

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION
and
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 456
No. 56412
MA-10277

Appearances:

Gimbel, Reilly, Guerin & Brown by **Franklyn M. Gimbel** and **Aaron M. Hurvitz**, appearing on behalf of the Milwaukee County Deputy Sheriffs' Association.

Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee County Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a commissioner or member of its staff to hear and decide a grievance filed by the Association. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on September 3, 1998. The hearing was not transcribed. The parties filed post-hearing initial briefs. The Association filed a reply brief. The County elected not to file a reply brief. The record was closed on January 19, 1999.

ISSUE

The Association describes the issue: [d]oes sec. 3.14(2)(a) entitle employes to extend vacation time by adding one day of compensatory time at the front and one day at the back of their vacations?

The County states the issue: [d]id the County violate sec. 3.14 of the labor agreement when it denied compensatory time at either end of vacations scheduled four and ten months ahead, respectively, with directions to resubmit the requests on a more timely basis? If so, what (is the) remedy?

I define the issue as twofold:

a) Does sec. 3.14(2)(a) of the parties' labor agreement entitle employees to exercise the option of extending their respective vacation times by adding one day of compensatory time at the front and one day at the back of their respective vacations?

b) If so, is such entitlement subject to the approval or denial of the sheriff?

PERTINENT CONTRACT PROVISIONS

1.02. MANAGEMENT RIGHTS. The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employees; the right to assign employees, subject to existing practices and the terms of this Agreement; the right, subject to civil service procedures and ss. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing managements rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Ch. 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management. No employee covered

by this Agreement shall, during the term of this Agreement, have his position within the Milwaukee County Sheriff's Department diminished on any basis except for misconduct in the performance of his duties within the department.

In the event the organizational structure of the Sheriff's Department is modified by the establishment of positions in classifications other than those currently represented by the Association, and where new employees assigned to such positions will perform duties traditionally performed by unit employees (Deputy Sheriff I, Deputy Sheriff I (Bilingual) (Spanish), Deputy Sheriff (Sergeant), such positions shall not be filled in the new classification except as vacancies occur through attrition in the unit classification which had traditionally performed such duties. The County reserves the right to assign employees within classification to other duties within the department in order to create vacancies in the function to which employees in the new classification are to be appointed.

...

3.02(4). Employees shall have the option of accumulating 120 hours of compensatory time, exclusive of holidays, in lieu of cash, within 26 pay periods, provided that such compensatory time may be liquidated only with the consent of the department head and if the County determines the staffing is adequate and if no overtime assignment will result employees will be allowed to liquidate their accrued compensatory time. If, because of the needs of the department, such compensatory time is not liquidated within the time limited, the unliquidated balance shall be compensated in cash.

...

3.14(2) VACATION

...

(2) Employees entitled to 120 hours vacation or more shall be permitted to split one such week into not more than 2 parts, one part being 24 hours, and the other being 16 hours, provided that the selection of such split week shall be made in accordance with existing departmental policies with respect to vacation selection on the basis of seniority, as defined in par.(4). Such split week vacation shall be selected by the employee who elects to do so at the same time that all other annual vacation periods are selected and scheduled. In accordance with the provisions of s. 17.17(1), C.G.O., the Sheriff may deny an employee's request to split a week of vacation when, in his judgment, such split vacation would impair the efficiency of the department or division.

(a) Any employee may use accumulated compensatory time to extend a vacation by one day at the front and one day at the back end of such vacation.

BACKGROUND

The Grievant, Deputy Charles G. Coughlin, is assigned to work at the Milwaukee County Jail. On January 5, 1998, Deputy Coughlin requested to use four days of compensatory time he had accumulated to add to two of his vacation periods. Specifically, Deputy Coughlin sought to add one day to the front and one day to the back of each of the two vacation periods. Under department procedures codified in sec. 3.14(3) of the parties' labor agreement, the Sheriff's Department is to establish a vacation selection procedure that will enable all deputies to be informed of their approved vacation request by March 1 of each year.

Deputy Inspector Michael Johnson denied Deputy Coughlin's request to augment his vacation periods with compensatory time. Deputy Coughlin was advised by the Deputy Inspector to resubmit the same request within thirty days of each of his contemplated vacation periods.

