BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.
FOR AND ON BEHALF OF ITS AFFILIATE LOCAL,
THE GREENDALE PROFESSIONAL POLICE ASSOCIATION

and

VILLAGE OF GREENDALE

Case 73
No. 62965
MA-12454

Appearances:

Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of the Labor Association of Wisconsin, Inc., for and on behalf of its affiliate local, the Greendale Professional Police Association, which is referred to below as the Association.

Nancy L. Pirkey with Geoffrey S. Trotier on the brief, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the Village of Greendale, which is referred to below as the Employer.

ARBITRATION AWARD

The Employer and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin as Arbitrator to resolve grievance number 2003-63, filed on behalf of Andy Becker, who is referred to below as the Grievant. Hearing on the matter was conducted on April 14, 2004, in Greendale, Wisconsin. On April 22, 2004, Elaine Thies filed a transcript of the hearing with the Commission. The parties filed briefs and a waiver of a reply brief by June 17, 2004.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the terms and conditions of Section 8.02 of the collective bargaining agreement when it denied Officer Andy Becker seven hours of overtime for time worked on August 20, 2003?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II – MANAGEMENT RIGHTS

SECTION 2.01: The Association recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility and in the manner provided by law, and the powers and authority which the Employer has not specifically abridged, delegated or modified by other provisions of this Agreement are retained as the exclusive prerogatives of the Employer. Such powers and authority, in general, include, but are not limited to the following:

. . .

H. To establish or alter the number of shifts, hours of work, work schedules, methods or processes.
I. To schedule overtime work when required. . . .

SECTION 2.02: The exercise by the Employer of any of the foregoing powers, rights and/or authority shall not be reviewable by arbitrations except in case such are so exercised as to violate an express provision of this Agreement.

. . .

ARTICLE VII – WORKING HOURS

SECTION 7.01: Employees shall work an average of thirty-nine and one-quarter hours (39.25) hours per week as scheduled by the Police Chief. The normal work schedule will be four (4) days of work followed by two (2) off days, eight hours and twenty-four minutes a day (8.4 hours), then repeat the cycle.

. . .

ARTICLE VIII – OVERTIME

SECTION 8.01: It is the policy of the Employer to avoid the necessity of overtime. No overtime work shall be performed without the approval of the Police Chief or his representative, and the Employer shall not incur any obligation for unauthorized overtime worked. Employees shall be required to work overtime when requested by the Police Chief or his representative.

SECTION 8.02: Employees shall receive time and one-half their basic hourly rate (annual rate divided by 2044 hours) for all overtime hours they are required to work. Overtime hours shall mean hours worked in excess of the following number of hours during the applicable biweekly pay period:

Number of Normal Workdays In The Biweekly Pay Period	Number of Hours
8	67.2

. . .

or when an employee works more than 8.4 consecutive hours on a workday, such consecutive hours in excess of 8.4. Employees shall receive a minimum of two (2) hours compensation at time and one-half (1– ½) for overtime not consecutive to a workday. . . .

BACKGROUND

The Association dated Grievance No. 2003-63 September 4, 2003 (references to dates are to 2003, unless otherwise noted). The grievance form cites Articles II, VII, VIII, XXIII and "any other appropriate Article or Section" as the contractual source of the alleged violation. The form seeks that "the Chief of Police cease and desist from violating the terms of the collective bargaining agreement and pay the grievant 7 hours of overtime for his time worked on August 20, 2003."

The grievance concerns how the Grievant should be compensated for testifying in state court on August 20. August 20 fell in the Employer's Pay Period 18, which ran from Saturday, August 16 through Friday, August 29. For that pay period, the Employer scheduled the Grievant to work eight days: August 18, 19, 20, 21, 24, 25, 26 and 27. The Grievant, at all times relevant here, worked the third shift, which runs from 11:36 p.m. until 8:00 a.m. The

Employer's first shift runs from 7:36 a.m. through 4:00 p.m. The second shift runs from 3:36 p.m. through 12:00 a.m.

The Employer staffs the police department on a four/two schedule, with a normal workday of 8.4 hours per shift. Officers receive pay bi-weekly in equalized checks. To make each check equal in amount, the Employer presumes standard pay of 78.5 regular hours for a biweekly pay period. In a payroll period including eight scheduled work days, an officer is normally scheduled to work 67.2 hours (8 shifts x 8.4 hours per shift). Pay period 18 was such a schedule for the Grievant. For that pay period, the Grievant worked five full shifts, attended training for a full shift, claimed sick leave for two full shifts and worked 3.6 hours of overtime in addition to a full shift.

On August 18, the Grievant requested and received permission to take sick leave to attend to a medical problem experienced by his wife. He requested and received permission to take sick leave for the scheduled shift that started at 11:36 p.m. on August 19 and on August 20. The Grievant did, however, report to work on August 20. He reported to the police station at 8:00 a.m. to pick up a squad to respond to a subpoena to testify in a criminal proceeding. He testified, returning the squad to the police station at 3:00 p.m. He turned in an overtime authorization card for August 20, which noted his regular hours and requested overtime from "0800 to 1500". The Lieutenant who received the slip denied the request, thus prompting the grievance.

Robert Dams has served as the Employer's Chief of Police for five years and has served in the Police Department for thirty-one. Citing Section 8.02, Dams denied the grievance in a letter dated August 27, which states:

> Employees shall receive time and one-half based on their basic hourly rate (annual rate divided by 2044 hours) for all overtime hours they are required to work. Overtime hours shall mean hours worked in excess of the following number of hours during the applicable biweekly pay period . . . or when an employee works more than 8.4 consecutive hours on a work day, such consecutive hours in excess of 8.4 . . .
>
> In a previous grievance like this one the matter had been settled by the employee being granted sick time for the time taken, and being paid straight time for the number of hours worked. If the number of hours . . . was over 8.4 hours overtime would apply.
>
> Therefore, to stay in compliance with the previous grievance settlement we will deduct the 8.4 hours you needed as family leave, and had chosen to have taken out of your sick time account. I will pay you for the seven (7) hours worked at

> straight time; however, no overtime will be paid since you did not work in excess of 8.4 hours. This also is covered under FSLA as well as State Law. Since the grievance has been settled in another case I have two additional situations as past practice with other officers since the grievance was settled. . . .

The Association processed the grievance to Step 3. In a letter to the Grievant dated October 6, Joseph Murray, the Employer's Village Manager, affirmed Dams' denial. The letter states:

> In reviewing the grievance, the issue seems identical to the Grievance filed earlier this year by Officer Sardina, Grievance #03-22. At issues is "**Does the use of leave count towards the number of hours worked making additional time eligible for overtime**?" As addressed with Officer Sardina in the previous grievance, the answer is "no".
>
> By reporting to State Court on August 20th from 8:00 – 3:00 P.M. (The Grievant) **worked** 7 hours. It is my understanding that (he) utilized sick leave to cover his regularly scheduled shift on August 20th, therefore he did not **work** beyond his reporting to Court, and therefore the 7 hours is not eligible for overtime. (He) properly received 7.0 hours of straight pay for his hours in Court and had his sick leave account reduced by 8.4 hours. . . .

The Association responded by advancing the grievance to Step 4. Murray responded in a letter dated October 17, noting:

> I'm extremely disappointed in the Association's decision to continue . . . Especially in light of the fact that we resolved this same issue only a few months ago in Officer Sardina's Grievance (#03-22), and have utilized that resolution at least twice since that time to pay officers overtime only for hours worked . . .

The Employer did not pay the Grievant seven hours of straight time for August 20. Rather, the Employer withheld the payment pending the resolution of this grievance.

As noted above, the Employer's response rests in part on a settlement reached regarding a grievance brought on behalf of Jerry Sardina, who was then a Patrol Officer. He was promoted to Sergeant sometime after filing the grievance.

The Sardina Grievance

The Sardina grievance, Number 03-22, concerned Dams' denial of Sardina's request for overtime on March 27. On March 27, Sardina was scheduled to work first shift. He requested and received permission to use sick leave from 7:36 a.m. through 9:00 a.m. on March 27.

Sardina became involved in an accident investigation at the close of his shift, and worked until 5:36 p.m. He submitted an overtime authorization card, which was approved by his immediate supervisor, then denied by Dams, thus prompting the grievance.

Sardina sought payment for March 27 thus: 1.4 hours of sick leave; 7 hours of straight time; and 1.6 hours of overtime. Dams approved the following payment: 1.4 hours of sick leave; 8.4 hours of straight time; and 0.2 hours of overtime. In a letter dated May 7, Murray offered to settle the matter thus:

> The Village will pay Officer Sardina 1.4 hours of straight time for the 1.4 hours of sick leave granted on March 28th. Accordingly, the Village will then reduce Officer Sardina's sick leave account for the corresponding 1.4 hours paid. Officer Sardina has already been paid the 0.2 hours of Overtime – the equivalent of working 8.6 consecutive hours.

The Association, in a letter from Benjamin Barth to Murray dated May 20, accepted the offer, stating:

> Please be advised that the Association is withdrawing the above referenced grievance without prejudice based upon your letter date May 7, 2003 . . . According to the settlement proposed Jerry Sardina will be paid 1.4 hours of straight time and the Village will deduct 1.4 hours of sick leave from his account.

Dams applied his view of this agreement to two other overtime requests.

<u>The Michael Susalla and Ryan Rosenow Overtime Requests</u>

Rosenow was originally scheduled to work the first shift on June 26. The Employer later assigned him to work that day from 4:00 a.m. until the regularly scheduled end of his shift at 4:00 p.m. At 11:18 a.m. Rosenow left work, on emergency leave, to attend to his daughter. He submitted an overtime authorization card for June 26, seeking 3.6 hours of overtime and 4.5 hours of sick leave. His supervising sergeant approved the request. Dams denied it, approving 7.3 hours of straight time and 1.1 hours of sick leave. Dams' written denial reads thus:

> On June 26, 2003, you began working at 0400 hours which you submitted an overtime card for. However, based on the unexpected Emergency Leave you had to take you did not <u>work</u> the required 8.4 hours necessary before you can be paid time and one half according to the contract, State Law, and FSLA. Therefore, you worked 7.3 hours, and only 1.1 hours will be deducted from your sick time account instead of the 4.7 hours you requested. . . .

Susalla was scheduled to work the first shift on July 24. The Employer assigned Susalla to report at 4:00 a.m. that day, and to work until the regularly scheduled end of his shift at 4:00 p.m. Susalla became ill, and left work at 7:12 a.m. He submitted an overtime authorization card, seeking 3.2 hours of overtime and 8.4 hours of sick leave. Dams approved 3.2 hours of straight time and 5.2 hours of sick leave. Dams' written denial reads thus:

> On 7-24-03, you were assigned to work form 0400 hours to 1600 hours. According to the sick report from Sgt. Daniels you worked 3.2 hours when you became ill and took sick time. Therefore, before I can pay any overtime you must work 8.4 hours before you are entitled to overtime. Sick time hours do not count as hours worked according to the contract. Therefore, I can not approve the overtime card submitted by you on 7-24-03. The 5.2 hours will only be deducted from sick time account.

Neither officer filed a grievance. Dams does not know if either officer discussed the matter with an Association representative. Dams did not communicate his denial to the Association.

It is undisputed that the Employer has maintained, since at least 1989, a Sick Leave/Emergency Leave policy that excuses an employee on sick leave "from being called for court." Dams has never counted sick leave to determine overtime eligibility, and does not believe any of his predecessors did. Dams does not know of any Employer communication of this view to any Association representative.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Association's Brief

After a review of the evidence, the Association contends that Section 8.02 is "sufficiently clear" to explain the circumstances "in which an officer of the Association would be entitled to receive overtime compensation." Section 8.02 grants overtime for two events. The first "is when the officer works more than 8.4 consecutive hours on a workday." The second "is when an officer works in excess of 8 scheduled days (67.2 hours) in a biweekly pay-period." The latter does not establish a "requirement that an officer actually has to work the eight days." That the officer is scheduled for the eight days is sufficient to establish that the officer is entitled to overtime "provided that he actually works." The language of Section 8.02 is clear enough that this right "cannot be ignored." Dams' testimony confirms this.

The schedule set in Section 8.02 does nothing other than establish when overtime is to be paid. Since each officer receives 78.5 hours per pay period to generate "26 equal

paychecks per year", it follows that "any hours in excess of 67.2 hours in a pay period . . . must be compensated at the overtime rate" provided the officer works and provided the officer is scheduled to work eight days in the pay period.

Dams could not cite any contract language "that would exclude sick leave from the calculation of hours worked", but relied on past practice. An examination of the record fails to support his assertion. Beyond this, the record will not support the Employer's view of the agreement. It paid the Grievant 78.5 hours for the pay period covering August 20, which means he "was never compensated for the seven hours of work on August 20, 2003."

The Employer's conduct effectively punishes the Grievant for filing the grievance. This cannot rest on the Sardina incident, since the parties resolved that matter on a non-precedent setting basis. The Grievant, unlike two prior officers, was not intimidated and "was/is being punished for his pursuing the issue."

