BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ADAMS COUNTY

and

THE LABOR ASSOCIATION OF WISCONSIN, INC.

Case 85
No. 54872
MA-9813

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, The Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915.

Attorney Michael J. McKenna, Adams County Corporation Counsel, P.O. Box 450, Friendship, Wisconsin 53934

ARBITRATION AWARD

On February 4, 1997 the Labor Association of Wisconsin, Inc. (Association) filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission by appointing either a Commissioner or a member of its staff as the Arbitrator in the above-captioned case. The matter was subsequently assigned to the undersigned who conducted an evidentiary hearing on May 21, 1997. Briefs have been filed and exchanged.

ISSUE

The parties stipulated that the issue is as set out in the Grievance #97-5:

> Did the Employer violate the provisions of the collective bargaining agreement when it refused holiday overtime pay to the grievant on December 23, 1996?
>
> If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article VI - WAGES

Section 5 - Holidays: The County provides the following holidays:

New Year's Day	Memorial Day
Labor Day	Thanksgiving Day
Independence Day	Christmas Day
Easter Day	Good Friday
Last work day before Christmas	(1) floating holiday

In addition to an employee's regular pay, an employee shall receive eight (8) hours of pay at the straight time rate for each of the above holidays. Employees who are required to work on the above holidays shall be paid one and one-half (1-1/2) times their hourly rate for all such time worked. Holidays shall be defined as a period from midnight before to midnight on the holiday. For an employee to be eligible to receive payment for the above holidays, he must work his last regularly assigned shift prior to the given holiday, as well as his regularly assigned shift following the holiday, except by mutual agreement of the parties.

Employees shall notify the Employer at least fifteen (15) days prior to taking their floating holiday. The Employer will notify the employee at least five (5) days prior to the chosen date as to whether or not the request has been approved. Once approved, a floating holiday shall not be canceled, except in an emergency. All floating holidays must be used during the calendar year in which they are earned. If not taken during that year, they will be considered to have been waived by the employee.

BACKGROUND AND FACTS

The County and the Association have been signatories to a series of collective bargaining agreements. The relevant provisions of these agreements have not changed and are set out above.

The Grievant, Lester Collins, is a jailer in the Adams County Sheriff's Department and is covered by the agreement that is the subject of this dispute. Mr. Collins worked on December 23, 1996 from 7:00 a.m. to 3:00 p.m. Mr. Collins applied for time and one-half pay for those hours. He testified that the 23rd was his last work day before Christmas and he interpreted the sentence "Employees who are required to work on the above holidays shall be paid one and one-half (1-1/2) times their hourly rate for such time worked" to apply to his

last work day before Christmas.

His request for overtime was denied and the Association filed a grievance on his behalf and others similarly situated. The grievance was denied at all steps and the Association filed the instant Request to Initiate Arbitration.

Mr. Collins testified that he was unaware of what was the interpretation.

Also testifying for the Association was Ms. Cheryl Thompson who has been the vice president of the Association for one year. Prior to that Ms. Thompson was the Association secretary and she had participated in the negotiations of three contracts. She testified that the language "last day worked before Christmas" was assumed by everyone to mean Christmas Eve. Ms. Thompson further testified that the language was constant in all the contracts, that the only time the issue came up was when a new employe asked about it and that she would tell them it meant Christmas Eve. Mr. Collins was the first one who wanted to file a grievance.

Robert Farber testified on behalf of the County that he was the Adams County Sheriff from 1983 to January 1, 1997 that he participated in negotiations and that he interpreted and applied the collective bargaining agreement for the entire period. Prior to 1983 he participated in negotiations as a member of the Association. Mr. Farber testified that the "last work day before Christmas" has always been December 24th, Christmas Eve, and that this is the first time it has ever been grieved.

Ms. Beverly Ward, the Adams County Clerk testified that her department has processed payroll since 1989 and that December 24th has always been the "last work day before Christmas" for determination of holiday overtime compensation in the Sheriff's Department under Section 5 - Holidays. Ms. Ward was president of the union from 19984 to 1989 before her election to County Clerk.

Mr. Roy Easterly testified that he has been on the Adams County Board of Supervisors for twelve years, and chair of the Law Enforcement and Personnel Committees for seven years. He has participated in negotiations and the issue involved in this case has not been raised by either party.

POSITIONS OF THE PARTIES

The Association's Position

The Association contends that by arguing past practice, the Employer has asked the Arbitrator to inject the Arbitrator's personal sentiments or values when rendering this decision. This is because the language at issue, "last work day before Christmas" clearly means the employe's last work day. The Employer has attempted to unilaterally change the

terms of the agreement by defining the "last work day before Christmas" as December 24th and for the Arbitrator to adopt the Employer's position constitutes a violation of the Arbitrator's authority.

The Employer's past practice argument fails for lack of mutuality of agreement. Since the Employer never served the Association with any written document placing the Association on notice of the Employer's definition, the Association cannot be said to have agreed to this definition. Further since the Employer's interpretation is not the highest standard in effect at the time of contract negotiation, the Employer has violated Article XIV, the maintenance of standards clause. Since the Employer did not negotiate its interpretation of the language at issue and violated Article XIV the Employer should be estopped from arguing past practice.

Since the Employer cannot argue past practice, the question becomes "Has the Employer exercised its management rights in a reasonable manner?" Quoting Sheriff Farber relative to the definition of last work day before Christmas, the literal application of Farber's definition would result in a laughable result to wit; overtime pay for time never worked. For the foregoing reasons the grievance should be sustained.

<u>The Employer's Position</u>

The Employer contends that the language, last work day before Christmas in Article VI - Section 5 has, by practice, been understood and agreed by both the Association and management to be, as designated by the Sheriff, December 24th. This policy and practice has been consistent for at least the fourteen years prior to this grievance. Further the policy was known and was discussed by Association members and was never presented, grieved or brought to the attention of management. The Grievants are trying to get the Arbitrator to rewrite the contract to read the "last day worked by each employee before Christmas."

The language at issue is ambiguous since the Association asserts that it means one thing and the Employer has a policy stating that it means another. Since the contract is ambiguous the parties' intent becomes a question of fact and can be addressed by extrinsic evidence such as past practice.

The United States Supreme Court and Wisconsin Supreme Court have both acknowledged past practice as part of a negotiated collective bargaining agreement where the contract is ambiguous. Courts require past practice to be unequivocal, readily ascertainable and clearly established as an accepted practice by both parties. Here the testimony of Farber, Ward and Easterly prove the policy was in place for fourteen years and Deputy Thompson's testimony proves the Association knew the practice and acquiesced to

its application. Therefore the practice has become a term of the collective bargaining agreement.

DISCUSSION

There is no dispute about the facts in this case. It is purely a matter of contract interpretation.

It is not true, as asserted by the Employer, that simply because the parties have differing views of the meaning of language it is ambiguous. I find, however, that it is capable of two plausible interpretations; it could mean an employe's last work day before Christmas or it could mean the last day before Christmas that work is done in the Department.

Article XIV - Condition of Agreement is a maintenance of standards clause providing that the conditions of employment are to be maintained and not changed absent agreement. The Association asserts that Article XIV should be interpreted to prohibit the Employer from making the past practice argument because in doing so the Employer is implicitly acknowledging a violation of that article. In other words the Employer should be equitably estopped from claiming past practice.

The difficulty with this argument is that Article XIV is inapplicable to the facts. Since there is no evidence that the language has ever been applied as the Association requests and has always been applied consistent with the Employer's interpretation, it follows that the Employer has not changed a condition of employment and has, in fact, maintained the highest minimum standard in effect since the signing of the agreement.

We now turn to whether the past practice here meets the requirements to make it binding. As cited by the Association, Arbitrator Justin has stated:

> In the absence of written agreement past practice to be binding on both parties must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

Arbitrator Mittenthal has stated:

> Even in the absence of an agreement on the matter by the parties, a past practice may be binding if it is shown to be the understood and accepted way of doing things over an extended period of time.

There is no doubt the practice is unequivocal. There is no evidence that it has ever

been done any way other than that the last work day before Christmas for determining holiday overtime pay has been December 24th.

While the practice has been enunciated and acted upon, there is no evidence that the policy was ever given to the Association by memorandum or letter. Nonetheless, this is not a case where the mutuality of acceptance would have to be inferred. Here, the

union steward knew of the practice and told each new employe who inquired about the language how the language was applied. Every year for at least fourteen years some of the employes have not received holiday overtime pay and have failed to grieve. While there is no evidence that the policy was distributed, there is no doubt that Association leadership knew the policy and that it was acted upon for as long as she had knowledge. Therefore, to use Professor Mittenthal's phrase, it was the understood and accepted way of doing things over an extended period of time.

The elements of binding past practice are all present in this case. It has become in effect a term of the agreement.

Therefore the Employer has not violated the collective bargaining agreement.

Based on the above and foregoing and the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 30th day of January, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

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