

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
LOCAL 2489, AFSCME, AFL-CIO	:Case 274
	:No. 49219
and	:MA-7864
ROCK COUNTY	:
	:
	:

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Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511-3808, appeared on behalf of the Union.

Mr. Thomas Schroeder, Rock County Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appeared on behalf of the County.

ARBITRATION AWARD

On May 14, 1993, the Wisconsin Employment Relations Commission received a request from Local 2489, Wisconsin Council 40, AFSCME, AFL-CIO, and Rock County to have William C. Houlihan, a member of the Commission's staff, appointed to hear and decide a grievance pending between the parties. On July 6, 1993, Mr. Houlihan was appointed to hear and decide the matter. A hearing was scheduled for August 10, 1993, and postponed to September 10, 1993. On September 10, 1993, a hearing was conducted in Janesville, Wisconsin. The proceedings were not transcribed. Both parties filed post-hearing briefs which were received and exchanged by October 4, 1993.

This Award addresses the right of a bargaining unit member to take a portion of holiday pay in the form of compensatory time off.

BACKGROUND AND FACTS

The grievances leading to this arbitration proceeding were filed in the Fall of 1992 when the County unilaterally discontinued its practice of permitting employes to select premium pay or time off for working on a contractually-identified holiday.

The parties negotiated what is now Article 8.06 during their 1981-82 negotiations, from language proposed by the Union. The effect of the parties' agreement was to grant time and one-half to bargaining unit employes who worked on one of the contractually-identified holidays. Prior to this time, employes working on a holiday had been paid at straight time. The language in question

was taken virtually verbatim from another contract that existed between AFSCME and the County. That contract, involving Local 1258

had been interpreted to pay premium pay in pay only. That is, there was no employe option to take time off in Local 1258.

The contract between Local 2489 and the County applies to a number of clerical, matron, food service, and dispatcher positions employed by the County in a number of Departments. As a practical matter, only Sheriff's Department employes work on contractually-designated holidays.

From the time this language was made a part of the contract employes have always had the option of taking their premium pay in either time or money. The one Union witness, Mary Berger, testified to that effect. Management witnesses essentially acknowledged that fact.

The events giving rise to this grievance grew out of the negotiations between the County and another of its bargaining units. During the summer of 1992, Rock County entered into a collective bargaining agreement with the Deputy Sheriffs. In those negotiations, the County and the Deputy Sheriffs agreed to pay deputies time and one-half for hours worked on a contractually-designated holiday. It was the first time the deputies had obtained the benefit which had been enjoyed by Local 2489. It was the understanding of the Employer that the premium pay would be in pay. That is, the Deputy Sheriffs would not enjoy a time or money option. Deputies subsequently demanded a time or money option, pointed to their own language and to the language found within the Local 2489 agreement, and demanded treatment similar to that afforded the AFSCME employes. The Employer examined the Deputy's language and the language of the AFSCME agreement and determined that it was in error in affording the AFSCME employes an option.

When Labor Day of 1992 rolled around, the Sheriff's Department, acting upon its review of the Local 2489 language, denied employe requests for compensatory time off. The Union protested this action. The Employer recanted its decision with respect to Labor Day hours and issued the following memorandum:

**Date:** September 28, 1992

**To:** All Supervisors

**From:** Chief Deputy Ash

**Ref:** AFSCME 2489 Holiday Pay

Effective November 1, 1992, employees covered by AFSCME 2489 will no longer have the option of choosing between pay or compensatory time for Holidays.

Employees will receive pay for Holiday time they worked per article 8.06 of the Labor Agreement.

As this change will not go into effect until November 1st, those personnel originally requesting comp time for Labor Day and were paid the Holiday pay instead, may have their pay changed back to comp time if they still desire. Personnel requesting this change will have the amount of Holiday pay they received deducted from their next pay check and their comp time will be adjusted to show the Holiday time.

This memorandum was sent to supervisory personnel only. However, it is the custom of this Employer to post memoranda such as this and to have them read at roll call. Evidence indicates that employees became aware of the existence of the memorandum, and of its contents, roughly contemporaneously with its issuance. Two employees indicated that they became aware of the memo when it was read at roll call. It may or may not have been posted. Employees who desired time off for Labor Day were subsequently given that time off. All evidence supports the conclusion that employees became aware that the memo was reinstating time for Labor Day and terminating the option prospectively.

The next contractually-recognized holiday was Thanksgiving. A number of employees, who worked on that holiday, requested time off. Those requests were denied. Those denials lead to a grievance, which ultimately lead to this arbitration proceeding.

During this time frame, that is, Labor Day through Thanksgiving, the parties were engaged in negotiations leading to a successor agreement. Both parties were aware of this controversy. Neither party chose to make this subject an issue in the ongoing bargaining.

#### ISSUE

The parties were unable to stipulate as to the issue. I believe the issue to be:

Do bargaining unit members have the option of pay or time off for hours worked on a holiday, in addition to a day off with pay?

#### RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

##### ARTICLE VIII - HOLIDAYS

. . .

- 8.05 The Department shall attempt to rotate employees called to work on holidays insofar as such rotation is not inconsistent with efficient operation of the department. Employees not scheduled to work, but called to work on a holiday, shall be compensated at the rate of time and one-half their hourly rate of pay for hours worked in addition to the holiday pay.
- 8.06 If a holiday falls on an employee's scheduled day of work, the employee shall be paid at time and one-half (1-1/2) for all hours worked and shall be entitled to a compensatory day off with pay. If a holiday falls on an employee's scheduled day off, the employee shall be entitled to a compensatory day off with pay. Any requested compensatory day off shall be granted subject to the approval of the Department Head. Employees, shall, however, have the right to accumulate and use holidays to extend their annual vacation within twelve (12) months of said holiday.

#### ARTICLE IX - GRIEVANCE PROCEDURE

. . .

- 9.06 Limit on Arbitrators. The Arbitrator shall have jurisdiction and authority to interpret the provisions of the Agreement and shall not amend, delete or modify any of the provisions or terms of this Agreement.

#### POSITIONS OF THE PARTIES

It is the view of the County that the language in Article 8.06 is clear and unambiguous. It requires pay. Nothing in that paragraph allows the pay at time and one-half to be taken in compensatory time.

The County cites certain bargaining history evidence in support of its position. It notes that the language in question was taken from AFSCME Local 1258's contract where the premium was, and continues to be, paid in cash. In the view of the County, the parties took the Local 1258 language and got the Local 1258

application of the language.

The County cites arbitral authority for the proposition that clear, unambiguous terms of a contract cannot be amended by a practice. To the extent any practice existed, it was terminated by the Ash memo.

It is the view of the County that if the Union wanted to retain its practice, it was the Union's obligation to bring that practice to the bargaining table during the then-ongoing negotiations.

The Union argues that it was never served notice that the County intended to terminate the practice. The Union points out that the Sheriff's Department is one of a number of departments covered by the terms of the collective bargaining agreement; that the contract language, and accompanying practices, regulate the entire unit and not simply the Sheriff's Department.

The Union contends that the term "pay" is ambiguous as to whether the pay comes in the form of money or time off. The long-standing practice of the parties serves to clarify that ambiguity.

The Union contrasts Section 8.06 use of the term "pay" with what it contends is a far more specific treatment of the subject in 8.05. The Union argues that the use of the term "compensated" in Section 8.05 is a more specific reference to pay, evidencing the parties' ability to specify pay when they so desired.

The Union discounts the Employer's bargaining history testimony as not particularly insightful or persuasive.

#### DISCUSSION

I believe that a past practice existed. The practice of giving employes an option to take time or money goes back ten years, originated with the inception of the agreement, is uniformly applied, and mutually understood. The practice survived a number of contracts between the parties. The Employer acknowledged the existence of the practice in its hearing testimony, and further, when it recanted its Labor Day actions in denying requests for time off.

I believe that as a practical matter, Chief Deputy Ash's September 28 memorandum put the Union on notice that it was the Employer's intent to terminate that practice. While it appears that the memo itself was never sent to the Union, it also appears that the Union leadership was put on notice of the Employer's intent to terminate the practice. The memorandum was read at the roll calls. As a practical matter, Union officials testified that they became immediately aware of its existence, and of its

content. Chief Deputy Ash's memo was itself a resolution of grievances filed relative to the Employer's repudiation of the practice with respect to the Labor Day holiday.

The Union contends that the Sheriff's Department is but one of several departments covered by the terms and the practices of this collective bargaining relationship. As a factual premise, that is true. However, this is the only department where employes work on holidays. The parties indicated that there is little, if any, impact in any department other than the Sheriff's Department.

As a practical matter, there is little point raising this matter to employes to whom it is irrelevant. In the context of the Sheriff's Department being the only bargaining unit department where this is an issue, I believe that giving notice to Sheriff's Department employes, including Union officials, effectively communicated meaningful notice to the Union.

The real issue in this dispute is whether or not the language in Article 8.06 is so clear and unambiguous to permit the Employer to terminate this long-standing practice. If the language is sufficiently clear, it represents the best evidence of the parties' bargain, and precludes the need to look at extrinsic interpretive aids, such as practices, the origin of the language itself, the bargaining table intent of the parties. The words used by the parties are that the employe shall be paid at time and one-half. The question is, is the use of the term "pay" exclusively a reference to money, or may it take the form of alternative time off.

The controlling sentence provides that, "If a holiday falls on an employee's scheduled day of work, the employee shall be paid at time and one-half (1-1/2) for all hours worked and shall be entitled to a compensatory day off with pay." On its face, the sentence appears to provide compensation in two forms. The first clause provides for "pay" at time and one-half. The second clause provides time off with pay. The term "...shall be paid..." is a term of command. On its face, no discretion is suggested. The fact that the term "...shall be paid..." is found within a sentence which goes on to specifically authorize compensatory time off, emphasizes the contrast between pay and time off. I believe the sentence clearly provides for pay (money) at the rate of time and one-half and also for straight time compensatory time. I see no ambiguity. My conclusion in this regard renders consideration of the bargaining history and origin of the language unnecessary.

The Union contends that the use of the term "pay" in Section 8.06 is more general than the use of the term "compensation" in paragraph 8.05. I disagree. To me, "pay" is a term commonly used to refer to money. 1/ Compensation is a broader term, commonly

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1/ Cf. The American Heritage Dictionary, Second College Edition, Houghton-Mifflin, 1982; Webster's New Collegiate Dictionary,

used to denote the economic (and potentially non-economic) attributes of employe remuneration. If anything, I believe the contrasting use of the two terms reinforces my conclusion that the reference to "pay" is a reference to money.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 19th day of November, 1993.

By William C. Houlihan /s/  
William C. Houlihan, Arbitrator

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Merriam, 1979.