BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN COUNTY PLEASANT VIEW HOME EMPLOYEES, LOCAL 1162, AFSCME COUNCIL 40, AFL-CIO

and

GREEN COUNTY (PLEASANT VIEW HOME)

Case 141
No. 57431
MA-10620

(Sunday Overtime Grievance)

Appearances:

Mr. Thomas Larsen, Staff Representative, AFSCME Council 40, appearing on behalf of the Union.

Mr. William Morgan, Corporation Counsel, Green County, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and County or Employer, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on June 18, 1999, in Monroe, Wisconsin. The County filed a brief at the hearing. The record was closed on June 21, 1999 when the Union notified the undersigned that it was not going to file a brief. Based on the entire record, the undersigned issues the following Award.

ISSUE(S)

The parties were unable to stipulate to the issue(s) to be decided in this case. The Union framed the issue as follows:

> Did the Employer violate the collective bargaining agreement and past practice by discontinuing the paying of one and one-half times the Sunday premium rate for overtime hours worked on Sundays? If so, what is the appropriate remedy?

The County framed the issues as follows:

> Is the contract language in question (Section 22.01, Overtime-Sunday Pay) so clear on its face so as to be unambiguous such that past practice is irrelevant?
>
> In the alternative, is reformation of the contract an appropriate remedy where the writing does not accurately reflect the intent of the agreement of the parties?

Having reviewed the record and the arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

> Are employes who work more than eight hours on Sunday contractually entitled to be paid at the rate of triple time and one-half for the time over eight hours?

PERTINENT CONTRACT PROVISIONS

The parties' 1997-98 collective bargaining agreement contained the following pertinent provisions:

ARTICLE XXII

OVERTIME

22.01 Time and one-half (1 ½) shall be paid after eight (8) hours in any one day or forty (40) hours in any one week, whichever is greater. All Sundays worked shall be paid for at the double time rate for employees working three days or more a week. In order to qualify for the double time rate, it is provided that the regular employees must work their regular scheduled work day immediately preceding and following the Sunday. Sunday pay shall be paid for all work performed during a twenty-four (24) hour period commencing 10:30 pm on Saturday and ending 10:30 pm on Sunday, except for maintenance where the twenty-

four (24) period would commence at their usual starting time of 7:00 pm on Saturday. Employees working the 2:30 pm to 11:00 pm shift on Sunday shall be entitled to Sunday pay for that entire shift.

. . .

ARTICLE XXVIII

MAINTENANCE OF STANDARDS

28.01 The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement, and conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

It is agreed that the provision of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

FACTS

The County and the Union have been parties to a series of collective bargaining agreements. Their most recent agreement was for 1997-98. They are in the process of negotiating a successor to that agreement. They had not reached agreement on a successor contract as of the date of the hearing herein.

One of the provisions in the parties' last labor agreement is Sec. 22.01 which is entitled "Overtime". That section deals with two separate matters: overtime and the Sunday pay rate. It provides that overtime is paid at the rate of time and one-half for work performed after eight hours in one day or 40 hours in any one week. It also provides that the Sunday pay rate is double time.

This case involves a change in the way the County calculates certain Sunday pay at the Home. Specifically, it involves the pay which employes who work more than eight hours on Sunday receive for the time over eight hours.

The record indicates that for the last 20 years, the Home has been calculating Sunday pay as follows. The first eight hours that an employe worked were paid at the double time rate. On occasion, employes at the Home worked more than eight hours on a Sunday. When this happened, they were paid double time for the first eight hours, and triple time and one-half for any time over eight hours. This latter figure (i.e. triple time and one-half) came from adding the overtime rate of time and one-half to the Sunday double time rate. In other words, the overtime rate and the Sunday rate were compounded/pyramided.

The Home's Accounting Department was aware of the foregoing, but the County's Accounting Department was not.

On December 17, 1998, the parties had a bargaining session. One of the topics addressed that day were ways to reduce the Home's overtime costs. During this discussion, Council 40 Staff Representative Thomas Larsen told the County's bargaining team that he had just learned that the Home was making a mistake in computing the pay of those employes who worked more than eight hours on Sundays, and if this mistake was corrected, it would save the County money. Specifically, Larsen told the County's bargaining team that when an employee worked more than eight hours on a Sunday, the Home was mistakenly pyramiding time and one-half on top of the Sunday double time rate, for an effective rate of triple time and one-half. The spokesman for the County's bargaining team, Attorney Howard Goldberg, indicated he personally was unaware of the pyramiding of such pay at the Home and that if such a practice existed, it was a mistake.

Following this meeting, the County investigated the matter and determined that the practice at the Home was indeed to pay triple time and one-half for hours worked after eight on Sundays.

On Sunday, January 3, 1999, several bargaining unit employes worked more than eight hours.

On January 6, 1999, the following memo was posted at the Home:

RE: Sunday Double Time Accounting Procedures:

Dear Pleasant View Nursing Home Employees:

> Please be advised that henceforth all hours worked on Sundays will be paid in strict accordance to the contract. In other words, there will not be any pyramiding of overtime upon double time as there has been in the past. This was brought up in our recent round of negotiations and acknowledged by the

Union through Mr. Larsen that this was not what was intended by Section 22.01 of the contract between Green County and the Green County Pleasant View Nursing Home employees.

If you should have any questions or concerns, please feel free to contact Nursing Home Administration or my office.

Very truly yours,

William E. Morgan /s/
William E. Morgan
Green County Corporation Counsel
State Bar No. 01019538

With this notice, the County intended to discontinue the existing Sunday pay practice at the Home.

The County's announcement referenced above was given without prior notice to the Union, and without the Union's agreement.

The employes who worked more than eight hours on January 3, 1999 were not paid at the compounded rate (i.e. triple time and one-half) for the time over eight hours, nor have any other employes been paid at that compounded rate subsequently.

The Union grieved the County's termination of the Sunday pay practice. The County denied the grievance and it was appealed to arbitration.

DISCUSSION

This dispute involves whether employes who work more than eight hours on Sunday are contractually entitled to be paid at the rate of triple time and one-half for the time over eight hours. The Union contends that they are, while the County disputes that contention.

In resolving this question, I will review both the applicable contract language and an alleged past practice. They will be reviewed in the order just listed.

The applicable contract language is found in Article 22, Sec. 22.01. As was noted in the **FACTS** section, Section 22.01 deals with two separate matters: overtime and the Sunday pay rate. The first sentence of that section provides that overtime is paid at the rate of time

and one-half for work performed after eight hours in one day or 40 hours in any one week. The second sentence of that section then goes on to provide that the pay rate for Sunday work for those employes who work three days or more a week is double time. The next three sentences go on to set certain qualifications to qualify for the double time rate specified in the second sentence. Those qualifications need not be reviewed here because they are not germane to this dispute.

Since this dispute involves Sunday pay, it is the second sentence of Sec. 22.01 which is dispositive here – not the first sentence of that section. The second sentence provides thus: "All Sundays worked shall be paid at the double time rate. . ." In very plain, clear and unambiguous terms, this sentence sets a single pay rate for "all" work performed on Sundays by employes who work three or more days per week, namely double time. Since the Sunday pay rate applies to "all" work performed on that day, it does not matter if the employe works one hour or twelve hours – their pay rate for all hours worked that day is double time. Thus, even if an employe works more than eight hours on a Sunday, they still do not receive anything other than double time. Specifically, they are not contractually entitled to receive time and one-half (i.e. the regular overtime rate) on top of the Sunday double time rate. It therefore follows then that Sec. 22.01 neither provides for, nor envisions, the compounding or pyramiding of the regular overtime rate of time and one-half on top of the Sunday double time rate.

