BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ONEIDA COUNTY DEPUTY SHERIFF'S ASSOCIATION

and

ONEIDA COUNTY

Case 136
No. 57262
MA-10570

(Grievance of Randy Keller)

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, appeared on behalf of the Association.

O'Brien, Anderson, Burgy, Garbowicz & Brown, Attorneys at Law, by **Mr. John O'Brien**, P.O. Box 639, 221 First Street, Eagle River, Wisconsin 54521, appeared on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and County 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 the grievance of Randy Keller. A hearing, which was not transcribed, was held on August 20, 1999 in Rhinelander, Wisconsin. Afterwards, the parties filed briefs. The record was closed on November 1, 1999 when the undersigned was notified that the parties would not be filing reply briefs. Based upon the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association framed the issue as follows:

> Did the County violate the parties' collective bargaining agreement and the June 30, 1997 Consent Award when it denied Sergeant Randy Keller's holiday and/or vacation time-off request for December 26, 1998? If so, what is the appropriate remedy?

The County framed the issue as follows:

> Did the County act within its authority when it denied Sergeant Keller's request for time off? (Must the conditions of Step 3 of the Consent Award in Case No. 127 No. 55044 MA-9876 be met before Section 4 becomes applicable?)

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

> Did the County violate the June 30, 1997 Consent Award when it denied Sergeant Keller's holiday and/or vacation time-off request for December 26, 1998? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1995-97 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IX – OVERTIME

. . .

Section 9.06 – Compensatory Time: Any employee may elect to take compensatory time off in lieu of cash at the rate of one and one-half (1 ½) hours of compensatory time for every one (1) hour of overtime. Employees shall be allowed to accumulate compensatory time in excess of one hundred (100) hours, however, only one hundred (100) hours may be carried over from year to year. All hours obtained in excess of one hundred (100) hours shall be paid in cash to the employee on the first pay period in the month of December of the contract year. However, nothing herein shall preclude the employee from using compensatory time during the year and then regenerating his or her account.

Section 9.07 – Compliance with Fair Labor Standards Act: The Association recognizes the County has elected to comply with the Fair Labor Standards Act for hours worked in excess of 171 hours during each 28-day work cycle.

ARTICLE X – HOLIDAYS

Section 10.01 – Holidays: Each employee (excluding the Sheriff and Chief Deputy) shall be allowed nine (9) paid holidays as follows: New Year's Day, Easter Sunday, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas Day, December 24th and Good Friday. In addition to the above scheduled nine (9) holidays, each employee shall receive a floating holiday, to be available after the employee has completed his or her initial probationary period. In the event the employee is required to work on these holidays, he shall be given extra compensation of one (1) day's pay, eight (8) hours, plus one (1) day off. For the purpose of this Section, if the holiday falls on the employee's regular time off, or during his vacation, the employee shall receive an extra day off. Pay vouchers are to be submitted no later than the end of the month worked, approved by the Sheriff and the Law Enforcement Committee. The holidays shall be considered from 11:00 p.m. of the day before the holiday to 11:00 p.m. of the holiday itself.

. . .

ARTICLE XI – VACATIONS

Section 11.01 – Vacation Schedule: Each employee (excluding the Sheriff) shall receive a vacation based upon two (2) weeks after one (1) year of service, three (3) weeks after eight (8) years, four (4) weeks after fifteen (15) years, five (5) weeks after twenty (20) years, six (6) weeks after twenty-five (25) years.

BACKGROUND

Among its many governmental functions, the County operates a Sheriff's Department. The Association represents various employes in that Department. The County and the Association have been parties to a series of collective bargaining agreements (hereinafter CBA). The parties' most recent CBA contained provisions dealing with holidays, vacations, and compensatory time, among others.

Employes in the department work a staggered 7/7 shift schedule. The schedule overlaps during certain periods to maintain continuity and to provide extra staff during periods of high need. The schedule permits employes to accumulate substantial amounts of compensatory time (hereinafter comp time).

For many years, the department's time off policy was that normally just one employe was allowed off at a time for vacation/holiday/comp time, unless special circumstances existed. This time off policy changed in one respect on January 1, 1999, when the department began to allow two employes to be off at once on the first shift for vacation/holiday/comp time. This policy change only applied to the first shift – it did not apply to the second and third shifts.

In 1997 and 1998, two grievances were filed after the Employer denied comp time requests. In both instances, the time off requests were denied based on the policy just referenced of normally allowing just one employe to be off at a time for vacation/holiday/comp time. Thus, the Employer denied these two time off requests because another employe had already been granted time off on the date in question.

The first comp time grievance was the Kortenhof grievance. What happened there was that Kortenhof had requested to be off on certain dates not specified in the record, and the request was denied because another employe was already going to be off on those dates. His grievance alleged that the County violated the CBA and an "Administrative Letter Ruling" dated August 19, 1994 from the U.S. Department of Labor, Wage and Hour Division. That particular ruling held that employers are not permitted to deny requests for comp time off on the basis that it would require the employer to pay overtime. The grievance was settled on June 18, 1997 when the parties agreed to the following Arbitration Consent Award:

CONSENT AWARD

1. The parties recognize that the Sheriff has the right to set and modify staff level requirements.

2. The policy for time off requests will be uniform for all requests including vacation time, holiday time and compensatory time.

3. Such requests for time off will be granted unless the requests would be unduly disruptive for the Department. Requests will not be considered to be unduly disruptive if

    a. Other staff is available to come in, or

    b. County activities or events are such that reduced staff levels would not create a problem.

4. Requests for time off may be considered unduly disruptive if more than one (1) employe in the same classification/division and on the same shift requests vacation, holiday, or compensatory time off.

> In addition to the above-noted appearances on behalf of the parties, Mr. Ken Kortenhof was present at the hearing and stated his understanding of, and agreement with, the terms of the Consent Award as set forth above. Based on the instant Consent Award, the undersigned considers the arbitration proceeding resolved and relinquishes jurisdiction of the matter.
>
> Dated at Madison, Wisconsin this 30th day of June, 1997.
>
> By /s/ Paul A. Hahn
> Paul A. Hahn, Arbitrator

The letter ruling was attached to the Consent Award.

At the instant hearing, both sides adduced testimony from witnesses concerning how the Consent Award came to exist in its final form.

The second comp time grievance was the Ouimette grievance. What happened there was that Ouimette had requested to be off August 8 and 9, 1998, and his request was denied because another employe was already going to be off on those dates. His grievance alleged that the County violated the CBA and the Consent Award by denying his comp time request for those two dates. This grievance was resolved in September, 1998, when the County's Personnel Director, Carey Jackson, notified the Association in writing that

> The Personnel Committe recognizes that Mr. Ouimette should have been allowed to take Compensatory Time Off on August 8th and 9th. Given the same fact situation, the County, through the Sheriff, will endeavor to approve such requests. It is my understanding that this resolves the above referenced grievance.

Jackson testified that the reason the County's Personnel Committee granted the Ouimette grievance was this: effective January 1, 1999, the Sheriff planned to modify the time off policy so that henceforth two employes could be off at once on the first shift for vacation/holiday/comp time. The Committee decided that since Ouimette worked on the first shift, and would be covered by this modification to the time off policy, and would have his time off request granted under same, it was appropriate under these circumstances to grant his time off request/grievance.

FACTS

It is against this backdrop that the following occurred. On November 24, 1998, second shift Sergeant Randy Keller requested holiday and/or vacation time off for December 26, 1998.

Thus, he requested that he be allowed to use holiday or vacation time off for that date. The lieutenant who receives time off requests, Lieutenant Boyer, denied Keller's time off request on December 1, 1998. Boyer denied Keller's time off request because Deputy Wege (another second shift employe) had previously been granted that shift off. Lieutenant Boyer has been instructed by his superiors to deny time off requests if one employe in the same classification/division has already been granted that shift off. Given that directive, no one in the department ever made any phone calls to unit members to ascertain whether any staff was able to come in on December 26, 1998, as Keller's replacement.

On December 3, 1998, the Association filed the instant grievance challenging the denial of Keller's time off request. The grievance alleged that the denial of Keller's time off request violated the CBA and the above-referenced Consent Award. The grievance was processed and appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the County violated the parties' 1997 Consent Award when it denied Keller his requested holiday/vacation day. According to the Association, Keller was entitled to use an accrued holiday or vacation day on December 26, 1998. It makes the following arguments to support this contention.

First, for background purposes, the Association maintains that the reason the parties bargained the 1997 Consent Award was because the Employer's then-existing practice of denying all time off requests when one employe on the shift had already been granted time off was not consistent with the federal wage and hour law's "unduly disruptive" standard. The Association notes that under a ruling by the U.S. Department of Labor, public employers have to grant comp time off requests unless granting the request is "unduly disruptive"; employers are not permitted to deny requests for comp time off on the basis that doing so would require the employer to pay overtime. The Association avers that by agreeing to the Consent Award which expressly incorporated the "unduly disruptive" standard into Sections 3 and 4, the prior practice was discontinued. In other words, the Association disputes the Employer's assertion that the Consent Award affirmed and continued the prior practice.

Next, with regard to the Consent Award itself, the Association maintains that Section 3 obligates the County to grant all time off requests unless they are "unduly disruptive". The Association reads Section 3(a) to explicitly provide that granting a time-off request does not unduly disrupt the department when another employe or employes can fill in for the employe or employes requesting the time off. It is therefore the Association's position that the County may not deny a holiday, vacation or comp time-off request unless it is determined that granting

the time-off request would be unduly disruptive because no other staff is available to come in. The Association submits that what happened here is that after Keller made his time off request, the County failed to take any steps to determine whether or not other staff was available to come in. It notes in this regard that no one in the department made any calls to unit employes to see if anyone was available to fill in for Keller on December 26. The Association contends this violated Section 3(a) of the Consent Award because that section requires the County to "consider" whether "other staff is available to come in", and here no such consideration occurred. As the Association sees it, the County is ignoring, nullifying, and giving no effect to Section 3(a) because it is not even considering whether the second employe requesting time off could be replaced by another employe. The Association asks the Arbitrator to reject that interpretation, and give meaning to Section 3(a).

Next, the Association avers that the parties' bargaining history concerning the Consent Award also supports the Association's interpretation of the meaning of same. To support this premise, it cites the testimony of Association representatives Jim Kluss and Randy Ingram who both testified that Section 4 was not included in the Consent Award as a *quid pro quo* for the remainder of the language. It also notes that one draft of the proposed Consent Award did not even include Section 4.

Finally, the Association maintains that the fact that the County granted the Ouimette grievance provides additional support for the Association's interpretation of the Consent Award. For background purposes, the Association notes that that grievance also involved a situation where more than one employe requested time off on the same shift, and the Employer ultimately agreed that more than one employe could be off on that shift. The Association interprets the Ouimette settlement to mean that Section 4 of the Consent Award does not entitle the County to ignore Section 3 of same.

The Association therefore believes the grievance should be sustained. As a remedy, the Association seeks an order that directs the County to henceforth consider the requirements set forth in Section 3(a) of the Consent Award, including the requirement that the availability of other employes be considered, before the County denies a vacation, holiday or comp time-off request.

County

The County contends it did not violate the Consent Award when it denied Keller's holiday/vacation time off request for December 26, 1998. In its view, Section 4 of the Consent Award required this outcome (i.e. that the time off request be denied). It makes the following arguments to support this contention.

The County begins by reviewing the bargaining history of the 1997 Consent Award. For background purposes, it notes that its long-standing time off practice prior to 1997 was that just one person could normally be off work at a time. According to the Employer, this practice did not change when the parties entered into the 1997 Consent Award because the practice was codified in Section 4. The County maintains it agreed to Section 3 in return for getting Section 4 (i.e. the practice codified). As the County sees it, both parties received a benefit when they negotiated the terms of the Consent Award: the benefit for the Association was that henceforth time off requests would be honored/granted regardless of whether they were for vacation/holiday/comp time even if it resulted in paying overtime, while the benefit for the County was that this existing time off policy/practice of only one employe being off at a time would continue. The Employer contends that "logic dictates the County would not have entered into the Consent Award under the Union's interpretation." In the County's view, its interpretation should be given "great weight because it continues a long-standing practice of granting requests for time off to only one person at a time."

Next, the County reviews Sections 3 and 4 of the Consent Award. It asserts that those sections are clear and unambiguous. According to the Employer, Section 3 provides that an employe's time off request will be honored unless it would be unusually disruptive. It reads Sections 3(a) and (b) to give two instances where such requests would not be unduly disruptive: (a) other staff is available to come in, and (b) County activities or events are such that reduced staff levels do not create a problem. The Employer argues that the section which follows, Section 4, is a qualifier to Section 3 because Section 4 goes on to provide that time off requests may be considered unduly disruptive if one employe is already off. In the County's view, Section 4 clearly gives it the right to deny a request for time off if one employe is already off. In other words, if one employe is already off, the County can contractually deny the second time off request. The County believes that is the only interpretation that provides any benefit to the County from the Consent Award, and it explains why the County would not agree to the Consent Award unless Section 4 was added. The County asks that Sections 3 and 4 be read together and given equal weight. It submits that if just Section 3 is looked at, as the Association proposes, this ignores Section 4 and fails to give it meaning. The County again maintains it would not have agreed to the Consent Award unless Section 4 was added.

The County argues in the alternative that if the Arbitrator finds the language of the Consent Award is not clear, but rather ambiguous, then it believes the Association has not carried its burden of proving the intent of the parties.

Finally, the County comments on the Ouimette grievance settlement. According to the Employer, that settlement did not create a precedent applicable here because a different work shift was involved. The Employer notes in this regard that Ouimette worked the first shift while grievant Keller worked the second shift. The Employer asserts that since the Sheriff's

new policy of allowing two persons off at once only applies to the first shift, and not to the second or third shifts, it follows that Ouimette was covered by the new policy, while Keller was not.

The County therefore asks that the grievance be denied.

DISCUSSION

This case involves the County's denial of the grievant's time-off request. The pertinent facts are as follows. The grievant requested that he be allowed to use holiday or vacation time on December 26, 1998. His request, which was made over a month in advance, was denied. This denial was made summarily without determining whether any other employes were available to replace the grievant on the day in question. The basis for the denial was that another employe on the grievant's shift (i.e. the second shift) had already been granted that particular day off. The lieutenant who denied the grievant's time-off request had been instructed (as of that point in time) to deny time-off requests if another employe on that shift had already been granted that shift off.

Many CBAs contain language dealing with the granting and denying of vacation, holiday and/or comp time requests. A review of this CBA, however, indicates it does not. The vacation, holiday and comp time provisions in this CBA simply do not address what criteria is used for granting or denying such leave. Additionally, those same provisions do not specify how many employes can be off work on those types of leave on each shift.

As has already been noted, when the Employer denied the grievant's leave request, their stated reason for doing so was that another employe on his shift had already been granted that particular day off. To justify this decision, the Employer does not rely on language contained in the parties' CBA. Instead, it relies on language contained in a 1997 Consent Award. The record indicates that in 1997, the parties negotiated a Consent Award that dealt, in part, with time off requests. Although the parties did not stipulate to an issue herein, both sides referenced that Consent Award in their wording of the issue. That being so, it is fair to say that the parties agree that this Consent Award governs the instant dispute. Accordingly, this case will not be decided on the basis of language contained in the CBA; instead, it will be decided on different grounds.

In the discussion that follows, attention will be focused first on the language contained in the Consent Award. If that language does not resolve the matter, attention will be given to evidence external to same. The undersigned characterizes that evidence as involving the County's past practice concerning the number of employes allowed off per shift and the parties' bargaining history concerning the Consent Award.

My discussion of the language begins with the following overview of same. Sections 1 and 2 of the Consent Award are not pertinent to this dispute and therefore need not be reviewed here. Broadly speaking, Section 3 obligates the County to grant employes' time off requests unless granting the request would be unduly disruptive for the Sheriff's Department. Specifically, it provides that a request for vacation, holiday and comp time off "will be granted" (i.e. honored) unless it (i.e. the request) "would be unduly disruptive for the Department." The phrase "unduly disruptive" is not defined, but the section then goes on to identify two instances where such time-off requests will not be considered "unduly disruptive": (a) when other staff is available to come in, or (b) when County activities or events are such that reduced staff levels do not create a problem. Section 3(a) therefore requires the County to "consider" whether other staff is available to come in. Section 4 then goes on to provide that requests for time off **may** be considered unduly disruptive if more than one employe in the same classification and division request the same shift off. When read in context with Section 3, the plain meaning of Section 4 is that the County will automatically allow one employe off per shift for vacation, holiday and comp time, but the County will apply the unduly disruptive standard to additional time-off requests.

In this case, there really is no dispute among the parties as to what Sections 3 and 4 mean. Both sides view the language as clear and unambiguous and the undersigned concurs. That being so, the dispute here is not over the meaning of Sections 3 and 4 *per se*. Instead, it is whether Section 4 frees the County from its obligation under Section 3(a) to determine whether other staff is available to come in when a second employe on the same shift requests that shift off. The County argues that it does. In its view, once a time off request for a particular shift has been granted, the County believes it does not have to determine whether other employes are available to come in and work as a replacement. I disagree. Notwithstanding the County's interpretation to the contrary, Section 4 does not free the County from its obligation under Section 3(a) to determine whether other staff is available to come in when a second employe on the same shift requests a shift off. A general rule of contract interpretation is that the parties intended to give effect to all provisions in their agreement. This rule of interpretation comes from the presumption that parties do not bargain terms intended to have no effect. In my view, the County's interpretation of the Consent Award does not give effect to Section 3(a). If the County's interpretation of the Consent Award is correct, and Section 3(a) is mere surplusage, the parties would not have included Section 3(a) in the agreement, and Section 4 would state that requests for time off **shall** be considered unduly disruptive if more than one employe requests time off for a given shift. However, the fact of the matter is that the parties did include Section 3(a) in the agreement, and Section 4 provides that requests for time off **may** be considered unduly disruptive if more than one employe requests time off for a given shift. The word **"may"** in Section 4 is not mandatory, so the fact that one employe has already been granted time off does not make a second request for time off for that same shift automatically "unduly disruptive". Consequently, when the County receives a time off request for a shift where another employe has already been granted off, the

County must still consider the availability of other employes before it acts on the (second) request. This requires someone from the department making calls to unit members or checking with them to see if anyone is available to come in and work that particular shift.

In litigating this case, both sides relied on evidence external to the Consent Award to buttress their interpretation of same. In doing so, they addressed the County's past practice concerning the number of employes allowed off per shift and the parties' bargaining history concerning the Consent Award. Arbitrators sometimes use past practice and bargaining history to help them interpret ambiguous language. The key word in the previous sentence is "ambiguous". The reason that word is key is because that is not the case here. As previously noted, both sides consider the language in Sections 3 and 4 to be clear and unambiguous. That being so, the undersigned concludes there is no need in this particular case to resort to using any past practice or bargaining history to interpret the Consent Award. Given that finding, the undersigned will not comment on the County's past practice concerning the number of employes allowed off per shift and the parties' bargaining history concerning the Consent Award.

Based on the foregoing, it is held that when Keller made his time off request, the County was obligated by Section 3(a) of the Consent Award to determine whether other employes could fill in for him on the day in question. Specifically, the County had to "consider" whether he could be replaced by another employe. That did not happen. In point of fact, the County made no effort to see if any unit employe could fill in for Keller on December 26, 1998. Since that did not happen, the County violated the Consent Award. Henceforth, pursuant to Section 3(a) of the Consent Award, the County is to "consider" the availability of other employes before it denies a vacation, holiday or comp time off request.

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

In light of the above, it is my

AWARD

That the grievance is sustained. The County violated the Consent Award when it denied Sergeant Keller's holiday and/or vacation time off request for December 26, 1998. In order to remedy same, the County is henceforth to "consider" the availability of other employes before it denies a vacation, holiday or comp time off request.

Dated at Madison, Wisconsin this 28th day of January, 2000.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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