Arbitral precedent precludes finding a binding past practice on this evidence. There is no indication that the Association was aware of the cases cited by the Employer, and the Sardina dispute was settled without prejudice.

The Association concludes that the grievance should be granted, and the Employer ordered to "compensate the Grievant 7 hours at time and one-half for the overtime work he performed on August 20, 2003."

The Employer's Brief

After an extensive review of the evidence, the Employer contends that Section 8.02 is clear and unambiguous and "must be given its plain meaning: a police officer is only eligible for overtime for hours **worked** in excess of 8.4 hours in a day, and the police officer cannot inflate hours worked by adding hours paid, such as sick time pay."

Arbitral precedent confirms that the "language contained in Section 8.02 needs no interpretation." The Grievant met neither of the conditions established in the section. He worked only seven hours on August 20, and he was only scheduled to work 67.2 hours "during the pay period beginning August 16, 2003 and ending August 29, 2003". Without regard to his schedule, he worked only 50.4 hours in that pay period.

The Employer has "historically applied the clear and unambiguous language of the contract to any overtime request by requiring the employee to actually **work** 8.4 hours in one day before receiving overtime pay." The Sardina, Susalla, Rosenow and Marasco cases establish this.

Against this background, the "Arbitrator (should) find that (the Employer) properly administered the contract when it denied overtime payment to the Grievant". It follows from this that "the grievance (should) be dismissed with prejudice in its entirety."

DISCUSSION

At hearing, the parties stipulated the issue for decision. Their post hearing arguments narrow the contractual focus to the second sentence of Section 8.02, which establishes the two conditions that govern the Grievant's request.

The second sentence of Section 8.02 states that "Overtime hours shall mean" one of two things. The first is "hours worked in excess" of a schedule set forth in the section. The second is "when an employee works more than 8.4 consecutive hours on a workday".

Each party contends the language of the two conditions unambiguously supports their interpretation. That each party states a plausible interpretation establishes that both lines of argument afford less than persuasive guidance. Stated more specifically, the two stated conditions do not employ the same terms. Whether or not the "hours worked" reference is considered to be contained in the second condition, it is triggered by the active reference to "employee works". The first condition does not contain this reference, but turns on the passive reference to "hours worked". This difference means that the conditions cannot be considered clear and unambiguous. Rather, the difference in operative terms poses an interpretive issue, which is whether both conditions demand that an "employee works" an 8.4 hour day or an eight-day, 67.2 hour biweekly schedule before becoming entitled to overtime.

Bargaining history and past practice are the most persuasive guides to resolve contractual ambiguity, since each focuses on the conduct of the bargaining parties, whose intent is the source and the goal of contract interpretation. Here, however, neither factor is helpful. There is no evidence of bargaining history, and evidence of past practice falls short of establishing conduct manifesting mutual understanding. The Association accepted Murray's May 7 proposal to settle the Sardina grievance, but did so "without prejudice." It is not clear what this reference means, but it makes it difficult to conclude the Association granted the settlement the binding force that Dams and Murray gave it. More significantly, the settlement would have binding force only if the two conditions are read to incorporate the "employee works" reference. That begs the interpretive issue posed here. The Employer's response to the Susalla and Rosenow requests affords no more guidance. They demonstrate the consistency of the Employer's conduct, but fail to indicate the mutual understanding that makes past practice binding. There is no evidence that the Association was aware of either request or the Employer's response.

Thus, the interpretive issue focuses on the language of Section 8.02. Although the relationship of the conditions may be unclear, the language of the second condition strongly

supports the Employer's view. The active reference to "employee works" makes it unpersuasive to conclude that accrued leave can be used to fill the "8.4 consecutive hours" requirement. To the extent the "hours worked" reference is considered implicit in the second condition, this conclusion becomes more compelling. In any event, coupling "employee works" with "a workday" underscores that this condition demands work performed, not work scheduled or work accounted for through the use of paid leave. Beyond this, the concluding reference linking overtime to "such consecutive hours in excess of 8.4" clarifies what work qualifies for straight time and what work qualifies for the overtime premium. In each case, it is time actually worked.

Thus, the interpretive issue turns on the relationship of the two conditions and on whether each incorporates the "employee works" requirement. The clarity of the second condition makes the Employer's reading of the first troublesome. Why would the parties use different terms to create the same requirement?

The application of the Employer's interpretation to the first condition raises more questions than it resolves. More specifically, the Employer's view ignores that the active "employee works" reference does not appear in the first condition, which uses a passive reference to "hours worked". The passive reference is not linked to "a workday" but to "the following number of hours during the applicable biweekly pay period". This reference then incorporates a schedule of hours, headed by a reference to "Number of Normal Workdays". This reference points to a schedule rather than to the specific performance of work on any given day or days. The reference to "hours worked" thus points to time actually worked, but the use of a passive reference coupled with the following table focuses on when that work occurs, i.e. outside of a regular schedule. This strongly supports the Association's view. Significantly, their view clarifies what work qualifies for overtime and what work must be paid at straight time. The 67.2 hour reference is the scheduled eight day work week, which is paid at straight time. Overtime thus becomes off-schedule work.

The Employer's view does not clarify how to compensate the Grievant. Their reading of Section 8.02 disqualifies the Grievant from receiving overtime, but affords no clarity on how he is to be compensated. If work outside of a normal schedule is not to be compensated by overtime, it is less than clear how it is to be compensated. Taken to its logical conclusion, the Employer view leaves the Grievant without pay for the time spent under subpoena on August 20. Dams and Murray sought to address this difficulty by offering straight pay, but the dilemma points to the weakness of the Employer's reading of the contract.

Thus, the Association's reading of the first condition of the second sentence of Section 8.02 is preferable to the Employer's. The Employer's reading of the second condition is preferable to the Association's. Since the Grievant's claim poses the first condition, the Employer violated Section 8.02 by denying his claim for overtime for testifying in a criminal proceeding on August 20.

Before closing, it is appropriate to clarify the scope of this conclusion. The difference in language between the two contingencies poses problems in arbitration, which are not necessarily posed to the parties. To read the two contingencies in the same way simplifies the Employer's and the Association's conflicting interpretations. Both interpretations, however, fail to give meaning to the different terms employed to establish the two conditions, an outcome inappropriate to contract interpretation. Thus, the conclusion stated above gives meaning to the differing language employed in the two conditions.

This conclusion demands some comment on how the conditions are distinguished. The differing terms establish that they address different situations. The reference to "a workday" establishes that the second condition applies to a single workday, while the reference to the "applicable biweekly pay period" establishes that the first applies to work outside a normal, biweekly schedule. Work "consecutive to a workday", a reference employed in the third sentence of Section 8.02, sets the distinction between the two conditions of the second sentence. Viewed generally, work immediately preceding or following a normal shift could be considered outside of the biweekly schedule and thus subject to the first condition. When consecutive to the workday, however, such work is specifically governed by the second condition of the second sentence of Section 8.02. Regarding "a workday", the specific terms of the second condition prevail over the general terms of the first, which governs hours worked "in excess" of specified normal hours in a biweekly schedule.

I cannot assert jurisdiction over the Marasco grievance, and thus do not address it here. The parties' agreement to extend the conclusion in this matter to that grievance must be left to the parties. As I read the contract, the Employer's handling of the Sardina, Susalla and Rosenow requests was appropriate under the second condition of Section 8.02. The Grievant's claim, unlike theirs, questions the first condition.

Section 8.02 provides overtime where an employee is "required to work." While the record has some evidence concerning whether the Grievant should have acted to avoid the need to testify on August 20, I do not read the record to question whether his testimony "required" him "to work" and do not consider that portion of Section 8.02 at issue here. Section 8.01 states a general policy "to avoid the necessity of overtime." I do not consider this provision at issue on this record in light of the stipulated issue.

The Association has questioned whether the Employer's failure to pay straight time to the Grievant for August 20 punished him for filing the grievance. The failure to pay the Grievant, as noted above, manifests a weakness in the Employer's reading of the contract. The evidence affords no reliable basis to extend this conclusion. It does not establish that the Employer acted for any reason beyond its view of how the contract should be administered. It appears the Employer questioned whether the Association was faithful to the Sardina settlement. As with the Association's concerns, this provides no persuasive help in interpreting the agreement.

The parties have not posed any dispute regarding the appropriate remedy, which is set forth in the Award entered below.

AWARD

The Employer did violate the terms and conditions of Section 8.02 of the collective bargaining agreement when it denied Officer Andy Becker 7 hours of overtime for time worked on August 20, 2003.

As the remedy appropriate to this violation, the Employer shall make the Grievant whole by paying him the difference between the amount it paid him for Pay Period 18 in 2003 and the amount it would have paid him but for the refusal to compensate him at time and one-half, as specified in Section 8.02, for seven hours worked on August 20, 2003.

Dated at Madison, Wisconsin, this 21st day of September, 2004.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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