Notwithstanding the contract language just reviewed, the Union contends that employes who work more than eight hours on a Sunday are nevertheless entitled to be paid more than double time for those hours because of a past practice concerning same. For its part, the County does not dispute the existence of such a practice. It acknowledges that for many years, employes at the Home who have worked more than eight hours on Sunday were paid at the rate of triple time and one-half for the time over eight hours. Given the foregoing, there is no question that a long-standing practice exists at the Home of paying employes who work more than eight hours on Sunday at triple time and one-half for the time over eight hours.

Past practice is a form of evidence which is commonly used and applied in contract interpretation cases. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means. Arbitrators traditionally look at past practice when the contract language is ambiguous, or when the contract is silent on a given point. In the former situation (i.e. where the language is ambiguous, indefinite or capable of different meanings), the past practice is viewed as the binding interpretation the parties themselves have given to the disputed term. In the latter situation (i.e. where the contract is silent on a given matter), the past practice may be binding upon the parties if it is

unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

In this case, neither of the situations referenced above is present. Specifically, the contract is not silent on the matter of Sunday pay, nor is the contract language contained in Sec. 22.01 ambiguous, indefinite or capable of different meanings. Instead, the situation present here is that there is contract language in Sec. 22.01 which is directly on point, and that language is clear and unambiguous in providing that so long as the employe meets certain qualifications, "all" work that is performed on Sundays is paid at the rate of double time.

It is a generally accepted principle of contract interpretation that contract language which is clear and unambiguous outweighs or trumps a past practice. Even a well-established and long-standing practice cannot be used to give meaning to, or countervail, a provision which is clear and unambiguous. When a conflict exists between the clear and unambiguous language of the contract and a long-standing past practice, arbitrators usually follow the contract, and not the past practice. In accordance with that generally-accepted view, the undersigned holds likewise. In this case, the practice clearly conflicts with the language in Sec. 22.01 because that section does not require triple time and one-half for those hours; instead, it only requires that employes receive double time for those hours. Thus, in this case, the language of Sec. 22.01 prevails, not the conflicting practice.

Attention is now turned to the Union's argument concerning the Maintenance of Standards clause (Sec. 28.01). That clause provides that "all conditions of employment relating to wages. . .overtime differential. . . shall be maintained at not less than the highest minimum standards in effect at the time of the signing of the agreement. . ." The Union contends that when the County posted its January 6, 1999 notice, it violated that clause. I disagree. The second paragraph of the Maintenance of Standards clause then goes on to make an exception for "inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of the Agreement. . ." The record evidence indicates that the Sunday pay practice that developed at the Home was a bona fide error. The Maintenance of Standards clause then goes on to provide that when either the Employer or the Union makes an inadvertent or bona fide error which it wants to correct, it can do so. All it has to do is correct the error within a certain specified time period, namely 90 days. The County did so here. Its January 6, 1999 memo put all bargaining unit employes on notice that the previous practice of paying triple time and one-half for hours over eight on a Sunday had been eliminated and that the County was not going to pay employes triple time and one-half for those Sunday hours any more. Given the foregoing, I find that the County complied with its obligation under the Maintenance of Standards clause because it timely corrected the error that had resulted in the instant practice.

Finally, it is noted that some arbitrators have found that a well-established past practice which does not have any basis in the written contract is still not subject to unilateral termination during the term of a contract, but is subject to termination only at the end of a contract. Even if the undersigned were to have so found here, it would not matter because the parties' labor agreement expired December 31, 1998, and the County posted its notice terminating the Sunday pay practice after that, namely on January 6, 1999. That being so, the Sunday pay practice has been terminated.

Any matter which has not been addressed in this discussion is deemed to lack sufficient merit to warrant individual attention.

In light of the above, it is my

AWARD

That employes who work more than eight hours on Sunday are not contractually entitled to be paid at the rate of triple time and one-half for the time over eight hours. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 26th day of August, 1999.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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