BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA COUNTY DEPUTY SHERIFFS' ASSOCIATION

and

CHIPPEWA COUNTY

Case 213
No. 58375
MA-10934

(Grievance of Robert Wanish)

Appearances:

Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, by **Attorney Richard Thal**, General Counsel, on behalf of the Association.

Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by **Attorney Victoria L. Seltun**, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Chippewa Falls, Wisconsin, on March 28, 2000. The hearing was transcribed. Both parties filed briefs and the record was closed on June 12, 2000.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

> Did the County violate the contract when it denied grievant Robert Wanish overtime pay for time spent driving to a training program on September 21, 22 and 23, 1999, and, if so, what is the appropriate remedy?

BACKGROUND

The County for a number of years has sent its Jailors and other Sheriff Department employes to state-mandated training. Jailors like grievant Wanish are required to have 24 hours of in-service training a year.

Jailor Wanish on September 21, 22 and 23, 1999 (unless otherwise stated all dates herein refer to 1999), attended such training in Rice Lake, Wisconsin, which is located about 60 miles north of Chippewa Falls. The scheduled hours for that training were from 8:00 a.m. to 5:00 p.m. each day. Classes in fact were over at 4:30 p.m. on September 21 and 4:00 p.m. on September 22 and 23.

Wanish, who ordinarily works the 2:45 p.m. – 11:15 p.m. shift, drove to and from Rice Lake in a County-supplied squad car on each of those three days, accompanied by fellow Jailor Lana Lowe who he picked up and dropped off at her home. Wanish left Chippewa Falls at 7:00 a.m. on each day and he returned to the department at 5:30 p.m. on September 21 and 5:00 p.m. on September 22 and 23. For the three days he traveled to and from Rice Lake for training, the County paid him eight and one-half hours a day at his straight time rate. He therefore was not paid the additional five hours of driving time that occurred outside that paid day. Wanish did not work his regular shift on any of those days.

Wanish, employed by the County for 25 years, testified that Jailors are required to receive 24 hours of in-service training a year; that he was specifically told by Captain Jim Jerabek that he would not receive any overtime for the Rice Lake training; that he in the "early '80's" received overtime for certain training in Hayward, Wisconsin; that he never received overtime when he traveled to Eau Claire for training; and that he was on duty when he traveled to Rice Lake.

On cross-examination, he stated that he could have driven his own personal car to Rice Lake if he had chosen to do so; that he was not required to pick up passenger Lowe on his way to Rice Lake; that the Jailor recertification plan has been around since 1979 or 1980; that he once before had been told by Captain Jerabek that he would not receive overtime for a prior training program in Rice Lake; and that he never grieved that denial.

Investigator James Kowalczyk testified that the County has paid for his state-mandated training, including when necessary, his overnight expenses; that he was paid for driving to Barron County in 1998; that his overtime request was approved by Captain Kurtis Folska; and that Investigator William Glass also attended the 1998 training.

On cross-examination, he said that he was paid the 1998 overtime "in lieu of staying overnight"; that he has a different supervisor than Wanish; and that he in the past was paid overtime for driving to the eastern part of the state.

Captain Jerabek – who is the jail administrator and commanding officer of the Dispatch Center – testified that he exercises final approval for any overtime requests and that for at least the last eight years he has been in charge, there has been a past practice of not paying any overtime for training-related driving. He explained, "It is my policy to offer the person either a County squad car or to pay for a tank of gasoline for their own vehicle" and that no overtime is paid for driving because "the Fair Labor Standards Law does specifically exempt payment for travel time for mandatory training." He said he had reviewed the applicable overtime records and discovered that employes on "dozens" of occasions in the past had traveled more than 50 miles for training and that they were never paid overtime for doing so.

He also said that Deputies Lowe and Connie Olson-Folska were not paid overtime for the training they took in Hayward, Wisconsin; that Wanish was never paid overtime for the prior training he took in Rice Lake; that Wanish never sought payment for such travel before he filed the instant grievance; that Wanish therefore was not paid overtime for driving to a training class held in Wausau in 1996; and that other Deputies in 1999 were not paid overtime for their traveling to and from LaCrosse, Wisconsin, and Hudson, Wisconsin (County Exhibit 1).

He further stated that employes get paid a full day for training even if it lasts less than eight hours and that they are not required to come back to work to finish out their shift; that Kowalczyk was paid overtime because "there may have been times when one slipped by us, but it is not our practice to pay for these types of things"; and that if overtime is to be paid for driving, "our amount of training is going to be curtailed dramatically." On cross-examination, he acknowledged that he does not approve or deny overtime requests for the Patrol Dispatcher or Investigators.

Recalled as a witness, Jerabek testified that employes are expected to leave on their squad radio when traveling to and from training and that they are expected to deal with any emergency that may arise. He also said he did not know what the practice was in dispatch before he took over command on July 1, 1999.

Patrolman Timothy Chaussee testified that Captain Folska told dispatchers in 1995 that dispatchers who drove to training would get paid for travel time, but that their passengers would not be paid; that drivers were paid such overtime when driving outside their regular eight-hour day; and that he once was paid such overtime for driving to Fort McCoy.

On cross-examination, he said he does not know what the policy is today for dispatch because he no longer works there; that he in April, 2000, was not paid overtime for driving to New Richmond for training; and that but for the one instance involving Fort McCoy, he cannot think of any other instance where someone was paid overtime for driving to and from training.

Patrol Lieutenant Eugene Gutsch testified that employes Kowalczyk, William Glass and Gordon Foils were the only employes who were paid overtime for traveling to and from training conferences (County Exhibit 5); that all three were in the Patrol Division; that the County's policy is to not pay such overtime; and that no one in the Patrol Division has received such payment since he became a supervisor in 1996. On cross-examination, he stated that County Exhibit 5 does not show where training took place and that deputies are entitled to stay overnight if training is more than 60-70 miles away.

POSITIONS OF THE PARTIES

The Association claims that the County violated the contract when it "denied Wanish overtime pay for time spent driving to the Rice Lake training program" because while the contract "does not explicitly cover the issue of whether time spent driving to training is counted as hours worked", Section 785.38 of the Fair Labor Standards Act ("FLSA") "does cover this issue" and that it must be followed under such arbitrable authorities as *How Arbitration Works*, Elkouri and Elkouri, p. 546 (5th Edition, BNA, 1997); MASON & HANGER-SILAS MASON CO., INC., 75 LA 1038 (Shearer, 1980); and CITY OF ASHLAND, Case 56, No. 44796, MA-6414 (Bielarczyk, 9/91). The Association also asserts that the County is wrong in asserting that a past practice supports its position on the ground that the record shows that Wanish, Chaussee, Kowalczyk, Glass and Foiles were paid such overtime in the past when they drove outside their normal workday. The Association also contends that the County's reliance on another arbitration award, BUFFALO COUNTY, is misplaced because Arbitrator William Petrie there "incorrectly interpreted federal wage and hour law" and because, unlike here, a past practice supported the employer's position in that case. As a remedy, the Association asks that Wanish be awarded five (5) hours of overtime pay.

The County, in turn, contends that "it is not the Arbitrator's role to interpret federal laws or federal regulations"; that neither the contract nor the parties' past practice "contemplates travel time reimbursement"; and that the "FLSA does not mandate reimbursement for travel time in the instant case."

DISCUSSION

This case turns upon the application of Article 13, Section 4, and Article 22 of the contract which state:

Section 4 – Overtime:

A. Compensation: All hours worked in excess of, or outside of, the normal work day or work schedule shall be approved in advance by the Sheriff of his/her designee, and shall be compensated for in pay or compensatory time at one and one-half (1-1/2) times the prevailing rate.

ARTICLE 22 – MEETINGS AND SCHOOLS: Existing departmental policy relative to continued payment to employees while attending meetings and schools shall be continued. Employees may not drink alcohol while attending meetings and going to school at County expense unless the consumption of alcoholic beverages is a requirement for attendance at said school (i.e., intoxilizer training). When out of town, the employee may drink alcohol on completion of a day's schooling or meeting.

Neither provision refers to the FLSA or to federal and state law. In addition, no other part of the contract incorporates by reference such external law.

The Association nevertheless argues that the FLSA travel time regulations must be followed. Absent clear contractual language giving me that authority, and absent the County's agreement that I apply federal law, it is beyond my authority to determine whether the County's actions violated the FLSA.

Instead, this case must turn on the contractual language found in Article 13, Section 4, and Article 22 above which do not expressly refer to the payment for training-related driving time and which codify the existing department policy relating to training.

That policy shows that but for four exceptions spread out over at least the last ten years, the County has had a practice of not paying overtime for any training-related driving. Thus, Captain Jerabek testified that he has followed that practice for the last eight years and Patrol Lieutenant Gutsch testified that no one in the Patrol Division has received such payment since at least 1996 when he became a supervisor. In addition, Jerabek testified without contradiction that he had reviewed the applicable overtime records and discovered that employes on "dozens" of occasions had traveled more than 50 miles for training and that they were never paid overtime for doing so. Indeed, Wanish himself must have known about this practice since he did not try to get paid for his driving for a prior Rice Lake training program and he similarly never sought payment for driving to Wausau in about 1996.

Given this history, I credit the County's representatives who testified that payment had been made on past occasions through inadvertence, rather than because of any clearly-defined County policy mandating such payment. Hence, it is the past practice of *not* paying for such driving time that governs here under Article 22 which states: "Existing departmental policy relative to continued payment to employes while attending meetings and schools shall be continued."

In addition, it is this past practice and this contract language which distinguishes this case from the arbitrable authority relied upon by the Association in support of its contrary claim. For while arbitrators in certain cases have applied the FLSA, they have not done so in the face of clear contract language dictating that the parties' past practice surrounding training expenses must continue. In MASON & HANGER, supra for example, Arbitrator John C. Shearer ruled that payment had to be made for a certain "sleep period" because "the language of the Agreement allows either interpretation, and clearly, only one is consistent with the law." Id., at 1040. Here, by contrast, the parties have expressly agreed that the past practice surrounding non-payment must continue. In CITY OF ASHLAND, supra, Arbitrator Edmond J. Bielarczyk, Jr., ruled that the City violated the contract when it denied overtime payment for the time grievants spent attending state-mandated recertification training. There, though, both parties agreed that the FLSA should govern their dispute, which is not the case here, and Arbitrator Bielarczyk there found that a past practice of paying for such training is "binding on the City." Id, at p. 12. Here, the past practice cuts the other way.

In light of the above, it is therefore my

AWARD

1. That the County did not violate the contract when it denied grievant Robert Wanish overtime pay for the time spent driving to a training program on September 21, 22 and 23, 1999.

2. That his grievance is therefore denied.

Dated at Madison, Wisconsin this 8th day of September, 2000.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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