

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF CUMBERLAND

and

NORTHWEST UNITED EDUCATORS

Case 18
No. 55310
MA-9976

Appearances:

Mr. Alan D. Manson, Executive Director of Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, for the Union and Grievant.

Mr. William R. Sample, Labor Relations Consultants, Inc., P.O. Box 808, Duluth, MN 55801, for the Employer.

ARBITRATION AWARD

On June 26, 1997, Northwest United Educators filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission which requested the Commission to appoint either a Commissioner or a member of its staff to serve as the sole arbitrator to issue a final and binding award relative to a dispute between the parties. The undersigned was subsequently appointed. A hearing was held on October 3, 1997, and briefs have been filed and exchanged.

POSITIONS OF THE PARTIES

Union's Position

The issue in this case arose long ago and was settled in the Union's favor as a result of a meeting between Association Representative Don Loyd and then Mayor Wallace Hollinger. As a result, reserve officers have received the additional one hour of pay when called to the detox center. City Clerk Dennis Rorkon confirmed that the City

had been paying consistent with the Union's interpretation of the Side Letter Agreement. Therefore, the City should not be allowed to unilaterally change an established interpretation of the agreement.

City's Position

Since the December 9, 1987 Side Letter requires that the reserve officers be paid the hourly rate paid by the County for its reserve officers, the City's reserve officers cannot be paid the additional hour for detox center calls, unless the County pays that rate for County reserve officers to respond to detox center calls. There is no proof that County reserve officers get additional pay for responding to detox center calls. Therefore, the City's reserve officers are not entitled to the additional pay.

Since the additional one hour of pay is not the agreed upon wage rate (i.e. County reserve officer hourly rate) then it must be a benefit. The December 9, 1987 Side Letter provides that reserve officers will not get paid benefits. Payment of the additional hour would violate the terms of the contract.

The testimony of Loyd to the effect that Mayor Hollinger approved the practice of paying the detox call pay should be disregarded as unsupported hearsay. Dennis Rockow's testimony should be interpreted as an honest effort to state that "yes, apparently the reserve officers had been receiving the additional hour pay" rather than "yes I knew they were receiving the pay."

If the Arbitrator finds the Side Agreement language ambiguous, he should interpret the language against its author, the Union.

ISSUE

The parties stipulated that the issue is:

Are reserve officers entitled to one hour additional pay in addition to regular pay for each answered call to the detox center under Article 17? If so, what is the remedy?

BACKGROUND

Barron County maintains a detox center in the City of Cumberland. From time to time staff of the detox center call upon the City of Cumberland police to provide assistance with a difficult patient at the center. The parties negotiated the last sentence of Article XVII - Wages of the Collective Bargaining Agreement to read: "Officers called to assist at the detox center will receive one hour of pay in addition to regular pay for each answered call."

The City of Cumberland also has reserve police officers. In 1987 the City entered into a Side Agreement with the Union that provides in pertinent part that the reserve officers “will be paid the hourly rate established by the County for its reserve officers” and that “there will be no fringe benefits paid to these reserves.” It is stipulated that for a period of time before this grievance the reserves were paid an additional hour of pay when they answered a call at the detox center. It is contested whether that was with the knowledge of the City.

DISCUSSION

The first question to be addressed is whether the language of the contract is clear or ambiguous, i.e. subject to more than one meaning.

Is the additional hour of pay a fringe benefit? The parties have cited no precedent for a finding either that additional pay is a benefit as distinct from wages or wages as distinct from a benefit. The City argues that if the County does not pay the additional hour to its reserves for answering detox calls, then such payment would have to be a fringe benefit. But that argument assumes that the entire agreement between the parties relative to compensation for reserve officers is contained in the Side Agreement. However, the Side Agreement does not contain a zipper clause. Therefore it is appropriate to look at the labor agreement to see if the parties considered the additional hour of pay as a benefit as contrasted to payment of wages for regular officers.

In that regard it is noteworthy that the sentence providing for the additional hour of pay is in the Article captioned “Wages.” In other words the parties at least thought of detox response pay in the same context as hourly wages as it relates to the non reserve police officers when it was considered in collective bargaining.

The City argues that since there is no proof the County pays the additional hour to its reserve officers who respond to the detox center, the Side Agreement does not require the same for the City. However, the Side Agreement only stipulates that the hourly rate for reserve officers shall be that of County reserves, it does not say it shall be the sole wage compensation. There is no evidence that the sentence is to do anything other than tie the hourly rate for reserves to the County reserve rate. There is nothing in the Side Agreement to indicate that it is the complete agreement relative to non benefit compensation, i.e. wages.

OTHER INTERPRETIVE EVIDENCE

There is hearsay evidence that former Mayor Hollinger authorized the payment of detox response pay for reserve officers. There is no corroboration of that hearsay in the record. The payment that did occur was not noted on the time sheets as detox response

pay but was entered as overtime. That would not necessarily indicate that the Mayor's decision, if one was made, was communicated to the Police Chief.

The City argues that if the arbitrator finds the language ambiguous, the arbitrator should interpret the language against the Union, since the Union authored the language. That, of course, is a recognized principle of contract interpretation. However, as the editors of Elkouri point out "Courts of law, however, apply this rule only if a satisfactory result cannot be reached by any other rule of construction, and it would seem that arbitrators should observe the same limitation."

BARGAINING HISTORY AND PAST PRACTICE

I find that the Side Agreement is unclear as to whether the parties intended detox response pay to constitute a benefit rather than wages, that the contract would favor, but not compel, a finding that it constitutes wages and that other interpretative evidence is indecisive. I turn now to the extrinsic evidence of bargaining history and past practice for further assistance at clarification.

There is little bargaining history evidence that either of the parties ever considered whether detox response pay was a fringe benefit or wage compensation when the terms of the Side Agreement were negotiated.

The question then becomes whether the practice that was followed prior to this grievance should be recognized as a binding past practice. It is stipulated that prior to the denial giving rise to the grievance, the reserves were receiving the detox response pay. The City contends that the staff of the Office of City Clerk were unaware that this practice was occurring. I accept that as fact. However, the Chief of Police was not only aware, he was actually authorizing the additional hour of pay for detox response.

Arbitrator Jules J. Justin stated in CELANESE CORP. OF AM. 24 LA 168, 172 (1954) that "In the absence of a 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 the parties." Elkouri's editors add that "However, the mutual acceptance may be tacit – an implied mutual agreement – arising by inference from the circumstances. Awareness of the practice is to be presumed from its long established and widespread nature. BETHELEM STEEL CO. 33 LA 374, 37 (VALTIN, 1959). It has been held in this regard that knowledge of members will be imputed to the Union.

Here, it seems to me fair to impute the knowledge and actions of the Chief of Police to the Employer. Therefore, I find that the necessary elements for a binding past practice are present.

In sum I find that the Side Letter Agreement is unclear relative to defining whether

detox response pay is a benefit as differentiated from wage. The Side Agreement does not indicate that it is the entire agreement between the parties regarding reserves. The contract indicates that detox response pay constitutes wages. The Side Agreement ties the hourly rate for reserves to the County rate but does not prohibit detox response pay. Past practice gives definition to the intent of the parties.

AWARD

The City of Cumberland is hereby ordered to pay one hour of pay to Officer Slayton at his then hourly rate for responding to the detox center on May 30, 1997.

The Arbitrator will reserve jurisdiction for 60 days to determine any issues arising from this award.

The grievance is sustained.

Dated at the City of Madison, Wisconsin this 23rd day of April, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

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