BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION

and

CITY OF FITCHBURG

Case 50
No. 56318
MA-10237

(Grievance of Denise A. Miller)

Appearances:

Mr. Mark Hollinger, Staff Attorney, Wisconsin Professional Police Association/LEER Division, on behalf of the Association.

Axley, Brynelson, LLP, by **Mr. Michael J. Westcott**, on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "City", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Fitchburg, Wisconsin, on August 19, 1998. The hearing was transcribed and both parties filed briefs that were received by October 12, 1998. Based upon the record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have jointly agreed to the following issue:

> Did the City violate Section 19.01 of the contract when it refused to pay overtime to grievant Denise A. Miller for hours worked in excess of eight hours in one day and, if so, what is the appropriate remedy?

BACKGROUND

Patrol Officer Miller works an eight-hour shift on a 6-3 rotation wherein she works six days and then is off three days. In addition to performing her patrol duties, she teaches the DARE program, a chore she regularly performs between 7:00 A.M. and 3:00 P.M. When she is not performing her DARE duties, Miller works various rotating shifts.

There is a testimonial conflict over whether Miller and Sergeant Louis A. Eifert in October, 1997, discussed Miller's upcoming work schedule. Eifert testified that he then told Miller that she could choose to either not work on November 9 or that she could work on November 9 during the 3:00 p.m. – 11:00 p.m. shift. Miller, according to Eifert, chose the latter option. Miller denied that any such conversation ever occurred.

Miller in any event worked the following shifts:

November 8 – 11:00 P.M. to 7:00 A.M.
November 9 – 3:00 P.M. to 11:00 P.M.

Miller on December 2, 1997 (all dates hereinafter refer to 1997), filed a written grievance wherein she claimed that she should have received overtime pay for the eight hours she worked on November 9 from 3:00 p.m. to 11:00 p.m. after she completed her earlier 11:00 p.m. to 7:00 a.m. shift that started on November 8 and ended on November 9.

The City has never paid such overtime for at least the last 16 or so years that the present pertinent contractual language relating to overtime has remained in effect. Moreover, Miller admitted that no such overtime was paid to her for the 10 or so times she previously worked the kind of short shift giving rise to her grievance. A short shift occurs when an employe finishes a shift, is off duty for the next shift, and then returns to work for the following shift, the net result of which is 8 hours off duty between shifts. That is what happened here when Miller worked the 11:00 p.m. – 7:00 a.m. shift on November 8, was off the following shift, and then returned for her 3:00 p.m. – 11:00 p.m. shift on November 9. Such short shifts are routinely worked by employes on swing shifts, none of whom have ever received the overtime pay claimed here. In addition, Deputy Police Chief Thomas Blatter testified "a day means a shift" and that employes have never received overtime for working such short shifts. The City thus has prepared an exhibit showing that employes were not paid overtime when they worked short shifts. (City Exhibit 1).

POSITIONS OF THE PARTIES

The Association claims that the City is required under Section 19.01 of the contract to pay Miller overtime because she worked more than eight (8) hours in a "day", i.e. November 9; because a "day" is a 24-hour period of time; because the City's contrary position is

"illogical and nonsensical and renders that portion of Section 19.01 meaningless"; because Section 19.01 is "clear and unambiguous and not susceptible to reinterpretation through practice"; and because employes "should be paid overtime for any hours worked in excess of eight (8) hours in any twenty-four hour period." As a remedy, the Association asks that Miller be made whole and that the City be ordered to cease and desist from "such further contractual violations."

The City contends that "overtime is not owed for working short shifts under the parties' past practice"; that other evidence demonstrates that "the parties have equated the term 'day' with an 8-hour shift"; that the Fair Labor Standards Act has no application here (which is true and which is why it is not discussed below); and that Miller's 3:00 p.m. – 11:00 p.m. shift on November 9 "was substituted for her convenience".