POSITIONS OF THE PARTIES

Association

The Association regards this issue as particularly important to deputies assigned to the jail division where it appears that compensatory time is more easily earned and accumulated than actually enjoyed.

The Association finds the language of sec. 3.14(2)(a) unambiguous in providing that an employe may use accumulated compensatory time to extend a vacation. The Association argues that the County's attempt to use the general language of sec. 3.02(4) to modify the provisions of sec. 3.14(2)(a) violates the general rule of contract construction that specific language must prevail over general.

In the alternative, the Association contends that even if the language of sec. 3.14(2)(a) is ambiguous, parole evidence introduced at hearing demonstrate that the parties intended sec. 3.14(2)(a) as an entitlement. The Association cites the testimony of three witnesses it called, all of whom were members of the bargaining team that negotiated the 1998-2000 agreement. The Association believes the testimony of these witnesses establishes that the intent of sec. 3.14(2)(a) was to guarantee that employes in the detention bureau would be able to use their accumulated compensatory time. This, according to the Association, was a sharp contrast to the situation previously existing for detention bureau employes who had difficulty in utilizing their compensatory time.

The Association argues that the testimony offered by the witness called by the County does not refute the Association's view as to the intent of the sec. 3.14(2)(a) language. The Association believes the County's witness simply testified that the rejection of Deputy Coughlin's request for compensatory time was based on past practice.

County

The County believes its actions in the administration of compensatory time-off under the collective bargaining agreement comply with both the letter and the spirit of labor agreement.

The County lists secs. 1.02, 3.02(4) and 3.14(2)(a) as the pertinent contract provisions. The County asserts that one portion of the agreement cannot be read in isolation, but “. . . must be read in concert with other provisions which impact on contract administration and interpretation.”

The County argues that sec. 1.02 (management rights) reserves to the Sheriff and the County the right to determine the work force necessary to carry out the department’s mission. The same section further preserves management’s right to maintain efficiency of operations by determining the method, the means, and the personnel by which department operations are conducted.

The County acknowledges that the sec. 1.02 language is broad, but mutually agreed to by the parties, and consistent with the “constitutional immemorial duties of the Sheriff.” It finds the language of this section to be clear and unambiguous.

The County also finds the language of sec. 3.02(4) to be clear and unambiguous. It argues the contingencies recited in that section relating to the use of compensatory time demonstrate that use of compensatory time off was not a right, but rather a matter of the Sheriff’s discretion. Under the County’s interpretation, compensatory time off is allowed only with the Sheriff’s consent, only if staffing is deemed adequate by the County, and only if no overtime results.

The County additionally urges that the Association’s interpretation of the sec. 3.14(2)(a) language is self-serving and represents a unilateral expectation of the Association, not a mutual understanding of the parties.

The County further argues that the Association has acquiesced in the County’s interpretation of the disputed passage, noting that earlier denials of compensatory time off requests based on (inadequate) staffing were never aggrieved.

Finally, the County contends that neither the union nor the collective bargaining agreement may legally impinge on the sheriff’s ability to run his jail. The County argues that the operation of the county jail and prisoner custody is a constitutionally protected function of the sheriff and as such could not be transferred to another office.

The County views the instant grievance as an attempt by the Association “. . . to dictate to the sheriff who works in the jail.” The County argues that the legislature may not usurp the sheriff’s constitutional and immemorial powers. Neither, says the County, may the union accomplish indirectly what it cannot accomplish directly under the guise of compensatory time off.

In summary, the County reasserts that the contested language is clear and unambiguous, and argues that the Association is seeking not to interpret the contract but to expand it “. . . by contriving a new entitlement benefit not bargained for or mutually agreed to by the parties.” The County maintains that any examination of the provisions cited by the County as controlling clearly demonstrates that the County, through the Sheriff, could act as it did in this matter. “The contract specifically allows the Sheriff to determine the method and means by which he carries out his immemorial duties, in this instance, keeper of the jail,” concludes the County, and “. . . also specifically allows the Sheriff discretion to deny the use of compensatory time.”

Association’s Reply

In reply, the Association points out that the sec. 3.14(2)(a) language specifically allows employees to use accumulated compensatory time to extend a vacation one day at the front and one day at the back. The Association reasserts its view of contract construction that specific contract language controls over general.

