

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
ROCK COUNTY DEPUTY SHERIFF'S ASSOCIATION
and
ROCK COUNTY, WISCONSIN

Case 300
No. 54920
MA-9828

Appearances:

Mr. Steven J. Urso, Executive Assistant, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, 7 North Pinckney Street, Suite 220, Madison, Wisconsin 53703, for Rock County Deputy Sheriff's Association, referred to below as the Association.

Mr. Thomas A. Schroeder, Rock County Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, for Rock County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Association and the 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in "Grievance 96-343, Holiday Hours Pay." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 23, 1997, in Janesville, Wisconsin. The hearing was not transcribed, and the parties filed briefs by August 6, 1997.

ISSUES

The parties stipulated the following issues for decision:

Has the County been violating the terms of Section 5.04 of the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V - HOLIDAYS

5.01 Holidays - Sheriff's Department.

A. Employees shall be granted the following holidays off with pay:

1) New Year's Day, 2) Memorial Day, 3) July 4th, 4) Labor Day, 5) Thanksgiving Day, 6) Friday following Thanksgiving, 7) Christmas and three "floating" holidays to be selected by the employee.

...

5.04 If a holiday falls on an employee's scheduled day of work, the employee shall be paid time and one-half for all hours worked.

...

ARTICLE VIII - HOURS OF WORK, WAGES AND CLASSIFICATIONS

8.01 Work Schedule. The hours of work for all regular full-time employees shall average forty hours per week annually. The workweek shall be five (5) days on/two (2) days off, five (5) days on/three (3) days off schedule, or a straight five (5) days on/two (2) days off schedule.

...

8.02 Shift Structure.

A. The hours of work for employees assigned the work schedule of five (5) days on/two (2) days off, five (5) days on/three (3) days off, shall be on either the first shift (7:00 am to 3:00 pm), second shift (3:00 pm to 11:00 pm), mid-shift (7:00 pm to 3:00 am), or third shift (11:00 pm to 7:00 am). All employees on this shift schedule shall report to work one-half (1/2) hour prior to commencement of their shift.

...

ARTICLE XI - GRIEVANCE PROCEDURE

...

11.02 Procedure.

...

Step 4 . . . The arbitrator shall have jurisdiction and authority only to interpret the specific provision aggrieved and shall not amend, delete, or modify any of the express provisions of this Agreement.

BACKGROUND

The basis for the grievance is set forth in a memo, dated September 12, 1996, to Sheriff Erickson from Charles Flood, a Detective and an Association grievance officer. That memo states:

It has recently been brought to our attention that association members working on prescribed holidays are receiving eight hours of pay at the rate of time and one-half. As you are aware, article 8.02A dictates that "all employees on this shift schedule (5-2, 5-3) shall report to work one-half (1/2) hour prior to commencement of their shift." Consequently, the members required to work on a holiday are in fact working 8.5 hours.

Article 5.04 clearly states . . . This language does not leave much room for interpretation and our contention is that these members should be paid for 8.5 hours at the rate of one and one-half their hourly rate of pay.

It is possible that there was some misinterpretation stemming from a 1991 "side agreement" between the Association and the "Black" Administration. In re-reading that document I reviewed #7 relating to an "(8) hour standard day". I specifically recall that the Administration approached us with that wording and the intent was to "alleviate payroll paperwork duties". During this period the payroll secretary did not have the luxury of a computer generated time clock, etc. To simplify payroll everything was then based on an (8) hour day.

I would also point out that the 1991 "side agreement" was not a contractual agreement and more of a "guideline" to be used by both parties to clarify certain issues. Also, at the time of the 1991 "side agreement" the Association had not yet bargained for holiday pay. Subsequently, the (8) hour day was not an issue.

We are bringing this matter to your attention in the hopes that by the next holiday payroll our members will be receiving the correct amount of holiday pay pursuant to article 5.04. . . .

The 1991 "side agreement" referred to by Flood was executed on February 13, 1991, by Sheriff Black and the then incumbent Association President. That agreement is referred to below as the Memorandum. Paragraph 7 of the Memorandum states:

In an effort to alleviate payroll paperwork duties, an eight (8) hour standard day will be used when dealing with the use of holidays, vacation, comp, and sick days. This would result in the deduction of only four (4) hours when taking a half-day of holiday, vacation, comp or sick days.

For example, a 1st shift deputy taking the first half of the shift off would report for duty at 11:00 AM, and be able to leave at 3:00 PM. If the second half of the shift were taken off, the deputy would report for duty at 6:30 (training time) and be able to leave at 11:00 AM.

The County denied the grievance at each step of the grievance procedure, contending that it has consistently applied the language of Section 5.04 to require the addition of four hours of overtime to the eight and one-half hours paid to Deputies on a 5-2/5-3 schedule who work a scheduled holiday.

The grievance questions the appropriate holiday pay for those Deputies who work a 5-2/5-3 work schedule. The number of holidays worked by such employes during the course of a year varies with their schedule. It is undisputed that the language of what appears as Section 5.04 first appeared in the parties' 1992-93 agreement as Section 5.03. The provision also appeared in the 1994-95 agreement as Section 5.03, but became Section 5.04 of the 1996-97 agreement. Neither party has proposed any change to the language of Section 5.04 or its predecessor.

The grievance posed here is the first challenge to the County's implementation of Section 5.04. James Bryant III is employed as the County's Personnel Director, and participated in the bargaining which resulted in the creation of what now appears as Section 5.04. Bryant noted that he costed the proposed change in the agreement at four hours per day for each holiday named in the agreement. The parties did not, however, share costing data during the collective bargaining which produced that provision. Bryant was unaware of the existence of the Memorandum until well after the creation of Section 5.03.

The parties do not dispute that the County has, since the initial agreement on Section 5.03, consistently applied it by adding four hours of overtime for each holiday worked

by a Deputy on a 5-2/5-3 schedule. Judith Lawler serves as the County's Payroll Coordinator/Manager, and served as an Accountant and Office Manager in the Sheriff's Department at the time Section 5.03 was implemented. She testified that, on average, Deputies working a 5-2/5-3 schedule work 79.55 hours every two weeks. Actual biweekly Deputy hours may vary from 76.5 to roughly 85 hours. Over a fifty-two week year, the 5-2/5-3 schedule yields 2,068.3 hours, while a 5-2 schedule yields 2,080 hours. In spite of this variance, the County uses, for all its employees, a 2,080 hour work year for the accrual and use of sick leave. Thus, the sick leave accumulation of any Deputy who claims sick leave for a shift is reduced by eight hours, including those Deputies who work a 5-2/5-3 schedule.

Flood, Eric Runaas and David Bier testified for the Association. Flood and Bier are Detectives and Runaas is a Patrol Officer. Flood and Bier work a 5-2 schedule, while Runaas works a 5-2/5-3 schedule. Each is an Association officer. Each agreed this grievance is the first time an Association represented employe has challenged the County's implementation of Section 5.04 or its predecessor. Flood participated in the bargaining which produced Section 5.03 and in the bargaining which produced the Memorandum. Sheriff Black, he noted, did not participate in the collective bargaining for a labor agreement. The Association bargaining team which agreed to the creation of Section 5.03 in the 1992-93 labor agreement included Deputies who worked a 5-2/5-3 schedule.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Brief

After a review of the evidence, the Association notes that the labor agreement specifies that certain deputies work a 5-2/5-3 work rotation. Section 8.02, A of the labor agreement "requires 5-2, 5-3 deputies to report to work one-half hour prior to the start time for their shift." This creates an 8.5 hour day, which yields a 2068.05 hour work year. The County's view alters this schedule to yield an 8 hour day for Deputies who work holidays. This view cannot, the Association contends, be squared with the labor agreement.

The Memorandum underscores this conclusion. It establishes "a payroll accommodation and the procedure for crediting time off against an employee's account in an effort to streamline and standardize the process." The Memorandum governs time off, but the grievance addresses time worked. That the Memorandum does not address time worked underscores the significance of the governing language of the labor agreement concerning holidays.

Article V clearly and unambiguously demands that pay for holidays reflect actual time worked. That the Association has not grieved the matter until now cannot obscure the clarity of the governing contract language. Arbitral precedent and the provisions of Article XI

underscore that interpretation of the contract begins and ends with the enforcement of clear and unambiguous terms. Past practice cannot be used to overcome this, and, in any event, the record will not show any Association waiver of the position asserted in this grievance.

The Association concludes that the grievance is "very straightforward," and poses a "fairness issue." The grievance must be sustained and "the appropriate remedy" ordered.

The County's Brief

After a review of the evidence, the County argues that "(t)he clear and unambiguous language of the Collective Bargaining Agreements reveals that this grievance must be denied." Section 5.04 of the agreement mandates payment for "all hours worked" on a holiday. Section 8.02, A, however, sets those hours at 8 per shift for Deputies working a 5-2/5-3 schedule. Beyond this, the County argues that "bargaining history reveals that this grievance must be denied." More specifically, the County contends that the Memorandum "makes clear that an eight (8) hour standard day is to be used for holidays, not eight and one-half (8 1/2) hours." Bryant's testimony underscores this as does the bargaining for the 1994-95 and 1996-97 labor agreements.

The County adds that "consistent, long-standing practice of the parties reveals this grievance must be denied." Lawler's testimony establishes that if the Association's view is adopted, "that would necessitate changes in how holiday and vacation time is deducted, as well as in how sick time is earned." The evidence establishes that the County has consistently applied these benefit provisions, and that the Association has, through three labor agreements, failed to challenge it.

The County concludes that the provisions of Section 5.04 are clear and unambiguous, and must be applied to provide for the payment of "12 1/2 hours of pay to a Deputy who works an 8 hour shift on a holiday." Even if this language could be considered ambiguous, bargaining history and past practice supports the County's interpretation. Any other conclusion would, according to the County, award the Association through grievance arbitration a benefit it never secured in collective bargaining. The "grievance must be dismissed."

DISCUSSION

Resolution of the stipulated issue turns on whether the provisions of Section 5.04 can be considered clear and unambiguous. The strength of the Association's position turns on the clarity of the terms of that provision.

The strength of the Association's position should not be understated. Section 5.04 demands payment of "time and one-half for all hours worked" whenever "a holiday falls on an employee's scheduled day of work." The County has implemented that provision by adding 8.5

(hours worked) to 4 (premium) to yield the holiday payment. Viewed as a multiplication formula, the County's view can be duplicated by multiplying 8 by 1.5 to yield the holiday payment. This view is not as well rooted in the language of Section 5.04 as is the Association's. The Association's view multiplies 8.5 (hours worked) by 1.5 (premium) to yield the holiday payment. This formula, unlike the County's, pays a premium for "all hours worked" since Deputies working a 5-2/5-3 schedule work 8.5 hours. The Association's interpretation of Section 5.04, applied to a 5-2/5-3 schedule, is preferable to the County's.

Although the County contends the language of Section 5.04 clearly and unambiguously supports its position, the strength of its case is rooted in past practice and bargaining history. These criteria are the most persuasive guides to the interpretation of contractual ambiguity since each reflects the behavior of the bargaining parties whose agreement is the source and the goal of contract interpretation.

The strength of the County's position should also not be understated. Whether or not the evidence supports finding the County's implementation of Section 5.04 to constitute a past practice, it is apparent that the County has consistently implemented the provision, without objection, for three labor agreements. More significantly, it is apparent this consistent implementation is well rooted in bargaining history. Flood acknowledged that there were members of the Association's bargaining team who worked a 5-2/5-3 schedule at the time the parties agreed to the language which has become Section 5.04. The County's implementation of that language from the point it appeared in the agreement has been consistent and unchallenged. The most persuasive guides to resolving contractual ambiguity thus favor the County's interpretation of Section 5.04 over the Association's.

Thus, the resolution of the grievance turns on whether the language of Section 5.04 can be considered clear and unambiguous. If it can, the Association's view must be preferred. If it cannot, the County's view must be preferred.

Although the language of Section 5.04 is arguably clear and unambiguous, its relationship to other agreement provisions is not. For this reason, the County's view must be preferred. The reference to "an employee's scheduled day of work" is broader than the grievance asserts, since it covers employees on a 5-2 schedule and employees on a 5-2/5-3 schedule. Section 5.04 thus demands consideration of Sections 8.01 and 8.02 which establish the 5-2 and the 5-2/5-3 work schedules. Those provisions bring with them the ambiguity of defining hours of work. Section 8.01, for example, demands that all "regular full-time employees shall average forty hours per week annually." The "average" reference establishes the imprecision of creating work schedules. As noted above, a 5-2 schedule yields a 2,080 hour work year, while a 5-2/5-3 schedule yields, roughly, a 2,068 work year. The imprecision is magnified as the averaging period is compressed. On average, a Deputy working a 5-2/5-3 schedule works 79.55 hours on a biweekly basis. This figure can vary from roughly 76.5 to 85 hours. This ambiguity explains how it is possible for a Deputy working a 5-2/5-3 schedule to cover an absence for an 8.5 hour shift with 8.0 hours of sick leave. This is the basis for the payroll convenience set forth in Paragraph 7 of the Memorandum.

The significance of this ambiguity as a matter of contract interpretation is that the provisions of Section 5.04 cannot be read standing alone. The hours worked under a 5-2 or a 5-2/5-3 work schedule pose complicated points. As a matter of contract interpretation, this points away from the Association's view of Section 5.04. That the County has, without challenge, consistently implemented Section 5.04 from the time it was first inserted in the labor agreement cannot be ignored. That Deputies working a 5-2/5-3 schedule sat on the negotiating team which produced what has become Section 5.04 cannot be ignored.

The purpose of grievance arbitration is to give bargaining parties the benefit of their agreement. For the Association's view to be enforceable in arbitration, it must first have been secured through negotiation. If the language of Section 5.04 could be considered clear and unambiguous, it would be enforceable here. However, the relationship of the language of that provision with other agreement provisions is ambiguous. It is, then, necessary for the parties to address this ambiguity at the bargaining table before it can be enforced through arbitration.

AWARD

The County has not been violating the terms of Section 5.04 of the collective bargaining agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 4th day of November, 1997.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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