DISCUSSION

Article XIX of the contract, entitled "Overtime", states in pertinent part:

> Section 19.01 Definition and Rate. Employees shall be paid one and one-half (1-1/2) times their straight time rate for all hours worked in excess of eight (8) hours per day and in excess of the 6-3 work schedule. Employees shall be paid two (2) times their normal rate for hours worked after thirteen (13) in succession. For purposes of computing overtime, the hourly straight time rate of pay is to be determined by dividing the annual salary by 1950 hours.
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> . . .

The key term here is "day". Does it refer to a twenty-four (24) hour period as claimed by the Association, or does it, instead, refer to an employe's regular eight hour shift as contended by the City? If the former, the grievance must be sustained because Miller on November 9 did, in fact, work more than eight hours in a twenty-four hour period. If the latter, it must be denied because Miller, in fact, did not work more than eight hours on either her November 8 or November 9 shifts.

In this connection, the contract elsewhere in Article XVIII, entitled "Hours of Employment", states in pertinent part:

> Section 18.01 Normal Schedule. The normal work schedule shall be six (6) workdays of eight (8) hours and three (3) days off (6-3).

> Section 18.02 Shifts. As far as practical, the employee shall work a straight eight (8) hours on an established shift. Shifts shall be maintained on the following schedule: 7:00 am – 3:00 pm; 3:00 pm – 11:00 pm; 11:00 pm – 7:00 am; swing shift. With reasonable notice to the affected employees, the Chief of Police may deviate from the established shift to meet specific needs. The Chief of Police, in his sole discretion, may assign one hundred percent (100%) of the total number of employees of the Police Department to work overlapping shifts in the case of criminal investigation, riots, civil disturbances, strikes, or emergencies, and the decision of the Chief of Police to do so shall be final and not subject to the grievance procedure.
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> . . .

The Association points out that Section 18.02 expressly refers to "shifts", thereby indicating, in the Association's words, that,

> "It is reasonable to conclude that if the parties had intended 'day' in Section 19.01 to mean a shift of eight hours. . .then the parties would have used 'workday' as defined in the immediately preceding article. Section 18.01 juxtaposes the definition of *workday* (as an eight hour shift) against that of a day."
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> . . .

But if that were true, why is it that bargaining unit members for at least 16 or so years never demanded overtime for working the kind of short shifts found here? After all, if the contract is as clear as the Association now contends, why is it that employes themselves never sought overtime under such clear language? No adequate answer has been given to this question, thereby indicating that the contract is not as clear as the Association claims.

Moreover, the contract does not clearly explain when such a "day" starts: is it at midnight when the normal 24-hour calendar day starts or does it begin to run at some other fixed time, say, at the start of the 7:00 a.m. – 3:00 p.m. shift?

The Association acknowledges this problem by pointing out in its brief, at page 10: "What is ambiguous, however, is when a 'day', as contemplated in Section 19.01 begins. For purposes of Section 19.01, if a 'day' begins at midnight, inequities could result." Hence, the Association itself recognizes that the definition of a standard 24-hour "day" that runs from midnight to midnight is inapplicable here because it can result in "inequities" that the Association urges can only be avoided by finding that Section 19.01, in its words, "guarantees employes who work more than eight hours in *any* twenty-four hour period be paid overtime

for such hours." In other words, the Association claims that a "day" must be defined to meet the individual shift and circumstances of each individual employe.

The contract, however, does not expressly provide for that, just as it does not expressly provide that employes who work "short shifts" are to be paid overtime. Indeed, but for the use of the word "day" in Section 19.01 that the Association itself recognizes is somewhat ambiguous, the contract is totally silent on this precise issue.

But, even if we were to assume *arguendo* that Section 19.01 is as clear as the Association asserts, that does not end the matter because it sometimes is still necessary to consider parol evidence in the face of such contract language.

The key to interpreting and applying contract language, after all, "is to determine and carry out the mutual intent of the parties." See *How Arbitration Works*, Elkouri and Elkouri, p. 471. (BNA, 5th Ed., 1997). Hence, "the standards of construction as used by arbitrators are not inflexible. They are but 'aids to the finding of intent, not hard and fast rules to be used to defeat intent.'" Id, at 474.

That is why:

> "Arbitrators seek to interpret collective agreements to reflect the intent of the parties. They determine the intent of the parties from various sources, including the express language of the agreement, statements made at pre-contract negotiations, bargaining history, and past practice. Constructions favoring the purpose of the provision are to be favored over constructions which tend to conflict with the purpose of the provision. Moreover, the terms of the collective bargaining agreement are to be applied in a logical manner consistent with the language, intent of the parties, and with the entire agreement. The collective bargaining agreement should be construed, not narrowly and technically, but broadly so as to accomplish its evident aims." Id., at 479-480. (footnote citations omitted).

If one presupposes, as I do, that an arbitrator's primary duty is to ascertain what the parties intended when they agreed to certain contract language and what they intended when they carried over that language in subsequent contracts, it follows that there is no merit to the Association's claim that past practice cannot be considered in determining how the disputed language should be applied in the future.

Arbitrator Richard Mittenthal explained why past practices must be considered alongside contract language in his seminal article on past practices when he wrote:

. . .

> By relying on practice, the burden of the decision may be shifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretive aid lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. Because such a decision is bound to reflect the parties' concept of rightness, it is more likely to resolve the underlying dispute and more likely to be acceptable. A solution created from within is always preferable to one which is imposed from without. (footnote citation omitted) "*Past Practice and the Administration of Collective Bargaining Agreements" from* Arbitration and Public Policy, *Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators"*, (BNA, 1961), p. 38.

. . .

He added: "The practice, in short, amounts to an amendment of the agreement". Id, at 42.

He therefore concluded that:

> Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to "existing modes of procedure." In this way, the practices may *by implication* become an integral part of the contract. Id., 48-49.

As a result, stated he:

> "Those responsible for the administration of the agreement can no more overlook these practices than they can the express provisions of the agreement. For the established way of doing things is usually the contractually correct way

> of doing things. And what has become a mutually acceptable interpretation of the agreement is likely to remain so. Hence, the full meaning of the agreement may frequently depend upon how it has been applied in the past." Id., at 37.

I therefore conclude that past practice should be relied upon to help resolve this issue, as that is the best indication of how the parties have interpreted and applied Section 19.01 over the years.

As to that, the record establishes that the City has *never* paid overtime for short shifts and that it has defined "day" in Section 19.01 to mean shifts for at least the last 16 or so years that this language has been in effect. Indeed, grievant Miller herself testified that she was never paid overtime for the ten or so times she previously worked short shifts.

The Association tries to downplay the significance of this past practice by asserting: "the vast majority of the City's evidence of this alleged past practice was based on the City's application of Section 19.01 to probationary employes." The record in fact, however, shows that said past practice was also applied to non-probationary employes like Miller, as well as officers Jackson, Stetzer, Clauder, Danielson, Kaschub and Gustafson, *none* of whom ever complained about said practice before the instant grievance was filed. Moreover, said overtime has *never* been paid in the 16 or so years that the overtime language of Section 19.01 has been in the contract.

All this constitutes a binding past practice because it: (1), is unequivocal; (2), has been clearly enunciated and acted upon; and (3), has been readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. See *How Arbitration Works*, supra, p. 632. By adhering to that past practice here, the City therefore did not violate Section 19.01.

Contrary to the Association's claim, such a ruling will not cause an "illogical and nonsensical" result that renders this portion of 19.01 "meaningless". In fact, the long-established past practice here shows that Section 19.01 has been applied in a wholly consistent manner and that it, in fact, has *never* caused any of the problems claimed by the Association – a fact the Association itself has tacitly acknowledged by not grieving over this section for the last 16 or so years it has been in the contract.

In light of the above, it is my

AWARD

That the City did not violate Section 19.01 of the contract when it refused to pay overtime to grievant Denise A. Miller for working a short shift; her grievance is therefore denied.

Dated at Madison, Wisconsin this 25th day of November, 1998.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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