The Association disputes the County’s characterization of its witnesses’ testimony as self-serving, and believes the County misstates the substance of the testimony by declaring the testimony shows only that compensatory time off was an important issue to the Association. The Association believes the substance of the testimony offered by its witnesses went to the intent of sec. 3.14(2)(a) during negotiations.

The Association asserts that the County has failed to demonstrate that the right of employees to use compensatory time off pursuant to the provisions of sec. 3.14(2)(a) contravenes the Sheriff’s authority under the State Constitution. Neither was the use of compensatory time off ever addressed in the cases cited by the County, according to the Association.

County’s Reply

The County declined to file a reply brief, stating that it found its position adequately addressed in its previous brief.

DISCUSSION

Both parties contend that the language of the contract is clear and unambiguous. Notwithstanding their agreement as to its clarity, each offers a competing interpretation of the language.

The Association limits its focus to the specific language of sec. 3.14(2)(a). On its face that language appears to grant employees the right to extend a vacation by one day at the front and one day at the back of the vacation period.

The County doesn't necessarily disagree, but argues that the sec. 3.14(2)(a) language is qualified by the sec. 1.02 management rights provisions of the parties' labor agreement. Under that language the County is reserved the right to 1) determine the work force necessary to carry out the department's mission, 2) to maintain the efficiency of operations by determining the means and personnel by which such operations are conducted, and 3) to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

The general rule is that "[u]nless a contrary intention appears from the contract construed as a whole, the meaning of a general provision should be restricted by more specific provisions. 1/ Thus the County is correct that the sec. 3.14(2)(a) language cannot be read in a vacuum, but must be read in conjunction and concert with other contractual provisions. If, however, no contrary intention to the express provisions of sec. 3.14(2)(a) can be found, the general provisions of the management rights language contained in sec. 1.02 must be found to have been limited by the more specific language.

1/ Elkouri & Elkouri, How Arbitration Works, Fifth Ed., BNA, Wash. D.C., 498 (citations omitted).

Section 3.14 of the parties' labor agreement deals exclusively with vacations. Subsection 1 grants employes an entitlement to a period of paid vacation, the length of which depends on the individual employe's years of continuous service. Subsection 2 grants employes entitled to 120 hours or more of vacation the option of splitting a vacation week into two parts, but specifically reserves to the Sheriff the right to deny an employe's request to split a week of vacation " . . . when, in [the sheriff's] judgment, such split vacation would impair the efficiency of the department or division."

Subsection 2(a), of course, contains the subject-language of this grievance that appears to allow employes to use accumulated compensatory time to lengthen a vacation period by one day at the front and one day at the back of such vacation. 2/

2/ Subsection 3 requires the department to establish a vacation selection procedure so that all deputies may be informed of the approved vacation request by March 1 of each year; Subsection 4 indicates that vacation picks will be made within classification in division and within current shift assignment on the basis of bargaining unit seniority and further identifies the three shifts.

I find no contrary intention expressed in any other part of the labor agreement. On the contrary, the agreement firmly expresses the view that employes are entitled to annual paid vacations of specified lengths. Moreover, while the length of the vacation periods to which employes are entitled vary according to the individual employe's length of service, it is clear that vacation length is a mandatory subject of bargaining. The product of this bargaining appears in the labor agreement. With one limited exception, vacation length has not been specifically subjected to any discretionary review by the sheriff.

While that exception permits an employee entitled to 120 hours or more of annual vacation to split a vacation week, it specifically grants the sheriff the right to deny a request to split a vacation week when the sheriff determines that granting such request would impair the efficiency of the department or division. *No similar reservation of discretion is listed with respect to accumulated compensatory time claimed as vacation time.*

The County, however, argues that sec. 3.02(4) of the parties' agreement reserves management's authority to approve or deny any employee's request for accumulated compensatory time-off. That section provides that ". . . compensatory time may be liquidated only with the consent of the department head and if the County determines the staffing to be adequate and if no overtime will result . . ."

But the County's argument mingles apples with oranges. In the context of sec. 3.02(4), an employee's request to use *compensatory time* (120 hours of which can be accumulated) is clearly subject to a discretionary review by management.

But sec. 3.14(2)(a) deals with *vacation time, not compensatory time*. Once an employee opts for the permitted vacation time extension, the accumulated compensatory time necessary to claim the extension is, in effect, converted to vacation time. Without this conversion the extension entitlement would be an empty reward – simply a continuation of the *status quo* - for no employee could prudently make any timely vacation commitment with any degree of certainty that he or she would be allowed to enjoy it. Presumably, this is the kind of situation the sec. 3.14(2)(a) language was designed to correct.

The County correctly notes that Sec. 1.02 reserves to the County the right to determine the work force necessary to carry out the department's mission. The same section further preserves management's right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

However, careful review of this language reveals no inconsistency between management's exercise of the rights enumerated therein and the entitlement of employees to use accumulated compensatory time to extend their annual vacations as set forth in sec. 3.14. No argument has been made that entitlement to vacation leave currently prevents management from continuing to determine how many deputies it needs to run its jail division or the personnel necessary. Clearly it does not. Under this circumstance it is difficult to understand how a legitimate entitlement is transformed into an intrusive destroyer of management rights by a vacation improvement of only two days per vacation period.

Vacation entitlement or none, two-day enhancements or none, management still has the right to determine how many deputies it needs for a given shift in a given division and to make the personnel assignments it deems appropriate. Thus while management may deem an additional two-day vacation entitlement as more costly or less efficient, management can still continue to exercise its management rights. Given the absence of any restrictive or limiting

language with respect to this entitlement, if cost (overtime) or efficiency (adequate staffing) is a spin-off issue, it is one to be resolved at the bargaining table. 3/

3/ As was apparently done, for instance, when the parties agreed to reserve for the sheriff the right to deny deputies' requests for splitting a vacation week when the sheriff believed that granting the request would impair department or division efficiency.

The County posits that the Association's grievance seeks “. . . to dictate to the sheriff who works in the jail.” I do not agree.

As the County points out, a collective bargaining agreement cannot limit a sheriff's powers derived from the Wisconsin Constitution. Undeniably, one of the sheriff's constitutionally mandated duties is custody of the common jail. STATE EX REL. KENNEDY V. BRUNST, 26 WIS. 412, 414 (1870). Contrary to the view suggested by the County, however, I do not perceive the instant issue as rising to constitutional proportions. I find nothing in sec. 3.14(2)(a) that impedes the sheriff in his custody of the common jail and of the prisoners therein. Increasing vacation entitlement of employes assigned to the jail may increase the cost of operating the jail; it does not, most decidedly, “dictate to the sheriff who works in the jail.”

Both parties agree the contract language is clear and unambiguous. I concur. Based on the specific language of sec. 3.14(2)(a) of the parties' agreement as well as the agreement as a whole, the grievance of the Association must be sustained. In my opinion, the contract clearly entitles employes to exercise the option of extending their respective annual vacations by adding one day of accumulated compensatory time to both the beginning and the end of the vacation period. Such entitlement is not subject to the approval, denial, or other action by the sheriff (except as to an employe's request to split a vacation week and the administration of the vacation scheduling procedure).

The Association seeks no remedy beyond an arbitral declaration of whether sec. 3.14(2)(a) constitutes an employe entitlement. The vacation periods that the Grievant sought to extend have passed by several months. The record does not reveal whether Grievant ever received the additional vacation time he requested. 4/

4/ If Deputy Coughlin was ultimately denied his right to extend his vacation as set forth in sec. 3.14(2)(a), inasmuch as a new vacation year has now commenced it appears virtually impossible to “make Deputy Coughlin whole” as to the four days he requested but did not receive. Presumably, those days still exist as accumulated compensatory time from which Coughlin may garner some future benefit. No monetary loss to Coughlin was alleged to have occurred.

AWARD

The Employer, Milwaukee County, shall comply with the express terms of sec. 3.14(2)(a) of the parties' labor agreement, and shall grant employe requests to extend their respective vacation times by adding one day of compensatory time at the front and one day at the back of their respective vacation, without any discretionary review for approval or denial of any such requested vacation extensions, except those restrictions applicable to the scheduling of vacation as noted above.

Dated in Madison, Wisconsin this 16th day of February, 1999.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator