

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WINNEBAGO COUNTY (SHERIFF'S DEPARTMENT)

and

WINNEBAGO COUNTY SHERIFF'S PROFESSIONAL POLICE ASSOCIATION

Case 360
No. 62565
MA-12343

(Schlichting Grievance)

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, WI 54915, on behalf of the Association.

Mr. John A. Bodnar, Corporation Counsel, Winnebago County, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, WI 54903-2808, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 2001-03 labor agreement between Winnebago County (County) and Winnebago County Sheriff's Professional Police Association (Association), the parties jointly requested that Sharon A. Gallagher be appointed as impartial arbitrator to hear and resolve a dispute between them regarding the denial of overtime to Deputy Christine Schlichting for training she performed on June 2, 2003. Hearing was scheduled and conducted at Oshkosh, Wisconsin, on September 24, 2003. No stenographic transcript of the proceedings was made. The parties agreed to exchange their briefs directly with each other, a copy to the Arbitrator postmarked on November 3, 2003. The parties later agreed briefs could be postmarked November 13, 2003. The Arbitrator received both parties' briefs by November 14, 2003. As parties waived reply briefs, the record was then closed.

ISSUES

The parties stipulated that the Arbitrator should resolve the following issues in this case:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the Employer denied Christine Schlichting overtime for conducting training on June 2, 2003? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section 111.70.

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ARTICLE 7

WORK WEEK

The regular workweek for all employees shall consist of an average of 38.2 hours. The four least senior Corrections Officers and the Narcotics Investigator may be scheduled to work various shifts and days as needed.

...

The person assigned as Courthouse Security Officer shall work a 5-2 schedule Monday through Friday from 8:00 A.M. to 4:30 P.M. with a one hour unpaid lunch period.

Employees serving in the capacities listed below shall work on a duty schedule consisting of five (5) consecutive work days of seven (7) hours and forty (40) minutes including a thirty (30) minute unpaid lunch period Monday through Friday:

- Jail Sergeant
- Police Officer – Support Services
- Corporal – Support Services

The number of personnel assigned in these capacities may vary from time to time depending upon the needs of the Department. Such employees who are required to work without a lunch break may be allowed to adjust their ending time at the discretion of their supervisor.

All other employees of the Department shall work a schedule consisting of six (6) consecutive duty days of eight (8) hours and ten (10) minutes each followed by three (3) consecutive days off. Provided however, detective sergeant, detectives, and juvenile officer shall work five (5) consecutive duty days followed by two (2) off days, followed by five (5) work days, followed by two (2) off days, followed by four (4) duty days, followed by three (3) off days, then repeating the cycle. A normal duty day shall consist of eight (8) hours and ten (10) minutes. Such employees shall be provided a paid lunch period within the duty shift as had been provided in the past.

Variations of the regular work schedules of employees, or temporary job assignments in excess of ninety (90) calendar days in any twelve (12) month period shall only be made by agreement between the Department and the Association Board of Directors, and only so long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.

...

ARTICLE 8

EXTRA TIME

Time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half, or the employee shall have the option to choose time off at the same rate in lieu of pay, subject, however, to the Department's scheduling requirements as determined by the County. In no event shall time off accumulated pursuant to this option exceed twenty-four (24) hours at any one time. To the extent permissible by law, time worked in excess of the regularly scheduled workday or workweek involving in-service training, schooling, departmental and shift meetings shall be paid at the rate of straight time, or time off at the same rate at the employee's option, however, no accumulation of compensatory time shall be carried over from one year to the next.

Overtime rate shall be computed on base pay, plus longevity, plus school credits. Overtime shall be paid in quarter-hour increments with the last increment worked rounded to the nearest quarter hour.

...

FACTS

Christine Schlichting has been a Deputy in the Sheriff's Department for some time. She has normally worked six days on and three days off according to Article 7 of the labor agreement. However, in June of 2003, Schlichting was working a five/two schedule (five days

on, two days off) as she was a member of the Jail Transition Team which was assisting the Sheriff's Department in its move to a new facility in Winnebago County. Schlichting's workweek on her five/two schedule amounted to 37.5 hours per week. On June 2, 2003, Schlichting worked her regularly scheduled hours (8 hours 10 minutes per Article 7, Work Week). Also on June 2, 2003, the Department had requested that Schlichting train departmental employees from 4:00 p.m. to 6:30 p.m. for "key training #38" at the Winnebago County Jail. As Schlichting worked beyond her normal hours in a normal workday, she submitted an overtime/comp time summary report indicating that she was requesting 2.5 hours of overtime for the time she trained her fellow jailers in key training #38. Schlichting submitted her overtime request form on June 2, 2003, and it was approved by the Deputy-in-Charge. 1/

1/ Schlichting's timesheet summary (Joint Exh. 3A and 3B) show that for June 2, 2003, she received 2.5 hours of comp time at straight time.

Association President Ken Daniels indicated that several items on the overtime/comp time summary slip are exempt from overtime pay by departmental tradition or past practice. Those items are as follows: dive team training, fire arms training, inservice, meeting, recruit training, S.W.A.T. training, TACT training and training-other. Daniels stated that #38 training on the overtime/comp time summary has never been exempted from overtime pay by the County and that there have never been conversations with the County which would indicate that employees who are performing training themselves should not receive overtime pay.

Daniels stated that although Schlichting's request for overtime pay was approved by Schlichting's immediate supervisor, Schlichting was later told to change her overtime/comp time summary form to comp time. At this point that Schlichting sought out Daniels to file the grievance on her behalf. Daniels stated that it is the Association's interpretation of Article 8 of the labor agreement that employees who act as trainers of their fellow officers should receive overtime pay (at time and one-half) while they are training, so long as they have completed working their regularly scheduled hours before the training began. Daniels admitted that he was not involved in negotiating the language of Article 8 and that this language was present in the labor agreement prior to his hire by the County.

County Accountant John Abendroth stated herein that during his tenure as an accountant with the County since 1998, it has been the Sheriff Department's practice to pay trainers straight time pay for their work training their fellow officers; that he has been unaware of the County ever paying a trainer overtime pay at time and one-half; and that the County has made no distinction during his tenure between those attending training and trainers when compensating them.

Lieutenant Paul Schreiber stated herein that in his 20 years in the Department both as a Association member and later as a lieutenant, the County has paid comp time at straight time but never time and one-half overtime for employees who perform training or employees who attend training. Schreiber stated that Article 8 has been in the contract for probably the past 20 years and that he cannot recall an officer ever being paid to train other officers at time and one-half overtime. Schreiber stated that employees could opt to cash out their comp time for straight time pay after a training session but that employees would fill out a slip for comp time to paid out and these employees never received time and one-half overtime for training performed or training attended.

Human Resources Director Fred Bau stated herein that on September 18, 2002, the Association submitted a contract proposal to modify Article 8, lines 13-16, to read as follows:

time worked in excess of the regularly scheduled workday or workweek involving schooling, departmental meetings, staff meetings, or training shall be paid at the rate of time and one-half (1-1/2) or compensatory time off at the rate of time and one-half (1-1/2), at the employee's option. (County Exh. 1)

On June 12, 2003, the Association filed the instant grievance, naming the Association as the Grievant. In its grievance form, the Association stated that facts, among other things as follows:

. . .

3. That June 2, 2003, Deputy Christine Schlichting submitted an Overtime/Comp Time Summary sheet requesting 2.5 hours of overtime for training employees from 4:00 PM to 6:30 PM for "Key Training #38" in the Winnebago County Jail.
4. That the Employer denied the overtime request and required Deputy Schlichting to take the 2.5 hours of straight-time pay, classifying her duties as training.
5. That provisions of *Article 8 - Extra Time* provide that employees who work **in excess of the regularly scheduled workday shall be paid at the rate of time and one-half, or compensatory time at the rate of time and one-half.**
6. That the Grievant alleges that the Employer violated the provisions of *Article 7 - Work Week* and *Article 8 - Extra Time* of the collective bargaining agreement when the Employer unreasonably denied the overtime request.

7. That the Grievant alleges that the Employer's actions violated the terms and conditions of the collective bargaining agreement, specifically *Article 2 – Management Rights* because the Employer's actions are an unreasonable application of management authority.

. . .

The County denied the grievance on the ground that “Deputy Schlichting received straight-time compensatory time for the extra hours that she worked on June 2, 2003, as a Trainer in accordance with Article 8 of the 2001-2003 collective bargaining agreement. There was no contract violation in this case. . . .”

POSITIONS OF THE PARTIES

The Association

The Association argued that Article 8 does not exempt employees who train their fellow jailers from receiving overtime pay for such training when the training they conduct occurs after they have completed their regularly scheduled shifts and/or work weeks. The only exception to the payment of overtime pay (or compensatory time at time and one-half) is when employees attend training “involving in-service training, schooling, departmental and shift meetings. . .” which are paid at straight time if the employee has already worked their regularly scheduled work day or work week. Under arbitral construction, like items which are not mentioned in a contractual lists are normally found to have been intended to be excluded by the parties. Thus, the Association urged that “in-service training” implies the act of attending, not conducting, such training. In addition, the Association noted that where general terms follow specific terms, arbitrators interpret the general language in the same vein as they would specific language. Therefore, in this case, because Article 8 refers to “schooling, departmental or shift meetings,” this language implies attendance and makes no reference to instruction.

If the County had intended to exclude conducting training sessions from overtime pay, it should have negotiated such an exception into the labor agreement. The County failed to negotiate such an exception. The Association noted that Article 8 also states that time worked in excess of a regularly scheduled work day or work week “shall be paid” at time and one-half or equivalent time off. Here, there is no question that Schlichting had finished her regular shift on June 2, 2003, and that she spent 2.5 hours training her fellow jailers immediately following her regular shift. Therefore, Article 8 would require the County to pay Schlichting overtime pay for the time she spent training employees after she had completed her regular shift on June 2, 2003.

The testimony of County witnesses that the County has never paid employees time and one-half compensation for conducting training of other employees should not be persuasive in this case. Here, the Employer's witnesses failed to offer any testimony regarding bargaining history or the parties' intent in including the disputed language in Article 8 of the labor agreement. As the County has made errors in contractual interpretation in past cases and because Association President Daniels stated that the Association never agreed to exempt trainers from the receipt of overtime, the Association urged that it should prevail in this case.

Finally, the Association argued that the County cannot successfully claim that a past practice exists which is contrary to the clear and unambiguous language of the labor agreement. In such instances, the Arbitrator must follow the clear language of the labor agreement. The Association argued that its contract proposal for the 2004-05 labor agreement concerning Article 8 has nothing to do with this case. The Association asserted its proposal was intended merely to clarify Article 8 to pay overtime pay to employees attending training, schooling, meetings, etc. Therefore, the Association asked that Schlichting be paid overtime for the 2.5 hours that she worked beyond her regular shift on June 2, 2003.

The County

The County noted that there are essentially no factual disputes in this case. Here, Schlichting worked her regular shift and then worked an additional 2.5 hours training jailer employees at the County. The County noted that the contract language contained in Article 8 is not ambiguous and that the Arbitrator can determine its meaning based on the language of Article 8 and the simple facts in this case.

The County's witnesses, including its Accountant and Lieutenant Schreiber, stated that there has been no distinction in the County's treatment of employees who attend and employees who conduct training for purposes of compensation over many years. In addition, no grievances have been filed over the years prior to the instant case seeking overtime pay for Deputies who conduct training. This evidence, the County urged, demonstrated a specific past practice in support of the clear language of Article 8 and its assertions in this case.

The Association's 2004-05 proposal to pay all those "involved" in training, schooling and meetings time and one-half pay or compensatory time at a time and one-half rate, should require a conclusion that the Association believed that the language of Article 8 could be reasonably interpreted, contrary to its arguments in this case. Therefore, in the County's view, the grievance should be denied and dismissed. If the Arbitrator rules in favor of the Association, the County urged that an order for payment to trainers should be prospective from the date of the Award and that no back pay should be awarded to Schlichting.

DISCUSSION

There is no dispute that Deputy Schlichting worked her regular shift on June 2, 2003, (8 hours, 10 minutes) and that thereafter (from 4:00 p.m. to 6:30 p.m.) Schlichting taught departmental employees “key training #38.” The only question before the Arbitrator in this case is what rate of pay Schlichting should have received for the 2.5 hours she spent training others on June 2nd.

Article 8, Extra-Time, states that

time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half, or the employee shall have the option to choose time off at the same rate in lieu of pay, subject, however, to the Department’s scheduling requirements. . . . (Emphasis supplied.)

It is this sentence which the Association argued requires the County to pay Schlichting time and one-half overtime pay for the time she spent on June 2nd training her fellow employees.

The Association’s argument would be a strong one but for the existence of sentence 3 in Article 8, which reads as follows:

To the extent permissible by law, time worked in excess of the regularly scheduled workday or workweek involving in-service training, schooling, departmental and shift meetings shall be paid at the rate of straight time, or time off at the same rate at the employee’s option. . . . (Emphasis supplied.)

Thus, sentence 3 stands as an exception to the rule stated in sentence 1 of Article 8. In my view, this language is clear and unambiguous.

The Association has argued that attending training, etc., not time spent performing or conducting/teaching at in-services or other meetings is covered by sentence 3 of Article 8. I disagree. The open-ended terms “time worked” and “involving” must be construed to include any activities (both teaching and attending) engaged in during “in-service training, schooling, departmental and staff meetings.” Indeed, this language is so broad that the Association’s arguments regarding the proper construction of the listed activities become unpersuasive. Thus, the use of these words together and without limiting language shows that the parties intended that any time spent in in-service training, schooling and departmental and shift meetings, should be paid at straight time “to the extent permissible by law.” 2/ Had the parties wished to exempt time spent conducting training or teaching at such meetings, they could easily have expressed that intention. They did not do so.

2/ No argument has been made herein that the County’s payment of Schlichting at straight time on June 2nd violated the law.

The Association has also argued that listing such activities as “schooling, departmental and shift meetings” after “in-service training” implies that all of these terms were intended to refer to the act of attendance, not to instruction. In my view, the use of the broad terms “time worked” along with “involving” undermines this argument and requires a conclusion that both attendance and instruction were intended to be included in “time worked.” 3/

3/ There was no evidence offered to show what topics are normally covered at departmental and staff meetings and by whom they are presented.

The County offered uncontradicted evidence (Abendroth and Schreiber) to show that for at least the past 20 years, the County has never distinguished between those attending and those conducting training for purposes of compensation — that all have been compensated over the years at straight time. In addition, the County argued that no objection or grievance has ever been filed regarding the failure to pay time and one-half for Article 8 instruction. This evidence strongly supports the County’s arguments herein, in my view.

The lack of evidence of bargaining history to show the parties’ true intent regarding the use of the words “time worked” and “involving” is not problematic. In this regard, I note that Association President Daniels admitted that he was not involved in negotiating the disputed language of Article 8 and that this language was present in the labor agreement prior to Daniels’ hire by the County. If evidence existed to contradict the County’s assertions herein, the Association had a full opportunity to submit it.

The County argued that the Association’s proposal to modify the language of Article 8 at sentence 3 during negotiations on September 18, 2002, demonstrates that the Association knew that a reasonable interpretation of Article 8 was that conducting and attending training, etc., was to be paid at straight time. The Association’s proposal retained the terms “time worked” and “involving” it only proposed to delete references to straight time, inserting overtime language. As the Association proposed to change only the method of compensation (overtime rather than straight time pay), this proposal does tend to support the County’s argument on this point. 4/

4/ I note that the Association did not offer any bargaining history evidence to contradict this County argument.

Based upon all the evidence in this case, I issue the following

AWARD

The Employer did not violate the terms and conditions of the collective bargaining agreement when the Employer denied Christine Schlichting overtime for conducting training on June 2, 2003. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 22nd day of January, 2004.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator