BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION

and

VILLAGE OF ELM GROVE

Case 17
No. 57341
MA-10598

Appearances:

Mr. Mark Hollinger, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, appearing on behalf of the Association.

Ms. Andrea Steen Crawford, Village Manager, Village of Elm Grove, 13600 Juneau Boulevard, Elm Grove, Wisconsin 53122-0906, appearing on behalf of the Village.

ARBITRATION AWARD

Pursuant to a request by Wisconsin Professional Police Association/LEER Division, herein "Association," and the subsequent concurrence by the Village of Elm Grove, herein "Village," the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on March 16, 1999, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on May 11, 1999, at Elm Grove, Wisconsin. A transcript was received on June 8, 1999. The parties did not file briefs.

After considering the entire record, I issue the following decision and Award.

ISSUES

The Association frames the issues as follows:

Did the Village of Elm Grove violate Article XIX – (Holiday Pay) of the 1998 – 2000 Collective Bargaining Agreement when it calculated holiday pay based on a 7.746 hour workday rather than an 8.0 hour workday. If so, what is the remedy?

The Village frames the issues in the following manner:

Did the Village of Elm Grove violate Article 19, holiday pay of the 1998-2000 collective bargaining agreement when it calculated holiday pay based on a 2014 work year as compared to 2080 work year. If so, what is the remedy?

Based on the entire record, the Arbitrator frames the issues as follows:

1. Did the Village of Elm Grove violate Article XIX – Holiday Pay by the manner in which it calculated holiday pay for the Grievants?

2. If so, what is the remedy?

DISCUSSION

During negotiations for the successor collective bargaining agreement, the Association proposed a schedule change for its dispatchers from a five day on, two day off schedule to a four two, four two, four two, four two, four one schedule. The purpose of the proposed schedule change was to allow employes off on different days of the week as opposed to consistently the same day. The five two schedule comes out to 2080 hours per year for unit employes while the latter schedule is equivalent to 2014 hours.

The Association and the Village ultimately signed a new agreement that runs from 1998 through 2000. The parties agreed that there would be a one percent wage increase in effect as of January 1, 1998, which increased the maximum hourly wage from $13.55 to $13.69.

The new schedule was implemented in March, 1998, with the wage rate again being increased from a maximum of $13.69 to a maximum of $14.14. This increase in the wage rate was designed to offset the reduction in hours from 2080 to 2014 so that the annual in-pocket dollar amount would not be reduced to unit employes due to the decrease in hours of the new schedule.

There was no discussion during bargaining of holiday pay or the method of calculating holiday pay.

The parties agree that the January 1, 1998 holiday was correctly calculated at $109.52 which is $13.69 times eight hours. The Village paid the other nine holidays at $14.14 times 7.746 hours which also equals $109.52.

On December 9, 1998, Tammy Ostroski, Renee Alverez, Carolyn Kiefer and Jessica Luedtke filed grievances which raised the issue of whether the Village violated Article XIX – Holiday Pay by failing to make proper payment to the Grievants. Regarding the relevant facts, the grievances state that the agreement "provides that employees shall receive a year end payment for the holidays identified in the Agreement. The Employer made payment, to the grievant, based upon 7.746 hours per day rather than 8.0 hours." The Village denied said grievances. In her letter to Association representative, Thomas W. Bahr, dated January 14, 1999, Village Manager Andrea Steen Crawford noted the following:

. . .

> At the January 6th meeting, the WPPA position was further defined through a series of questions which you posed and answered.
>
> > Did we negotiate a 4.02% increase in holiday pay? No.
> > Did we negotiate any change in the holiday pay provision? No.
>
> You asserted that the requested 4.02% increase in holiday pay from 1997 to 1998 is the result of the negotiated settlement. In conclusion, the WPPA position on the calculation of the 1998 holiday pay was defined based on the following example using the highest wage category with no step increased during the year.
>
> EXAMPLE 1 – WPPA methodology for calculating holiday pay
>
> | | | |
> |---|---|---|
> | January 1, 1998 | $13.69 x 8 hours = | $109.52 |
> | 9 other holidays | $14.14 x 8 hours = | $113.12 per holiday |
> | | | x 9 holidays |
> | | | $1,018.08 |
> | Total 1998 holiday pay requested | | $1,127.60 |
>
> $1,127.60 represents a 4.02% increase over 1997 holiday pay of $1084.

> While it is true that contract negotiations did not include a discussion of a 4.02% increase in holiday pay or a change in the contract language outlining holiday pay, WPPA did negotiate a wage proposal for 1998 called for a one percent increase in total compensation for a full-time dispatcher at the highest pay range with no step increase during the year. Chief Haig represented that the top pay dispatchers did, in fact, receive a 1% increase in total compensation for 1998 including $1095.20 holiday pay compensation thereby satisfying the Village's negotiated contractual obligations.
>
> . . .
>
> My philosophy in negotiating and administering contracts is to treat all employees fairly and equally. When a specific contract clause calls for an alternate methodology for a benefit calculation, it is adhered to. In the absence of specific language, all employees are treated equally. In the case of holiday pay, a consistent methodology was used in the calculation. Village employees with a 1950 hour work year received 75.0 hours in holiday pay. Employees with a 2021.5 hour work year received 77.75 hours in holiday pay. Employees with a 2080 hour work year received 80.0 hours in holiday pay. Dispatchers with a 2014 hour work year received 77.46 hours in holiday pay.
>
> In conclusion, I find that the contract does not identify a specific methodology for calculation of holiday pay, but that the Village has satisfied the negotiated wage agreement by providing a one percent increase in overall wages including a one percent increase in holiday pay. I further find that this methodology is consistent with the manner in which other employees are compensated for holiday pay based on the number of hours worked annually. Therefore, I do not concur with your holiday pay calculation as outlined in Example 1 above and the additional $32.40 per dispatcher requested.

At issue is whether the Village violated Article XIX – Holiday Pay by the manner in which it calculated holiday pay for the Grievants. The Association argues that the Village violated the aforesaid contractual provision by calculating holiday pay based on 7.746 hours instead of 8 hours. The Village takes the opposite position.

Article XIX – Holiday Pay provides that "All regular full-time employees shall be entitled to holiday pay." Said article, however, does not expressly describe what constitutes holiday pay. Bargaining history does not shed light on its meaning.

The Village argues that because the holiday article contains no formula for calculating holiday pay and other contract provisions contain the formulas for calculating benefits noted below the Village may calculate holiday pay on a basis other than eight hours. In particular,

the Village points to Article XVII which provides that the Village will grant paid sick leave at the rate of eight hours for each calendar month worked and to Article XXIII which sets out a vacation schedule and uses the word "days" referencing the number of days off. The Village is correct in pointing out that arbitrators frequently apply the principle to express one thing is to exclude another. Elkouri and Elkouri, How Arbitration Works, 5th Edition, page 497 (1997). The contract, on its face, appears to support the Village's position that it properly paid holiday pay based on 7.746 hours.

The Association argues, contrary to the above, that past practice supports its position. In this regard, the Association maintains that the Village has always calculated holiday pay by multiplying the employees' wage rate times the number of hours they worked in a day which is eight hours. However, 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 both parties. Elkouri and Elkouri, supra, page 632. The Village provided unrebutted testimony and evidence that it calculated holiday pay in the past based on a consistent methodology which provided that eight hours is the holiday pay only within the context of a 2080 hour work year. Dispatchers now work a 2014 hour work year. Pursuant to the Village's methodology that work year computes to 77.46 hours of holiday pay. It is clear from the foregoing, that the Village has not always accepted the practice of paying dispatchers eight hours of holiday pay except under the old work schedule. Therefore, the Arbitrator rejects this argument of the Association.

The Village argues that it has honored the terms of the negotiated agreement by providing a one percent increase in the holiday pay benefit. In fact, there is no dispute that the parties agreed to a one percent wage increase effective January 1, 1998, which increased the maximum hourly wage from $13.55 to $13.69. There is also no dispute that for the January 1, 1998 holiday the Village correctly paid dispatchers $13.69 times eight hours which equals $109.52 or a one percent increase over the holiday pay for the 1997 holidays. (Tr. 44) The Village also points out that the other nine holidays in 1998 were paid at $14.14 times 7.746 hours which also equals $109.52 for the same one percent increase over the 1997 holiday pay.

The Association argues, contrary to the above, that the Village's failure to pay the other nine holidays at $14.14 times eight hours violates the parties' agreement reached during collective bargaining. However, as pointed out by the Village, the parties did not negotiate a four percent increase in the holiday pay benefit (which the Association's holiday pay formula would result in) or any other change in the holiday pay provision. Thomas Bahr, bargaining representative for the Association, confirmed same when he testified at hearing that when the schedule changed in March, 1998, the hourly rate changed upward to offset the reduction that otherwise would have occurred in the annual wages of the employe. (Tr. 12) In other words, the hourly wage rate upon implementation of the schedule change was agreed to be increased to a proportional amount percentagewise to the number of the cut in hours so that there would be no loss in in-pocket dollars to the full timers. (Tr. 12-13) The disputed holiday payments

by the Village resulted in no loss in in-pocket dollars to the Grievants. As noted above, it resulted in a one percent increase in holiday pay. This was consistent with the parties' agreement for a one percent across-the-board increase effective January 1, 1998. The Association's request to sustain the grievances would result in a four percent increase in the holiday pay benefit, something the Association did not bargain successfully for at the bargaining table. The Association should not be allowed to accomplish in grievance arbitration something it did not even attempt at the bargaining table.

It is true, as pointed out by the Association, that the Village's method of calculating holiday pay is based on a different number of hours in a work day (7.746 hours) than the number of hours an employe takes off for a holiday (8 hours). However, the Association offers no persuasive evidence that this violates the collective bargaining agreement.

Based on all of the foregoing, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the Village of Elm Grove did not violate Article XIX – Holiday Pay by the manner in which it calculated holiday pay for the Grievants.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the above and the record as a whole, it is my

AWARD

The grievances are denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 23rd day of July, 1999.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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