

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MARATHON COUNTY (SHERIFF'S DEPARTMENT) : Case 199
 : No. 46101
 and : MA-6866
 :
 MARATHON COUNTY DEPUTY SHERIFF'S :
 ASSOCIATION :
 :

Appearances:

Ruder, Ware & Michler, S.C., by Mr. Dean R. Dietrich, Post Office Box 8050, 500 Third Street, Wausau, Wisconsin 54402-8050, appearing on behalf of the County.
 Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Richard Thal, 20 North Car

ARBITRATION AWARD

Marathon County (Sheriff's Department), hereinafter referred to as the County, and Marathon County Deputy Sheriff's Association, hereinafter referred to as the Union, are parties to a collective bargaining agreement, April 2, 1991 through December 31, 1991, which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over Holiday pay. Hearing on the matter was held in Wausau, Wisconsin on August 16, 1991. Post-hearing arguments and reply briefs were received by October 8, 1991. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed to leave framing of the issue to the Undersigned. The Undersigned frames the issue as follows:

"Did the County violate Article 21 of the collective bargaining agreement when it failed to grant employes compensatory time for holidays that fall during an employe's vacation period?"

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISION

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ARTICLE 20 - HOLIDAYS

Deputies who have been continuously employed by the County for a period of six (6) months or more shall receive one day compensation at their normal rate of pay for holidays. Deputies who work on a listed holiday shall receive an additional one-half (1/2) day credit for compensatory time off or pay. Holidays shall include the following:

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|------------------|------------------|
| New Years Day | Thanksgiving Day |
| Easter | December 24th |
| Memorial Day | Christmas Day |
| Independence Day | December 31st |
| Labor Day | Good Friday |

Holiday compensatory time shall be given Deputies as jointly determined by the individual Deputies and the Sheriff. Holidays set forth in this section shall accrue on the above dates and any Deputy receiving the benefit of such holiday before it accrues and subsequently terminates the employee's employment with the County agrees to have the County deduct from the employee's final paycheck the value of such holiday or holidays received.

ARTICLE 21 - VACATIONS

A. Length: Each Deputy shall receive an earned vacation leave, based upon seniority, with pay, as follows:

| | |
|--------------------------------------|-----------|
| After one (1) year of service | - 2 weeks |
| After eight (8) years of service | - 3 weeks |
| After fourteen (14) years of service | - 4 weeks |
| After nineteen (19) years of service | - 5 weeks |

Vacations shall be based upon the calendar year and all new Deputies who have completed their probation shall be granted vacation on a pro rata basis. No partial days vacation shall be granted to any Deputy as the minimum vacation period is one (1) day.

One (1) week vacation shall consist of the number of days of a scheduled work week. Holidays and off days shall not be considered as part of vacation. Should they occur during a Deputy's vacation, the employee will be granted credit for the same based upon compensatory time off as jointly determined by the Deputy and the Sheriff.

B. Scheduling: The number of Deputies on vacation at any period shall be determined by the Sheriff. The choice of vacation time shall be made on the basis of seniority within each division, bureau, detail or crew, except that the selection by any Deputy of a vacation

period of a duration of one full week, two full weeks, etc., shall take precedence over a selection by another Deputy of a period of less than one full week.

C. Carry Over: No Deputy shall be allowed to carry unused vacation into the succeeding year unless permission to do so is granted in the sole discretion of the Sheriff or the County Personnel Committee.

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BACKGROUND

The County and the Union have been parties to a number of successive collective bargaining agreements since at least 1971. For a number of years the County granted to employes who had a holiday fall during a vacation period the pay for the holiday, the vacation pay and eight (8) hours of compensatory time. In 1985 a dispute arose when a Deputy scheduled to work a holiday, December 31, 1984, requested and was approved a single vacation day for December 31, and was subsequently denied eight (8) hours compensatory time. A grievance was filed and was resolved voluntarily by the parties when the County's then Director of Human Resources sent the following letter to the Union's then Business Representative:

March 18, 1985

Thomas Bauer
Business Agent
206 S. Arlington Street
Appleton, WI 54915

Dear Mr. Bauer:

This letter is my reply to grievance 85-31, Deputy Rudie and issue of comp time off for December 31, 1984.

The facts are these:

- A. Deputy Rudie was regularly scheduled to work on a holiday, December 31.
- B. He requested a vacation day for December 31.
- C. That request was approved.
- D. Article 21-A Rudie provides for ". . . credit for the same (eight hours) based upon comp time off. . ."

All in all it appears to be in the best interests of all the officers, the department and the public if officers are dissuaded from utilizing single days of vacation on a holiday.

Chief Kohl's letter of March 9th is correct in general. In my opinion, the best way for the department to

avoid officers inappropriately playing the vacation/holiday/comp time game is for the department to closely monitor such requests. In such instances, the supervisor can simply deny such requests for a vacation on a holiday. The officer might utilize comp time to substitute for duty on a holiday. But using comp time on a holiday would not generate eight hours of additional comp time.

As I have determined to grant the grievance I see no good purpose served by your traveling to Wausau for a meeting on same. I trust you will concur in waiving the meeting.

The grievance is granted. Officer Rudie's comp time record should be adjusted to add eight hours for December 31, 1984.

Sincerely,

Jeremiah L. Stone /s/
Jeremiah L. Stone
Director

sg: Kohl
Fischer/Rudie

During 1991 the County instituted a new accounting system. During early June the County's Finance Department processed the payroll for the County's Sheriff's Department and discovered that employes who were on vacation during Memorial Day week were to receive forty (40) hours of pay, eight (8) hours Holiday pay and eight (8) hours compensatory time. The Finance Department contacted Personnel Director Brad Karger to question how they should properly compensate employes. Karger, representatives of the Sheriff's Department and representatives from the Union met to discuss the matter. The Union maintained that the practice should continue. The County maintained the practice unjustly rewarded employes who took vacation when a holiday fell, particularly as employes who worked on a holiday only received a total of twenty (20) hours of pay and compensatory time off. The County concluded such a result was unreasonable, absurd and an improper interpretation of language of the collective bargaining agreement that provided for the payment to employes who take vacation during a period when a holiday fell.

The parties, unable to resolve the matter, agreed to process the issue through the grievance procedure. At the hearing, although the parties were unable to agree on framing the issue, the parties agreed the issue was properly before the arbitrator. At the hearing the parties stipulated that since at least 1971 employes of the Sheriff's Department who have a holiday fall during their vacation period have received eight (8) hours of compensatory time for use at a latter date.

UNION'S POSITION

The Union contends Article 21, Section "A", provides that an employe is entitled to compensatory time when a holiday falls during that employe's vacation. The Union argues this provision is clear and unambiguous. The Union asserts the County recognized this when it settled the Rudie grievance in 1985

and concludes the County must grant compensatory time for holidays that fall during a vacation period. The Union acknowledges it has been getting a very good deal under this provision but both the County and the Union have acknowledged the bargain was made. The Union further argues that it is well established that the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. The Union argues the County contention that employes make out like bandits is irrelevant and not material. The Union contends the County is bound by Article 21, Section "A", until the parties agree to change the provision through the negotiations process.

The Union also argues the 1985 Rudie grievance settlement binds the County. The Union points out the settlement of the grievance granted the remedy requested, cease and desist from denying compensatory time for holidays that fall during a vacation period. The Union asserts the Undersigned is not free to disturb the binding precedent established by that settlement absent a conclusive showing of changed conditions. The Union argues the only changed condition is new County administrative personnel who believe the County should not be bound by a contractual provision they dislike.

The Union also contends that even if the Undersigned were to conclude that Article 21, Section "A", is ambiguous, the 1985 settlement of the Rudie grievance confirms the Union's interpretation of this provision. The Union asserts that in the light of the 1985 settlement it is clear the parties had a mutual understanding of the meaning of Article 21, Section "A". This understanding was that despite the County's displeasure with the provision, employes are entitled to compensatory time for holidays that fall during a vacation period. The Union argues the mutual intent resulting from a grievance settlement should carry great weight. The Union claims the evidence of mutual intent is clear in this case, particularly since it is undisputed the County has lived up to the 1985 settlement for over six (6) years, a time period spanning four (4) negotiations of successor collective bargaining agreements.

In its reply brief the Union argues the application of Article 21, Section "A", is clear and unambiguous. The Union asserts it is a cardinal rule of contract interpretation that if the language approved by the parties is clear and unambiguous there is no basis for interpretation and the collective bargaining agreement must be enforced as written. The Union points out Article 20 provides one (1) day's compensation for certain holidays. Article 21 provides for paid vacations. Additionally, Article 21, Section "A", provides that if a holiday falls during a vacation period an employe will be granted compensatory time off. The Union concludes this language is clear and any inquiry should end there. The Union asserts an arbitrator should not resort to "equitable" principles to becloud the otherwise clear intentions of the parties. The Union also argues the County's use of pulling one sentence to render the Article ambiguous fails because the primary rule in construing a written instrument is to determine, not from a single word or phrase, but from the instrument as a whole the true intent of the parties. The Union points out the County's interpretation ignores the clause providing for compensatory time, offers no explanation as to what the clause providing for compensatory time means, resulting in a conclusion the County's argument that the agreement is ambiguous to have no reasonable basis in the language of the collective bargaining agreement.

The Union also reasserts that the 1985 grievance settlement as well as the County's past practice demonstrate the collective bargaining agreement's meaning is clear on its face. The Union points out the grievance settlement acknowledges that a vacation day taken over a holiday generated a compensatory day. The County had numerous chances during the four (4) negotiations since 1985 to rectify any mistakes concerning the application of the provision. The

Union asserts the County choose not to and therefore the County's actions belie its claim that this clause was a mistake.

The Union also claims that the County's reliance on bargaining history for the 1977 and 1980 collective bargaining agreements does not demonstrate that a mistake has been made and ignores the settlement in 1985 of the Rudie grievance. The Union further claims Article 21, Section "A", does not result in a harsh consequence. The language provides that employes on vacation when a holiday falls shall receive compensatory time. It can have no other meaning and comparisons to employes who are working is not a proper comparison.

The Union concludes by pointing out the Undersigned does not have the authority to delete any terms from the provisions of the collective bargaining agreement. The Union argues that the only way for the County to achieve the remedy it desires is by a modification of the collective bargaining agreement. The Union asserts the Undersigned may not modify the agreement.

The Union would have the Undersigned sustain the grievance and direct the County to continue to grant compensatory time for holidays that fall during a holiday period.

COUNTY'S POSITION

The County contends the collective bargaining agreement's language on payment for holidays that fall during a vacation period is ambiguous and therefore must be interpreted. The County argues that in interpreting an ambiguous language the ultimate goal is to determine and give effect to the parties' intent. The County asserts the ambiguity is apparent because the language suggest that an employe who is already off of work because of vacation should receive an additional compensatory day because an off day (holiday) fell during a vacation period. The County argues that the ambiguity arises when the holiday language of the collective bargaining agreement, which requires the County to pay employes who work on a holiday to receive an additional one (1) day of pay and one-half (1/2) day compensatory time, is read in conjunction with the vacation language of the collective bargaining agreement. The County contends that its interpretation of the agreement, sixteen (16) hours of pay (i.e., eight hours holiday pay and eight hours vacation pay) is as reasonable as the Union's twenty-four (24) hours of pay (i.e., eight hours holiday pay, eight hours vacation pay and eight hours of compensatory time). The County concludes that because each interpretation is reasonable the language is ambiguous. The County contends that the Undersigned must interpret the agreement and in so doing, using principles of contract interpretation, the conclusion is that the County's method for compensating employes when a holiday falls during a vacation period is a proper method of payment under the collective bargaining agreement.

The County contends the Union's interpretation of the collective bargaining agreement provides for compensation at triple time rates and creates an absurd and harsh result. The County argues it is well recognized under arbitral law that where one interpretation would lead to an absurd result while an alternative interpretation would lead to an equally consistent but reasonable result the latter interpretation must be given effect. The County argues that in the instant matter the absurd result is that an employe who works on a holiday two and one-half (2 and 1/2) times his/her regular while an employe on vacation when a holiday falls receives the equivalent of triple his/her regular pay.

The County also argues in 1977 the Union sought to clarify the vacation language when the parties modified the holiday language. The County points out the Union failed at that time to obtain clarifying language granting additional

vacation days to employes when a holiday falls during a vacation period. The County contends this bargaining history, as well as bargaining history surrounding the 1975-76 negotiations, demonstrates the parties never intended for an employe to receive vacation pay and compensatory time off when a holiday fell during a vacation period. The County asserts the bargaining history of the 1980 negotiations also demonstrates an attempt by the Union to obtain a benefit they could not justly claim under the then existing collective bargaining agreement. At that time the Union proposed language that holidays and off days shall not be considered as part of an employe's vacation, should they occur during an employe's vacation another day of vacation would be granted. The County asserts this bargaining history lends further support to the County's position that the interpretation sought by the Union is contrary to the intent of the parties.

In its reply brief the County argues the Union's contention that the language of Article 21, Section "A", is clear and unambiguous fails because a more thorough review of the language demonstrates it is subject to various interpretations. The County argues its interpretation is as logical as the Union's and is supported by bargaining history. The County also contends the instant matter is not the simple case described by the Union. The County argues bargaining history must be reviewed and asserts the Union cannot rely on misapplication of this language over the years by their own members to achieve an overpayment when employes take a vacation at a time when a holiday falls. The County emphasizes the language is not clear and unambiguous and is not subject to an easy interpretation.

The County also argues the settlement in 1985 of the Rudie grievance does not create a binding precedent for the County or the Arbitrator. The County points out the settlement does not acknowledge an admission or interpretation by the County which requires payment of triple time when a holiday falls on a selected vacation day. The County also points out the response does not acknowledge the bargaining history which the County has presented in the instant matter. At most, the County claims, the resolution of the grievance demonstrates the settlement of a disputed claim on the basis of a singular set of facts and shows the existence of an ongoing dispute regarding the interpretation of Article 21, Section "A", that is now ripe for consideration. The County also points out that the settlement was not to be considered as a precedent for future claims over the interpretation of the collective bargaining agreement. The County also asserts the resolution of the grievance concerned facts which are distinguishable from the instant matter. Here the County claims the benefit of triple time had been approved by administrative staff who received the same benefit. The County stresses it was not until the implementation of a new payroll system that the overpayment to employes was discovered. The County concludes the response to the Rudie grievance does not constitute precedence for the County or the Undersigned in the interpretation of Article 21, Section "A".

The County would have the Undersigned deny the grievance.

DISCUSSION

The record herein demonstrates that since at least 1985 the County has been aware of the manner in which Article 21, Section "A", was being administered. The settlement of the Rudie grievance (85-13), signed by the Director of Human Services, demonstrates Rudie was on vacation when a holiday fell and he received eight (8) hours of compensatory time. While the current administration may not of been aware of the parties practice concerning the interpretation of the Holiday and Vacation provisions of the collective bargaining agreement, County administrators clearly were aware in 1985, agreed to the Rudie settlement, and thereafter continued to give employes who where on

vacation when a holiday fell eight (8) hours compensatory time. That interpretation is still binding on the County. Compensatory time is to be credited for eight (8) hours if an employe is on vacation during a paid holiday.

The County's arguments concerning the original intent of the parties when the issue of holiday pay, vacations and compensatory time was raised in negotiations in the late 1970's and early 1980's does not dispute the fact that for at least six (6) years employes who have a holiday fall during a vacation period receive eight (8) hours of compensatory time. Article 21, Section "A", clearly provides for this result. Even if the Undersigned agreed that the result of triple time as argued by the County was an absurd result, the parties have voluntarily agreed for a lengthy period of time to this interpretation of the collective bargaining agreement. As the Union has pointed out, four (4) collective bargaining agreements have been negotiated since that settlement. However there is no evidence the County has made any effort to modify the language at issue herein. The Undersigned concludes the grievance procedure is not the appropriate forum to change such a longstanding practice and clear contract language concerning compensatory time, particularly when there has been ample opportunity for the County to raise this issue in negotiations.

Therefore, based upon the above and foregoing and the arguments, testimony and evidence presented by the parties the Undersigned concludes the County violated Article 21, Section "A", when it failed to grant compensatory time to employes who were in a vacation period when a holiday fell. The County is directed to make whole any employes who have been adversely affected by its actions and to maintain the current practice. The grievance is sustained.

AWARD

The County violated Article 21, Section "A", when it failed to grant compensatory time to employes who were in a vacation period when a holiday fell. The County is directed to make whole any employes who were adversely affected by its actions and to maintain the current practice.

Dated at Madison, Wisconsin this 5th day of November, 1991.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator