BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BROWN COUNTY SHERIFF'S DEPARTMENT
NON-SUPERVISORY EMPLOYEES

and

BROWN COUNTY (SHERIFF'S DEPARTMENT)

Case 537
No. 51483
MA-8625

Appearances:

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, appearing on behalf of the County.

Mr. Frederick J. Mohr, Attorney at Law, appearing on behalf of the Union.

ARBITRATION AWARD

Brown County Sheriff's Department Non-Supervisory Employees and Brown County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the wisconsin Employment Relations Commission appoint an arbitrator from its staff to resolve the Paul Loppnow grievance. The Commission appointed Thomas L. Yaeger, a member of its staff, pursuant to that request. Hearing in the matter was held on November 17, 1994, at Green Bay, Wisconsin. The hearing was transcribed and the parties filed post-hearing briefs, the last of which was received on January 23, 1995.

ISSUE:

The parties, at hearing, stipulated to the following statement of the issue:

> Was Paul Loppnow entitled to five hours of call-in pay on June 30, 1994?

PERTINENT CONTRACT LANGUAGE:

Article 15. OVERTIME

. . .

Minimum Call-In Time. A call-in is defined as any time an employee is required to work outside his/her normal work shift schedule. However, a call-in does not include the following:

1. Moving an officer forward to cover for a swing car as indicated above.

2. An extension of the normal work shift by one hour on the front or any extension on the back of such shift (exclusive of reporting time).

3. Disciplinary procedures where the officer is not vindicated through the grievance procedure.

4. Certain training time as provided below.

Employees will be compensated for a minimum of three (3) hours for any call-in time worked on a scheduled work day. Employees will be compensated for a minimum of five (5) hours for any call in time on a day off or scheduled vacation day. This call-in time shall be compensated at the normal rate of pay.

. . .

TO: ALL EMPLOYEES

FROM: CHIEF DEPUTY GARY PIESCHEK

DATE: February 9, 1994

RE: NO WORKING ON VACATION

Historically the Brown County Sheriff's Department has not allowed an employee who is on vacation to work overtime on their normally scheduled shift and/or during those shift hours. This practice will continue for all department employees with one

exception. Because the K-9 officers work an "overlap" shift (9P-7A) and sign vacation along with the "C" Shift (11P-7A), they will be allowed to be on vacation 9P-7A and work overtime from 9P-11P (i.e. 3P-11P o/t slot). The exception does not allow the K-9 Officers on "C" shift vacation to work "C" shift overtime.

MEMORANDUM OF UNDERSTANDING

The following agreement has been reached between Brown County and the Sheriff's Non-Supervisory Employees Association represented by Frederick J. Mohr, attorney.

The parties agree to an interpretation of Article 15, entitled "Overtime", of the existing labor contract as follows. Under the subsection entitled "Minimum Call-in Time", an officer is entitled to call-in pay in addition to any overtime pay for which he qualifies in the event that an employee is required to work outside his/her normal work shift. "Required" as used in this paragraph is interpreted to mean that the employee has been ordered to work on an involuntary basis. In other words, should the employee volunteer to accept the overtime offered, he/she is not entitled to the call-in pay. However, should the officer be ordered to work, he/she shall be entitled to the call-in pay.

For the purposes of this agreement, voluntary extra duty assignments shall not qualify for call-in pay. These voluntary extra duty assignments include, but are not necessarily limited to, the Emergency Response Unit, Boat Patrol, Snowmobile Patrol, Honor Guard, DARE Unit, and the Arson Task Force.

Commencing August 1, 1991, employees assigned to the Reconstruction Unit shall be entitled to the addition to base pay as set forth in Article 24 of the existing labor agreement. In order to qualify for this premium pay, employees must be assigned to the designation of reconstruction expert on a full-time basis. Those individuals who are not so designated but are certified reconstruction experts and who are required to perform the functions of a reconstruction expert outside their normal shift shall be entitled to call-in pay for any such assignments. Individuals receiving the addition to base pay, however, shall not qualify for call-in pay when assigned to reconstruction duties outside their

normal shift.

Canine officers may be shifted forward up to two (2) hours from their normally scheduled shift without the employer incurring call-in pay. If a canine officer has his/her shift moved forward, the officer is entitled to work to the end of his normally scheduled shift. In the event that a canine officer is required to work outside of the time period as set forth within this paragraph, the officer shall be entitled to call-in pay in addition to overtime.

Dated this _____ day of July, 1991.

FOR BROWN COUNTY:

_____

By: Gerald E. lang
Personnel Director

FOR THE UNION:

_____

By: Frederick J. Mohr
Bargaining Representative

BACKGROUND:

The basic facts of this case are not in dispute. On June 30, 1994, Lieutenant Peter Mitchell called grievant Loppnow at his home at approximately 7:30 a.m. on the morning of June 30, 1994. Loppnow was scheduled to be on vacation that day. Mitchell was calling to ask Loppnow to come in to work to help with a prisoner transport. Loppnow agreed to come in to assist with the prisoner transport. After ending the conversation with Mitchell, Loppnow got out of bed, showered and shaved and dressed for work. Just as he was about to leave his residence the phone rang, he answered it, and it was Mitchell again. Mitchell told Loppnow that he had not realized Loppnow was scheduled to be on vacation when he called originally, and that because Loppnow was on vacation the Department would find someone else to assist with the prisoner transport. Subsequent to these events, Loppnow applied for five hours of call-in pay pursuant to Article 15 of the parties' contract. The Employer denied his request, and Loppnow filed the

grievance which is the subject of this arbitration case:

> On June 30, 1994 I was on vacation at home. At approx. 7:35Am (sic) Lt. Mitchell of the court division called and asked if I would come in to work for him and take a prisoner transport. I agreed to come in and work. I got ready to go to work and as I was walking out the door of my home my phone rang and it was again Lt. Mitchell and he asked if I was on vacation and I told him that I was. He then told me not to come in because I could not work whicle (sic) on vacation. I was therefore cancelled.

The Union argues that the grievance should be sustained. It states that at the time the grievance arose the parties were operating under an expired collective bargaining agreement, and that it was incumbent upon the County to maintain the status quo during this contract hiatus. The relevant contract language defines call-in "as any time an employee is required to work outside his/her normal work shift schedule." Thus, in the opinion of the Union, the question presented by this grievance is whether the call to Loppnow from Mitchell offering overtime and Loppnow's acceptance of that offer triggered a "call-in" within the meaning of Article 15.

The Union asserts that the historical practice of the parties establishes that the events of June 30, 1994, did trigger a "call-in" within the meaning of the parties' contract. Schroll, President of the Association at time the relevant contract provision was negotiated, testified that it was the intention in applying this language that an officer receive a "call-in" upon being called. Schroll also testified that for years it has been the consistent practice of the County to make payment once a "call-in" was offered to and accepted by the employe, and that actually reporting to work was not considered a condition precedent to receive credit for the "call-in." Schroll's testimony was further bolstered by two specific instances involving David Jossart. Jossart, on two separate and distinct occasions, was called in to work, but had the call cancelled before he actually reported to work. In both instances he submitted time cards and was paid for the time.

The Union asserts that the County produced no evidence to rebut the evidence of historical practice. The County's reliance on the Pieschek memorandum prohibiting calling employes on vacation for overtime work is misplaced. Clearly, the parties were in the process of negotiating specific language to cover instances when employes would be allowed to work overtime on scheduled vacation days. As indicated by Employer Exhibit 7, it was the Association's belief that employes situated such as Loppnow would have been allowed to work on their scheduled vacation days under the circumstances existing here. The County's position after the meeting referred to in Pankratz's memorandum of May 27 is unclear. We can assume for the purposes of this arbitration that the parties have not reached an agreement changing the practice of the parties.

Lastly, the Union asserts that there is nothing contained in the contract which prohibits Loppnow from working on a vacation day. The lone prohibition arises as a result of the Pieschek memorandum. However, since the parties were in a contract hiatus and the memorandum directly affects a mandatory subject of bargaining, it cannot legally be imposed. Thus, the Union concludes that the grievance should be granted and Loppnow be awarded five hours call-in pay for June 30, 1994.

The County, contrary to the Union, believes that in order for call-in pay to be granted, the situation must meet the definition of call-in time appearing at Article 15. The County asserts that call-in time does not meet that definition unless an employe is required to work outside his/her normal schedule, i.e. unless the employe reports to work involuntarily. Even the Memorandum of Understanding which interprets Article 15 and was drafted by the Association's attorney distinguishes between voluntary and involuntary overtime. That agreement provides "'Required' as used in (Article 15) is interpreted to mean that the employee has been ordered to work on an involuntary basis. In other words, should the employee volunteer to accept the overtime offered, he/she is not entitled to the call-in pay." (emphasis added) Thus, the County concludes that both the contract and Memorandum of Understanding provide that when an employe voluntarily accepts work outside his/her normal shift, he/she is not entitled to call-in pay.

The County also asserts the language of the contract is clear. "A call-in is defined as any time an employee is required to work outside his/her normal work shift schedule." The undisputed facts in this case are that Loppnow was not required to work and, in fact, did not perform any work for the County, and thus did not qualify for call-in pay based on the events of June 30, 1994. Loppnow testified that he was not ordered into work, but rather agreed to report for work. Thus, he voluntarily accepted the assignment and thereby is not entitled to receive call-in pay.

The County also argues that Loppnow is not eligible for any overtime on June 30, 1990, merely based upon the events which are not disputed. The County argues that Article 15 only provides that employes will be compensated at the rate of time and one-half their normal rate for "all hours worked outside their normally scheduled hours." The County does not believe that Loppnow's preparation to report for work constitutes work, and in any event, even if that were concluded, the Union did not establish how much time was spent by Loppnow in preparing for work. Consequently, the County concludes that Loppnow is not entitled to any overtime pay for the events of June 30, 1994.

The County also contends that the situation on June 30 is not analogous to SWAT team call-ins where the call-in is subsequently cancelled prior to the SWAT team member's arrival at work. First, officers who agree to join the SWAT team assume an obligation to respond to calls whenever they are physically able to do so. This obligation to respond to SWAT calls is quite different from the choice presented to an officer who simply is requested to report for work. Second, the SWAT team example is not analogous to the June 30 incident because of the unique

nature of SWAT work. To effectively respond, the SWAT team members must drop whatever they are doing and organize quickly. Just as quickly, the emergency situation that prompted the call can evaporate. Paying SWAT team members for cancelled calls makes sense because SWAT team members have assumed a duty to respond and do so quickly, and emergencies can evaporate as quickly as they arise. If the Department did not compensate the SWAT team for, at least, a minimum amount of call-in time, no one would volunteer for the much needed duty.

The County also argues that there is no "unique nature" of generic overtime work, and it is not "much needed" as is the case with SWAT team work. Because Mitchell's offer to Loppnow involved generic overtime work, Loppnow could have agreed or refused to help with the prisoner transport. Had he refused, the Department could have found someone else to assist with the work or use only one officer for the duty. Sergeant Mitchell testified that he was not even certain the Department found another officer on June 30, 1994. Also, to grant the grievance in this case would be to force upon the County a policy of paying employes when they have not performed any work. To compensate Loppnow in this instance would set a precedent for future similar incidents. Philosophically, contractually and ethically, and based upon past practice, such a policy would be ludicrous.

The County also asserts that the denial of Loppnow's grievance is consistent with the Department's past practice of denying overtime work during an employe's vacation. Chief Deputy Pieschek testified that the Department had a longstanding general policy that employes who are on vacation cannot work overtime. Pieschek admitted that there were a few occasions where vacationing employes did work overtime, but that "as soon as we found out about it, we tried to stop that type of thing." In late 1993 or early 1994, a K-9 officer filed a grievance involving overtime work he had wanted to perform while he was on vacation. The Department, citing its policy, refused to allow the officer to work. A grievance was filed and was eventually settled by the Department by allowing the officer to work two hours outside of his normal shift because of the different work schedule overlap of the K-9 officers. The resolution of that grievance caused Pieschek to issue his memo relating to overtime work during vacations. The memo reiterated the Department's past practice/policy and stated the exception established by the grievance for K-9 officers. Thus, Pieschek's memo is simply an explanation of the Department's past practice policy and a statement of the special exception of K-9 officers because of their different schedules. Upon receipt of Pieschek's memo, Attorney Mohr, on behalf of the Association, wrote to Pieschek stating his belief that the Department had a past practice of allowing officers to work overtime during their vacations except when the available work was due to the vacationing officer's absence. Pieschek on March 17, 1995, responded to Mohr, "You indicated there had been a practice in the past that an officer was able to work overtime even though he was scheduled for vacation. In response to this statement, effective April 15, 1994, Brown County/Brown County Sheriff's Department will cease the practice . . ." The Department's past practice, however, always was to prohibit overtime work during vacation. Pieschek's February 9, 1994 memo merely reiterated that policy, and his March 17, 1995 correspondence merely informed Mohr, because Mohr mistakenly believed that the practice was to allow such work, and Mohr should

consider that practice discontinued. However, there was no real discontinuance of a policy allowing overtime work and hence no violation of a duty to bargain because to begin with there was no such policy. Thus, the County concludes that the Department's denial of call-in pay to Loppnow was consistent with its policy/past practice and not in contravention of it.

Alternatively, even if the Arbitrator finds that the Sheriff's Department had a practice of allowing such work, the County contends that it, via Chief Deputy Pieschek, has given proper notice of discontinuance of that past practice. Hence, the past practice will expire at the termination of the 1994 contract. There is substantial arbitral authority for the proposition that a practice which is not subject to unilateral termination during the term of a collective bargaining agreement is subject to termination at the end of said agreement by giving due notice of intent not to carry the practice over to the next agreement. After being so notified, the other party must have the practice written into the agreement to prevent its discontinuance. In this case, Pieschek's February 9, 1994 memo and March 17, 1994 correspondence to Mohr constitutes sufficient notice of intent to discontinue a practice. Thus, if the Arbitrator finds, contrary to the County's assertions, that a practice did exist, the County avers that that practice of allowing overtime work during vacations expires with the 1994 collective bargaining agreement.

Lastly, the County contends that the Union in this case should not be permitted to obtain through the grievance procedure what it could not obtain through negotiations. The County asserts that Mohr on June 1, 1994, requested that certain language be included in the new collective bargaining agreement and that this language reflected Mohr's intent to request the right to have employes available for overtime, even when they are on vacation. In this case, the County interprets that to mean that by the Union's failure to obtain that concession from the Employer it must be concluded that the Union did not have that right previously because it is presumed that you do not ask for what you already have. Based on that fact alone, the County concludes that the Loppnow grievance should be denied.

DISCUSSION:

The Union, in its brief at page 4 states "The issue is whether the call to Officer Loppnow offering overtime and Loppnow's acceptance of same triggered a call-in." The Union believes that it did, whereas the County believes to the contrary. It asserts that because Officer Loppnow was not ordered or required to work, and did not in fact perform any work for the County on that day, he did not qualify for call-in pay.

The undersigned's analysis of the Minimum Call-In Time language of Article 15, Memorandum of Understanding, and testimony in this proceeding is that the grievant was not eligible to receive call-in pay as a consequence of the events of June 30, 1994. Article 15 defines "call-in" to mean "any time an employee is required to work . . ." this language, standing alone, appears clear and unambiguous with regard to the question of whether an employe is required to

actually perform work or at a minimum report to the work site. In the instant case, the grievant did neither. Before he could leave home for work he was directed not to report. The Union argues that a practice has developed that the County made payment once the call-in was accepted and reporting for work was not a condition precedent to receipt of payment. However, past practice can only be used to aid in the construction of ambiguous language, but cannot be relied upon to alter the meaning of clear and unambiguous language. Either party can insist upon enforcing clear and unambiguous language, but it has long been the understanding among arbitrators that neither party can insist upon enforcing a past practice that runs contrary to the clear meaning of the contract language itself. Arbitrator Wycoff said in Tide Water Oil Co., 17 LA 829 (1952) "(Established practice) is a useful means of ascertaining intention in a case of ambiguity or indefiniteness; but no matter how well established a practice may be, it is unavailing to modify a clear promise." Here the language plainly says "required to work."

Historically, clauses like this one have been included in contracts to guarantee that if an employe is going to unexpectedly come to work outside his/her regular work schedule that the employer is prepared to guarantee him/her a minimum number of hours of work and/or pay. This provides an incentive to employers to not disrupt employes non-work schedules unless there is a substantial or significant reason to do so. In this case, the grievant was not required to work. He agreed to come in to work, but was later told, before he left his home, not to report. Thus, the undersigned is satisfied that he did not work, was not "required" to work, and therefore, did not become eligible for "call-in pay. Had he reported to the work site, then was told to go home, the outcome might have been different. But, those are not the facts of this case.

Also, the parties in 1991, entered into a Memorandum of Understanding which provided, among other things:

> The parties agree to an interpretation of Article 15, entitled "Overtime", of the existing labor contract as follows. Under the subsection entitled "Minimum Call-in Time", an officer is entitled to call-in pay in addition to any overtime pay for which he qualifies in the event that an employee is required to work outside his/her normal work shift. "Required" as used in this paragraph is interpreted to mean that the employee has been ordered to work on an involuntary basis. In other words, should the employee volunteer to accept the overtime offered, he/she is not entitled to the call-in pay. However, should the officer be ordered to work, he/she shall be entitled to the call-in pay.

This clearly provides that Minimum Call-in Time is only to be paid to officers who are ordered into work, and is not to be paid to employes who volunteer to report. In the instant case, the

record evidence establishes the grievant was not ordered to report for work on June 30, 1995. Rather, it is obvious from the testimony of the grievant that he was asked and agreed to come in to work that day. This is additional evidence that the events of June 30 did not qualify the grievant as eligible for the minimum call-in pay.

Furthermore, even if one were to conclude the language of Article 15 was ambiguous, the record evidence did not conclusively establish the existence of a binding practice. The Union here argued that the call to an employe, and subsequent acceptance of the offer to work, triggered a "call-in" within the meaning of Article 15. To support its contention, it looks to the testimony of its witness Jossart, a Sergeant in patrol who is also a member of the SWAT team. He testified that on two occasions he was paged to respond to SWAT calls. One involved an incident in the Village of Howard and while in route home to pick up his gear the call was cancelled. The other was an escape from Ashwaubenon where the call was cancelled before he left home. In both instances, Jossart testified he received the "call-in" pay. However, on cross-examination Jossart testified that as a member of the SWAT team he considered it an order to report to work (assume the duty if you are fit to report) unlike other "call-in" situations in the Department. Because of the uniqueness of the responsibility of SWAT team members versus other officers, the handling of "call-in" pay for them does not necessarily establish a binding procedure or practice in all other "call-in" situations. Thus, at least based upon the record in this case, one cannot conclude the events of June 30, 1994, are governed by the procedures that are followed in SWAT team call-ins.

Because of the foregoing conclusion, it is not necessary to reach the other issues regarding calling in officers for overtime who are scheduled off on vacation.

Based on the above and foregoing, the undersigned issues the following

AWARD

Paul Loppnow was not entitled to five hours of call-in pay on June 30, 1994. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 11th day of May, 1995.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator