

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**PRICE COUNTY PROFESSIONAL DEPUTIES  
ASSOCIATION, LOCAL 116**

and

**PRICE COUNTY**

Case 71  
No. 58194  
MA-10873

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Appearances:

**Mr. Patrick J. Coraggio**, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Union.

**Mr. Ronald R. Gabrielsen**, Price County Human Resources Coordinator, appearing on behalf of the County.

**ARBITRATION AWARD**

The Price County Professional Deputies' Association, Local 116 (herein the Union) and Price County (herein the County) are parties to a collective bargaining agreement covering the period January 1, 1999, to December 31, 2001, and providing for binding arbitration of certain disputes between the parties. On November 17, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on overtime pay denied to Joseph Lillie (herein the Grievant) and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute. The parties waived any procedural objections to arbitration and a hearing was conducted on March 13, 2000. The parties filed briefs on April 21, 2000.

**ISSUE**

The parties stipulated to the following statement of the issue:

Did the Sheriff violate the Collective Bargaining Agreement by denying the overtime card of Deputy Joseph Lillie for 15 minutes at the rate of time and one-half for assisting at an accident scene on Sunday, July 18, 1999?

If so, what is the appropriate remedy?

**PERTINENT CONTRACT PROVISION**

**ARTICLE 2 – MANAGEMENT RIGHTS**

The County possesses the sole right to operate County government and all management rights that repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but are not limited to, the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, demote, discharge and take other disciplinary action for just cause against employees;
- E. To relieve employees from their duties because of lack of work or any other legitimate reasons;
- F. To maintain efficiency of County government operations;
- G. To take whatever action is necessary to comply with State or Federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To determine the kinds and amounts of service to be performed as pertains to County Government operation; and the number and kinds of classifications to perform such services;
- K. To contract out for goods or services;
- L. To determine the methods, means and personnel by which County operations are to be conducted;
- M. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

The Association and the employees agree that they will not attempt to abridge these management rights, and the County agrees it will not use these management rights to interfere with rights established under this Agreement. Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy.

### **ARTICLE 13 – OVERTIME**

- A. Deputies who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half (1 ½) or compensatory time off at time and one-half (1 ½) at the Deputy's discretion. Overtime must be approved by the Sheriff or Chief Deputy in advance except in an emergency. Time and one-half (1 ½) payment, if the Deputy selects pay instead of compensatory time, shall be rendered to the Deputy no later than the last pay period of the following month.

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### **BACKGROUND**

In February 1997, Joseph Lillie, hereafter the Grievant, was hired as an Assistant Jail Officer by the Price County Sheriff's Department. At the time, Jail Officers were also sworn as Special Deputy Sheriffs and did have certain limited arrest powers within the Courthouse, although they weren't included in the protective classification of employees. The general job functions of the Jail Officer include maintaining security in the County Jail, guarding and caring for prisoners, controlling Huber inmates and other prisoners, booking arrested persons and searching prisoners.

On Sunday, July 18, 1999, the Grievant was scheduled to work from 3:00 p.m. until 11:00 p.m. He arrived at the Sheriff's Department at approximately 2:40 p.m. and began walking from the parking lot with Deputy Sheriff Michael Hauschild, who was also scheduled from 3:00 p.m. until 11:00 p.m. While so doing, the Grievant and Hauschild heard a traffic accident on the street in front of the Courthouse. The Grievant proceeded to the accident scene while Hauschild informed the Dispatcher of the accident and then followed the Grievant to the scene. At the scene, the Grievant and Hauschild were joined by Deputy Sheriff Brian Schmitt. Hauschild and Schmitt proceeded to direct traffic while the Grievant rendered first aid to one of the drivers who had suffered facial injuries. Shortly thereafter, officers from the Phillips Police Department arrived and took control of the scene, at which time the Grievant, Hauschild and Schmitt returned to the Sheriff's Department and punched in for their shifts.

Subsequent to the incident, the Grievant, Hauschild and Schmitt all requested 15 minutes of overtime pay for the time they spent at the accident scene prior to commencing their regular shifts, pursuant to Article 13, paragraph A, of the collective bargaining agreement. Hauschild and Schmitt's requests were granted. The Grievant's request was denied by his supervisor, Sgt. Greenwood, on the basis that, as a corrections officer, the Grievant had no authority or responsibility to handle an accident scene, and that his aid there was voluntary. The Grievant proceeded to invoke the grievance procedure and the grievance was denied at each step, resulting in the matter being submitted to arbitration.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The labor agreement's Management Rights clause gives management authority over scheduling employees and assigning work. Those rights are specifically limited, however, to the extent that they contradict other provisions of the agreement. Article 13, paragraph A, provides that any Deputy who is required to work in excess of the scheduled workday shall receive overtime compensation at the rate of time and one-half. The County concedes that, although the provision specifically refers to Deputies, the language covers Jailers, as well. This language governs the dispute at hand.

The County argued that the overtime was not pre-approved, as required, and was, therefore, rightfully denied. This ignores the fact that the contract language makes a specific exception for emergencies and that the Sheriff testified that the traffic accident in this case constituted an emergency. It also ignores the fact that Deputies Schmidt and Hauschild received overtime pay for responding to the accident, although they also were not ordered to do so. The County distinguished the circumstances by asserting that Schmidt and Hauschild had full powers of arrest, whereas the Grievant did not, but it failed to point out any provision of the contract wherein this distinction is drawn. Further, the Sheriff conceded that powers of arrest are irrelevant when responding to an accident scene. What is relevant is that the Grievant belongs to the same bargaining unit as Schmidt and Hauschild and is entitled to the same benefits, one of which is overtime pay.

At the time of his hire, the Grievant was provided with policy and procedure manuals, but was never told what, if any, responsibilities he had as a Jail Officer if confronted with an accident scene. The Sheriff conceded as much and admitted that the issue never came up until the Grievant submitted his overtime request in this case. He further stated that no written department policies or regulations cover the question of the off-duty responsibilities of jailers. Jailers, however, wear uniforms identifying them as employees of the Sheriff's Department and would not be distinguished from deputies by the general public. The average citizen, therefore, would expect such a person to respond to an emergency and render assistance.

The Sheriff expressed concern that jailers responding to accident scenes would expose the County to greater liability. He was, however, unable to cite cases or statistics to support his argument, nor any workshop or seminar at which the issue was addressed. It should also be noted that Sec. 895.46, Wis. Stats., which covers a County's liability for actions of its employees, makes no distinction between deputies and jailers, and thus both are equally shielded by the statute, making the Sheriff's concern unfounded.

It should further be noted that, according to the Sheriff's testimony, jailers are to maintain the same standards of conduct while off duty as deputies. The Sheriff testified that all law enforcement personnel are informed that they live with a higher standard and their private conduct should not be such as would discredit the department. This is inconsistent with his view that the Grievant should not have rendered assistance at the accident scene. Thus, the attempts to distinguish the Grievant from the deputies fall short and he should be granted overtime as dictated by the labor agreement.

The County's position also runs counter to federal law. The Fair Labor Standards Act mandates that work performed for the employer must be compensated and this was amplified by the U.S. Supreme Court in *GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*, 469 U.S. 528 (1985). Similarly, 29 C.F.R. Sec. 785.13 states that merely promulgating a rule prohibiting unauthorized work is insufficient and imposes a duty on the employer to prevent unauthorized work from being done. If unauthorized work is suffered or permitted it must be compensated. It is not enough, therefore, for the Sheriff to say he did not authorize the Grievant to do the work. He did not direct him not to do the work or advise him that he was not to respond to accidents and, therefore, the County is responsible to pay him for the services he performed. For all the reasons stated, the grievance should be sustained.

### **The County**

The County did not file a brief.

### **DISCUSSION**

The Union asserts that the Grievant is entitled to 15 minutes of overtime for service rendered at a traffic accident scene prior to reporting for work on July 18, 1999. This claim is predicated on the language of Article 13, paragraph A of the collective bargaining agreement, which provides for overtime pay whenever an employee works more than the scheduled workday. Typically, overtime must be preapproved by the Sheriff or Chief Deputy, except in the case of an emergency and it is conceded that a traffic accident constitutes such an emergency. The question that must be addressed, however, is whether, under the facts of this case, the Grievant's service at the accident scene constitutes "work" for which he is entitled to be compensated.

At the time of the events that form the basis for the grievance, the Grievant was an Assistant Jail Officer for the Price County Sheriff's Department. It is not disputed that he was not a Deputy Sheriff. His regular work duties, as described in the job description for his position, included ". . . booking arrested persons upon their arrival, proper completion of necessary arrest records, searching prisoners and making certain that they are issued necessary clothing, bedding and other material needs." (Employer Ex. 4) There is no dispute that the Assistant Jailers are not trained or assigned to perform the duties of Deputy Sheriffs. They are not issued patrol cars, do not monitor traffic or apprehend law violators and do not have powers of arrest. They have no duty or responsibility to respond to or render assistance at traffic accident scenes. Thus, on the surface it would appear that the Grievant's response to the accident on July 18 falls outside the definition of compensable work contained in his job description.

The Union maintains, however, that federal wage and hour regulations, as well as court precedents, establish that the Grievant is entitled to compensation. The Union cites 29 CFR Sec. 785.11, along with *GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*, 469, U.S. 528 (1985), for the proposition that any work suffered or permitted by the employer must be compensated. For a number of reasons, I do not find these authorities to be controlling under the facts presented here. In the first place, the use of the phrase "suffered or permitted" in the regulations and the cases presupposes knowledge by the employer that the work is being performed. In fact, 29 CFR 785.12 states, in part, "If the employer knows or has reason to believe that the work is being performed, he must count the time as time worked." Thus, the regulations appear to require at least constructive knowledge of the employee's work on the employer's part before the requirement to pay for it arises. There is no evidence in the record that the County became aware of the Grievant's involvement at the accident scene until after the fact.

The Union next cites 29 CFR 785.13, which states "The mere promulgating of a rule against unauthorized work will not be sufficient. It is incumbent upon management to ensure enforcement of the rule." It is the Union's apparent position that this regulation imposes an affirmative duty upon management to take steps to prevent unauthorized work and if it does not do so the employer must pay for any unauthorized work done. Whether or not this is the case, in my view this regulation still requires at least constructive knowledge on management's part. Again, however, the Grievant's actions took place before he arrived for work and away from the worksite. Furthermore, it was apparently the only time the Grievant has responded to an accident scene in an official capacity. It is difficult to conceive what steps the County could have taken to interdict this behavior.

Another objection to the Union's argument is the fact that the regulations state that in order to be compensable the work must either be a principal activity under the employee's job description, or must be essential to the carrying out of the employee's principal job activities. As has been previously noted, the duties undertaken by the Grievant were neither. I cannot find, therefore, that the work performed by the Grievant was compensable labor under the regulations.

This does not end the analysis, however. Had the Grievant's actions fallen within the scope of the regulations, his work at the accident scene would have been compensable per se. Likewise, had the contract clearly covered the situation presented, compensation would be merited. Neither is the case. Nevertheless, the parties, by their actions, may create obligations separate from the regulations or the contract. In this case, the Union offered testimony that in 1999 the County paid overtime to Jail Assistants John Janak and Eric Pilgrim for responding to traffic accidents. The County did not contest or rebut this evidence or in any way distinguish the circumstances from the present case. This raises an issue of past practice.

Where a contract is ambiguous or silent as to a particular issue an arbitrator may rely on the past practice of the parties to establish their intent, where such practice is clear and consistent. Here, the Union asserts without contradiction, that the recognized practice is that when Jail Assistants respond to traffic emergencies outside normal working hours they are paid overtime for the time worked. This is not inconsistent with the language of Article 13, paragraph 2, which the parties agree applies to Jail Assistants as well as deputies, and which provides for overtime without prior approval in emergency situations. While it is true that there do not appear to be many occasions on which this practice has been employed, it is likely not a situation which arises frequently and under such circumstances an arbitrator may infer the existence of a practice based upon a small number of instances. *CRESKO MANUFACTURING CO.*, 79 LA 1220 (COHEN, 1982). Of particular note here is the fact that the County did not contradict the Grievant's testimony regarding Janak and Pilgrim nor did it attempt to explain or distinguish the circumstances, lending credence to the Union's argument. On the record before me, therefore, I conclude that the incidents involving Janak and Pilgrim were the only prior situations where Jail Assistants provided aid at traffic accident scenes and they were compensated for their time.

It appears, from the testimony of the Sheriff, that the County has never articulated a policy for what its off-duty Jail employees may or must do when confronted with an emergency. Establishing a practice of compensating off-duty Jailers for services performed under these circumstances, however, has the effect of tacitly condoning the activity. Having done so, the County is bound to apply the practice fairly and may not be arbitrary or capricious. That is not to say that the County may not depart from the practice, because under the Management Rights clause it retains the power to direct and assign the workforce. Before it may do so, however, it must put the employees and the Union on notice that it is repudiating the practice.

Apparently, the County has reconsidered the wisdom of such a policy, for the Sheriff testified that in February, 2000, the Jailers were reclassified as Correctional Officers and relieved of their limited arrest powers, in part to prevent future situations such as the one in question here from occurring. This, however, is to close the barn door after the horse is gone. Whatever the prospective effect of such a decision, it cannot impact the Grievant's rights retroactively. I find, therefore, that prior to July, 1999, there was an established practice of paying overtime to Jail Assistants who responded to traffic emergencies and that under such practice the Grievant was entitled to compensation for his actions on July 18.

Based upon the foregoing and the record as a whole, the undersigned enters the following:

**AWARD**

The County violated past practice and the collective bargaining agreement by refusing to compensate the Grievant for his time spent in responding to a traffic accident on July 18, 1999. Accordingly, the County shall pay to the Grievant the equivalent of 15 minutes pay at one and one-half times his regular hourly wage at the time.

Dated at Eau Claire, Wisconsin, this 20<sup>th</sup> day of September, 2000.

John R. Emery /s/

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John R. Emery, Arbitrator