by the State of Wisconsin.

In the spring of 1990, a meeting was held in the Department between Sheriff Drootsan, Attorney Mohr, and other County and Association representatives. At this meeting Drootsan informed the Association that he anticipated again sending a tactical squad, and that he had been told by other Sheriffs that the State would not pay more than 8 hours at straight time plus 8 hours at overtime rate, per day that a deputy was assigned to the spearfishing team. It is undisputed that Drootsan indicated that he expected to attend a meeting of State and other sheriff's departments' officials, at which the State would identify what it would pay, and that Mohr asked Drootsan to get more money if he could. It is also undisputed that no final agreement as to terms of the work was reached at this meeting. Drootsan testified, however, that he expected the rate payable to be the same as it had been in the two prior years.

Drootsan subsequently went to the State's meeting, and was told that the State would not pay more than the "8 + 8." Drootsan thereafter sent a letter to the Association specifying in pertinent part:

. . . .

I would like hearing from you soon with regard to our tactical members assigned to spearfishing, which is only a few weeks away. I attended a meeting in Stevens Point yesterday and the following matters were agreed upon.

The officers assigned would receive eight (8) hours of straight time and eight (8) hours of time and one-half or additional time and one-half for hours worked beyond eight (8) hours at overtime. Meals will be provided for the officers at no additional cost. It is my intentions that the officers assigned to the spearfishing efforts would be there for a period of seven to ten (7-10) days. The officers who are assigned to duties in our area and are covering for the tactical team members would be working twelve (12) hours on and (12) hours off with pay to coincide with the union contract.

I would appreciate, Fred, to hear from you soon so I can make my plans if our tactical team is going to be responding to the north. I would like a very clear,

concise answer to avoid any unanticipated labor contract conflicts. If we can't come to an agreement, I will only be sending a few staff people.

May I extend to you my best wishes and hope we can continue to work together constructively with all matters of mutual concern. Should you have any questions, please don't hesitate to call on me.

This letter was sent directly to Mohr and dated March 27, 1990. A copy was forwarded to Union President Jane Danforth. The employes involved in the tactical squad were deployed to spearfishing sites from April 17 to April 30, 1990. On the morning they left, Drootsan held a meeting with them and told them that the compensation arrangement was "8 + 8" and asked if there were any questions. No questions, according to Drootsan, were asked. Drootsan testified that two union officials, Sergeants Spaeth and Meitner, were on the tactical team.

Spaeth testified that his understanding from the meeting held prior to the spearfishing season was that employes would be paid similarly to prior years. Spaeth testified that when he saw the Sheriff's letter, he concluded that it meant 8 hours pay for being assigned up at the spearfishing barracks, 8 hours at time and one half for being at a spearfishing landing, and additional time and one half for any time over 8 hours actually worked. By Spaeth's calculation, he testified, a 9 and one half hour working day would generate a 20 hour guarantee of pay plus time and one half for the additional one and one half worked beyond eight, thus generating the equivalent of 22 and 1/4 hours at straight time. Spaeth testified that some other employes read the letter the same way. Union President Jane Danforth testified that she received telephone calls from employes at the spearfishing landings saying that the employes were being told they would get paid 8 + 8. She told them that Drootsan's letter specified different terms than that, and the Association subsequently filed the present grievance. Drootsan, however, testified that in his opinion the language used in his letter to Mohr did not identify any change in the County's past practice of payment for spearfishing duty.

THE ASSOCIATION'S POSITION:

The Association contends that the Sheriff's March 27, 1990 letter constitutes a side agreement to the collective bargaining agreement, and that the language of that letter clearly shows that "additional time and one half shall be paid for hours worked beyond 8 hours at overtime." The Association contends that this language unambiguously supports its position that overtime rates are payable for all hours beyond 8 which are worked at the spearfishing landings. The Association argues that whether or not the Sheriff intended the language to be thus interpreted is irrelevant in view of the fact that his letter, not his intent, was the basis for the agreed-upon rates. The Association notes also that ambiguous contracts are normally construed most strongly against the maker or drafter. The Association further argues that the Arbitrator cannot substitute his interpretation for the plain meaning of the contract, and that the plain meaning of the contract as amended by the March 27 letter was that overtime is payable beyond 8 hours' work. The Association further notes that the contrary information given by Captain Barrington to tactical squad members who were about to be assigned to spearfishing duties was given without Barrington having seen the Sheriff's letter.

The Association requests that the Arbitrator order payment at overtime rate for all hours worked in excess of 8 hours during spearfishing season by tactical team members.

THE COUNTY'S POSITION:

The County contends that the Association has known all along that the basis for the tactical team's payment was the reimbursement received by the County from the State, and that its practice in 1990 did not vary from the prior years. The County notes that at the meeting held with Attorney Mohr and other Association representatives, Mohr's request was that the Sheriff attempt to get more money from the state, but Mohr did not explicitly refuse to have employes work at the prior rates. The County argues that the Sheriff subsequently advised Association representatives among other tactical team members that "8 + 8" was the basis for the payment, and argues that the Sheriff's letter merely confirms this. The County argues that if there is any ambiguity in the Sheriff's letter, it must be resolved in favor of the County's position, because of the consistent manner in which the tactical team had been paid for this work. The County contends that Mohr failed to raise any objections to the letter, even though invited to do so in the three weeks between the letter's date and the assignments of the work involved. The County thus argues that this constitutes a knowing acquiescence in the established basis on which the tactical team had previously been paid. The County requests that the grievance be denied.

DISCUSSION:

As the parties have stipulated that Jt. Exhibit 6, the letter from

Sheriff Drootsan to Mohr dated March 27, 1990, constitutes a side agreement to the collective bargaining agreement, I must find that the terms of this letter would control the outcome of this case even if, read fairly, the letter varied the prior terms under which deputies had been employed.

I do not, however, find that the bare language of the March 27 letter supports the Association's position. The sentence which controls this matter is "The officers assigned would receive 8 hours of straight time and 8 hours of time and one half or additional time and one half for hours worked beyond 8 hours at overtime." Breaking it down, this sentence first specifies that 8 hours at 8 hours at straight time is payable. This is undisputed. The sentence then provides that 8 hours of time and one half or additional time and one half ... is to be provided. But the sentence does not say "...or additional time and one half for hours worked beyond 8 hours." Instead, the sentence adds the words "at overtime." The apparent meaning of the latter half of the sentence, therefore, is that additional time and one half is payable for hours worked beyond 8 hours at overtime. In other words, the additional time and one half, beyond the first 8 hours at that rate, is payable only for hours worked beyond 8 overtime hours. Since the prior practice of the parties is agreed to be payment of additional overtime rate for hours worked beyond 16 in a day, the prior practice of the parties is identical to the common labor relations use of the term "hours at overtime," which is that such hours have been worked in addition to hours previously worked at straight time. Nowhere in the collective bargaining agreement, in the parties' prior practice, or most importantly in the March 27 letter is there any reference to the straight time hours paid for spearfishing duty being paid for not working. Thus, the additional time and one half for hours worked beyond 8 hours at overtime is most plausibly construed as meaning hours actually worked beyond 8 hours actually worked at overtime, which in turn is beyond 8 hours actually worked at straight time. I therefore conclude that there is nothing in the March 27 letter that extends any further benefit to employees beyond the 20 hours' pay guarantee referred to orally by Drootsan at the meetings and previously paid by the Department. Accordingly, as the March 27 letter clearly controls the terms and conditions of spearfishing duty, the County has not violated the terms of that agreement by refusing to pay additional overtime pay for hours actually worked that total under 16 hours per day.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the County's payment for spearfishing duty was in accordance with Sheriff Drootsan's letter of March 27, 1990.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 13th day of March, 1991.

By _____
Christopher Honeyman, Arbitrator