BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PRICE COUNTY

and

PRICE COUNTY PROFESSIONAL DEPUTIES ASSOCIATION, LOCAL 116

Case 74
No. 58926
MA-11114

Appearances:

For Price County, **David Deda,** Price County Corporation Counsel, Slaby, Deda, Marshall, Reinhard & Fuhr LLP, 215 North Lake Avenue, P.O. Box 7, Phillips, Wisconsin 54555-0007.

For Price County Professional Deputies Association, **Thomas A. Bauer,** Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915.

ARBITRATION AWARD

Price County (hereinafter referred to as "County" or "Employer") and Price County Professional Deputies Association, hereinafter referred to as "Association" are parties to a collective bargaining agreement covering the period from January 1, 1999 through December 31, 2001. That agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On June 2, 2000, the Union filed a request with the Wisconsin Employment Relations Commission for a WERC commissioner or staff member to serve as the sole arbitrator of the grievance that had arisen between the parties. Commissioner A. Henry Hempe was appointed by said Commission to hear and decide said dispute. A hearing was conducted on September 22, 2001 in Phillips, Wisconsin. No transcript of the proceeding was prepared. The County filed an initial brief received on October 8, 2001 and a reply brief received on October 22, 2001. The Association filed an initial brief received on October 9, 2001, and filed no reply brief.

STATEMENT OF THE ISSUE

The Union proposes the following statement of the issue:

Did the Employer violate the terms and conditions of the collective bargaining agreement when it refused to pay the proper overtime and holiday rates for work performed on December 31, 1999 and January 1, 2000?

If so, what is the appropriate remedy?

The County suggests the following statement of the issue:

Did the employer violate the terms and conditions of the Collective Bargaining Agreement when it refused to pyramid holiday pay and overtime pay for work performed on December 31, 1999 and January 1, 2000?

If so, what is the appropriate remedy?

I adopt the following statement of the issue:

Did the County violate the terms and conditions of the Collective Bargaining Agreement by failing to pay to pay both holiday and overtime pay (i.e., triple time) to deputies whose holiday work on December 31, 1999 and January 1, 2000 also constituted work in excess of their respective normal daily or weekly schedules?

If so, what is the appropriate remedy?

FACTS OF THE CASE

The issue of this case is one of contract interpretation. The facts are undisputed. The parties agree that based on his concern over possible Y-2K problems, the Price County Sheriff scheduled the entire roster of Price County deputies to work both December 31, 1999 and January 1, 2000. This resulted in several deputies being required to work on what would have been their scheduled day off. This also resulted in some deputies working in excess of their normal workday of eight hours.

Both December 31 and January 1 (New Year's Day) are listed holidays in the collective bargaining agreement of the parties.

Each of the deputies who worked on New Year's Eve (December 31, 1999) and New Year's Day (January 1, 2000) was compensated at the rate of time and one-half of his/her normal hourly rate of pay for each hour worked in addition to his/her normal hourly rate of pay.

Several members of the Association testified, including Association President Joseph Lillie who is employed as a jailer, Association Vice-President Brian Roush who is employed as a deputy, and Brian Schmidt (not an officer of the Association) who is also employed as a deputy.

Deputy Lillie has been a jailer with the Price County Sheriff's Department for four years. Lillie testified the work cycle for deputies is 6 days on, 2 days off, 8-hours a day. Deputies receive 14 Kelly Days per year, and work a total of 2078-hours per year. Lillie said the 2nd shift starts at 3:00 p.m. and ends at 11:00 p.m. He noted there are 26 pay periods per year, with 9 paid holidays. Lillie was scheduled to work on December 31, 1999 from 7:00 a.m. to 7:00 p.m. His hours had been changed at the Sheriff's direction and resulted in Lillie being required to work 4 hours in excess of his normal 8-hour shift. He acknowledged receiving premium pay for each of the actual hours he worked on the holiday, but contended he is also owed an additional 4 hours at time and one-half for overtime.

Deputy Schmidt has been employed by the Price County Sheriff's Department for 12 years. December 31, 1999 was normally his day off. He was scheduled to work and did work on that date from 3:00 p.m. to 3:00 a.m. the following morning. He received compensation at the rate of time and one-half. He contends he is additionally entitled to overtime pay at the same rate of pay.

Deputy Roush was scheduled to work from 7:00 a.m. to 3:00 p.m., on December 31, 1999 then 10:00 p.m. on December 31, 1999 to 3:00 a.m. on January 1, 2000. He actually worked from 7:00 a.m. to 3:15 p.m., then the additional 5 hours from 10:00 p.m. that evening to 3:00 a.m. the following morning. Deputy Roush acknowledges receiving 8 hours of compensation at straight time, holiday pay at the rate of time and one-half, and 15 minutes of overtime. He believes he is entitled to an additional 5 hours (overtime) at the rate of time and one-half.

The County submitted an affidavit executed by Timothy Gould, Chief Deputy for the Price County Sheriff's Department for 14 ½ years The affidavit was received into evidence pursuant to a stipulation between the parties, and recites in relevant part as follows:

> I, Timothy Gould, being first duly sworn on oath depose and state that I am the Chief Deputy for Price County and that I have held that position since January 16, 1987. From January 1987 until January 1995 I was involved in the

actual preparation of the payroll sheets as Chief Deputy. Since January of 1995 until the present date, as Chief Deputy, I am involved in reviewing the payroll sheets that are prepared by the Administrative Assistant-Executive. Either the Sheriff or I review the actual payroll sheets. I do have supervisory responsibility. The actual payroll checks are prepared by the Payroll Manager for Price County.

I am not aware of a single incident where an employee who was an Association member of the Price County Deputies Local 116 has worked on a holiday and been paid other than time and a half for the hours actually worked, whether the hours worked were eight hours, less than eight hours or more than eight hours on the holiday.

In addition pursuant to the Master Contract, all members of the Price County Deputies Association Local 116, whether they work or not on a holiday are paid eight hours for that holiday at straight time.

Dated this 16th day of October, 2000.

/s/ Timothy Gould

Jurat

Chief Deputy Gould reaffirmed his affidavit in sworn testimony at hearing. He asserted that in addition to straight time, any deputy required to work on a holiday is paid time and one-half for each hour actually worked.

The County also submitted an affidavit executed by Karren L. Balzar, Payroll Manager/Personnel Assistant. Pursuant to a stipulation between the parties the affidavit was received into evidence and recites in relevant part as follows:

Karren L. Balzar being first duly sworn on oath deposes and state that she is currently the Payroll Manager/Personnel Assistant in Human Resources Department of Price County which has been her position since June 15, 1999.

Throughout the time Karren L. Balzar has been in that position, on every occasion that an association member of the Price County Deputies Association Local 116 has worked on a holiday, that employee has been paid time and one-half for the hours actually worked whether it be an eight hour day, less than eight hours or more than eight hours. The holidays are listed in Article 14, paragraph A.

All members of the Price County Deputies Association Local 116 are paid an additional eight hours at straight time on each holiday whether that person works or not pursuant to the provisions of the Master Contract.

Karren L. Balzar has checked records from prior to her employment in the Human Resources Department and believes the same procedure was followed when paying for hours worked on a holiday by a member of the Price County Deputies Association Local 116 in the past, and Karren L. Balzar is not aware of a single situation where an employee was paid other than time and one-half for hours actually worked on a holiday whether the hours worked were less than eight hours, eight hours or more than eight hours.

Dated this 16th day of October, 2000.

/s/ Karren L Balzar
Jurat

The County additionally submitted copies of pay records into evidence that appeared to substantiate the County's pay practice relating to holiday/overtime pay described by Chief Deputy Timothy Gould (Exhibit C). Although one deputy professed to know nothing about the past practice, the other two acknowledged its existence. They contended, however, that the December 31, 1999-January 1, 2000 situation differed from previous instances: 1) in the most recent instance the employees did not have the option of declining to work and 2) in the past the *entire department* had never been ordered in to work a holiday.

RELEVANT CONTRACT PROVISIONS

The relevant contract provisions are contained in the labor agreement between the parties covering the period from January 1, 1999 through December 31, 2001.

Article 7 – Grievance Procedure

A. Definition of Grievance * * *
B. Steps of Grievance Procedure * * *
C. Arbitration
    1. Time Limit * * *
    2. Arbitrator: Any grievance which cannot be settled through the above procedures may be submitted to an arbitrator appointed by the Wisconsin Employment Relations Commission from one of its staff.

3. The arbitrator selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Association, which shall be binding upon both parties.
4. Costs * * *
5. Transcript * * *
6. Decision of the Arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

. . .

Article 10 – Hours of Work and Kelly Days

A. Work Year * * *
B. Work Day: The normal work day shall be eight (8) hours.

. . .

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.

Article 14 – Holidays

A. Each employee shall be entitled to nine (9) paid holidays as follows:

New Year's Day	Thanksgiving Day
Easter Sunday	Christmas Day
Memorial Day	December 24
Independence Day	December 31
Labor Day	

. . .

C. Holiday pay shall consist of eight (8) hours pay at the employee's regularly hourly rate of pay if he does not work on the holiday. Employees scheduled to work on a holiday shall receive compensatory time or salary at the rate of one and one-half (1 ½) hours for each hour worked.

POSITIONS OF THE PARTIES:

Association:

The Association asserts that the clear and unequivocal language of two sections of the collective bargaining agreement can be interpreted to apply to the same event. Applied to the instant facts, the Association argues that its bargaining unit members are entitled to both holiday pay and overtime pay for working overtime on a holiday.

The Association finds nothing ambiguous about Article 13. Article 13 recites that deputies required to work in excess of their normal work day or work week will receive pay at the rate of time and a half or compensatory time off at the rate of time and a half.

The Association insists that Article 14 is equally plain on its face. If the employee does not work on a contractually named holiday, he is entitled to be paid his straight hourly rate; if he is scheduled to work on a holiday, he is to receive compensatory time off or salary at one and one-half (1 ½) hours for each hour worked.

The Association cites both Wisconsin case law and hornbook law to the effect that the arbitrator must follow the contract language where it is clear and unequivocal – even though the results may be harsh and contrary to the expectations of one of the parties.

The Association echoes the Wisconsin Supreme Court in asserting that the ultimate aim of all contract interpretation is to ascertain the intent of the parties. If this can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence, according to the Association.

The Association is adamant that Article 14 (Holidays) is clear and unequivocal and is not susceptible to more than one meaning.

The Association argues " . . . (w)hen Article 14, Holidays, Section C, is dissected, the clear meaning is evident as to how employees are to be compensated when NOT REQUIRED to work on a holiday, when they ARE REQUIRED to work on a holiday. (Caps included.)

The Association finds that if an employee is not scheduled to work on a holiday, he/she shall be paid eight-hours pay at the employee's regular rate of pay. This, says the Association, is obviously not applicable.

But, says the Association, if an employee is scheduled to work a holiday, 1) the holiday must be a recognized one, 2) the employee must be scheduled to work the holiday, and 3) the employee shall have the option of taking pay or compensatory time off at the rate of time and one-half for each hour worked on the holiday. The Association contends that all three elements of the latter scenario have been adequately addressed by the testimony of both Association and County witnesses.

The Association also argues that Article 14 evinces a clear intent that whenever an employee works on a holiday compensation shall be given.

The Association notes that this incident is unprecedented and has no past practice on which to rely. The Association underscores the testimony of Deputy Lillie who said there has never been a time when the entire department was required to work on a holiday.

The Association believes that Article 13, Section A and Article 14, Section C have to be construed to be applicable for the same instance and cannot be differentiated under the circumstances. The Association contends that if Article 13 – Overtime, Section A is applicable in the same bi-weekly pay period that a holiday falls, it is also safe to assume and exert the argument that it could fall on the same work day or off day. (Emphasis included) Therefore, if the same work day or off day constitutes a holiday, then Article 13 – Overtime, Section A and Article 14 – Holidays, Section C shall both apply, and must be read in conjunction with each other.

Finally, the Association asserts that Article 13, Section A and Article 14, Section C require that the Employer compensate employees as stated in each section in every and all instances. The Association finds the word "shall" in each article and finds that word to express a firm mandate.

In summary, the Association reiterates its arguments:

1) The contract language is clear and unequivocal.
2) Article 14 – Holidays, Section C mandates that extra compensation be given when an employee is required to work on a recognized holiday.
3) No past practice exists.
4) Article 13, Section A and Article 14 Section C have to be construed to be applicable for the same instance and cannot be differentiated under the circumstances.
5) Article 13, Section A and Article 14, Section C require that the Employer compensate employees as stated in the specific language of each section in every and all instances.
6) There is no language in Article 14, Section C which prohibits compensation if overtime is also paid.

Therefore, the Association urges the arbitrator to order the Employer to compensate the Association members who worked on December 31, 1999 and January 1, 2000 in a manner consistent with the Association interpretation of the contract as expressed above.

County:

The County also finds the contract language clear, but reaches a different conclusion than the Association.

The County agrees with the Association that Article 14 shows a clear intent whenever an employee works on a holiday, compensation shall be given. The County notes that all employees are paid for eight-hours of holiday, whether or not they work it. The County also agrees that the employees that work are paid an additional hour and one-half for each hour worked. But, says the County, there is no provision in the labor agreement for pyramiding premium pay for overtime on premium pay for holidays.

The County points to the affidavits from Chief Deputy Gould and Personnel Manager Karren Balzar as establishing that for many years employees that work on a holiday have been paid at time and one-half for the hours actually worked, whether the hours were overtime hours or not, with no additional pay if the hours were overtime hours.

The County further points to the County Exhibit 1, which consists of the contract language from the 1981 labor agreement. The language is identical to the current contract language under which the Association is attempting to proceed. Yet, over the years, says the County, there have been many occasions when employees have worked overtime on a holiday. The employees have always been paid at the same rate of time and one-half for hours actually worked.

Association's Response:

The Association did not submit a response.

County Response:

The County takes issue with the Association's argument that there was no past practice. The County cites hornbook arbitration law to demonstrate that the practices of the parties gradually give substance to disputed terms in the contract.

In the instant matter, the County emphasized that never has there been "pyramiding" in Price County with respect to overtime pay and holiday pay. Employees have always been paid at the rate of time and one-half for actual hours worked on a holiday, plus eight hours of straight time. The affidavits from Gould and Balzar clearly establish that on many occasions an employee has worked overtime hours on a holiday without pyramiding time and one-half for overtime and time and one-half for holiday hours, says the County.

The County is not persuaded by the Association's argument that the fact the whole department was called in to work the holidays somehow makes the case unprecedented. According to the County whether everyone works or some work isn't material as to the question of whether or not a past practice has been established.

DISCUSSION:

The Association contends that a deputy whose hours of actual holiday work exceeds his or her normal workday or work week is entitled to triple time. The Association reasons that since the contract provides for holiday pay at time and one-half for actual hours worked, and the contract further provides for time and one-half for hours worked that exceed the deputy's normal workday or workweek, when considered separately the two components add up to triple time: 1 ½ plus 1 ½ = 3.

The County does not agree that the issue is susceptible to the simple arithmetic interpretation proposed by the Association. Pointing out that all deputies receive holiday pay consisting of 8 hours of straight time, the County further notes that it pays deputies additional wages (or compensatory time off) equal to time and one-half for all holiday hours actually worked, just as Article 14 mandates, but does not add a separate premium for work that exceeds the deputy's workday or workweek. The County insists that this arrangement has existed since at least 1981 under contract language for holiday and overtime pay that is identical to that in the current contract.

The Association does not deny the practice has existed with respect to individual employees. But it denies that the practice has ever been implemented when the *entire* department has been required to work on a holiday, because until the 1999-2000 New Year's holidays the *entire* department has never been called in to work on a holiday.

Each party insists that its interpretation is based on clear and unambiguous contract language. Each interpretation is plausible. In a summary (that may do scant justice to each) the Association reads each article (13 and 14) as having separate and independent existence from the other; the County believes the two articles must be read together to give meaning to each. Under these circumstances, I have no difficulty in finding ambiguity. 1/

1/ In arbitration it is fundamental that " . . . an agreement is ambiguous is plausible contentions may be made for conflicting interpretations." Elkouri, 5th Ed., at 470.

What is quite clear to me, however, is that since at least 1981 to year 2000 there was agreement between the parties as to how Article 13, Section A and Article 14, Section C should operate in conjunction with each other. Based on that mutual understanding and acceptance, neither article was viewed in a vacuum separate from the other. Instead, the articles were read together, and a practice grew that appears to give some credence to each. In effect, the parties themselves have supplied their own interpretation of the articles in question – an interpretation that has survived for approximately 20 years. As the County suggests, past-practice duration of this length is significant and serves to clothe the practice with indisputable validity. 2/

2/ Another important factor to be considered in determining the weight to be given to past practice is how well it is established. In this regard, Arbitrator Robert E. Mathews stated that to be given significant weight in contract interpretation, 'the practice must be of a sufficient generality and duration to imply acceptance of it as an authentic construction of the contract.'" Elkouri, 5th Ed., at 650.

The practice is not vitiated because the instant dispute was triggered by what the Association describes as the unprecedented directive that required the entire Sheriff's Department to be on holiday duty over the 1999-2000 New Year's holidays. I am not persuaded that this is a material difference from previous instances of holiday work by individual deputies that may exceed their normal workday or workweek. That unbroken string of instances has been well documented by the County, and constitutes a past practice. Based on that past practice, the County had a right to rely on continued acceptance of what had been up to New Year's Eve, 1999, a mutually agreed contractual interpretation that the practice described. If one of the parties is now unhappy with that interpretation being applied to a factual situation it may not have foreseen, it must seek its remedy in collective bargaining.

Certainly, alternate interpretations can be reached. The interpretation skillfully urged by the Association is not illogical on its face. But, apart from serving the self-interest of one party or the other, there is no reason in this matter to seek an interpretation at variance from the past practice of the parties. As the Association argues, "(t)he ultimate aim of all contract interpretation is to ascertain the intent of the parties." 3/ But a practice, once developed, is the best evidence of what the language meant to those who wrote it. 4/

3/ PATTI V. WESTER MACH. CO., 72 WIS.2D 348, 241 NW2d 158 (1976).

4/ Mittenthal, Richard, "Past Practice and Administration of Bargaining Agreements," from Arbitration and Public Policy at 37, BNA (1961)

Mittenthal elaborated:

> By relying on practice, the burden of the [arbitrator's] decision may be lifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretative guide lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. 5/

5/ ***SUPRA*** at 38.

Based on the entire record, the grievance is denied.

AWARD

The County did not violate the terms and conditions of the Collective Bargaining Agreement by failing to pay both holiday and overtime pay (i.e., triple time) to deputies whose holiday work on December 31, 1999 and January 1, 2000 also constituted work in excess of their respective normal daily or weekly schedules.

The grievance is dismissed, with each party to pay its own costs.

Dated at Madison, Wisconsin, this 23rd day of January, 2002.

A. Henry Hempe /s/
A. Henry Hempe, Arbitrator

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