

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUPACA COUNTY LAW ENFORCEMENT OFFICERS' ASSOCIATION,
LOCAL 2771 AFSCME, AFL-CIO**

and

WAUPACA COUNTY

Case 148
No. 64127
MA-12815

(Holiday Pay Grievance)

Appearances:

Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, appearing on behalf of Local 2771.

Mr. James R. Macy, Attorney, Davis & Kuelthau, S.C. 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin, appearing on behalf of Waupaca County.

ARBITRATION AWARD

Waupaca County Law Enforcement Officers' Association, Local 2771 AFSCME, AFL-CIO, hereinafter "Union," and Waupaca County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on September 28, 2005, in Waupaca, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs. The Union declined to submit a reply-brief while the County filed same which was received on December 5, 2005, whereupon the record was closed.

Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree to the framing of the substantive issues.

The Union frames the issues as:

1. Did the Employer violate the collective bargaining agreement when it discontinued the longstanding method of payment provided to an employee when working on an overtime basis on a legal holiday?
2. If so, what is the appropriate remedy?

The County frames the issues as:

1. Did the County violate Article III or Article XX of the collective bargaining agreement in the manner in which it paid employees for working on a holiday?
2. If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the issue as:

1. Whether the County violated Article XX or Article XI of the collective bargaining agreement when it paid employees for overtime hours worked on an approved holiday at the holiday rate of time and one-half rather than at the overtime rate of time and one-half combined with the holiday rate of time and one-half thus totaling three times the regular hourly rate?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE III – MANAGEMENT RIGHTS

The County possesses the right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights which are normally exercised by the County or the Sheriff include, but are not limited to the following:

- A. To direct all operations of the Sheriff's Department.

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- C. To maintain efficiency of County government operation entrusted to it.
- D. To introduce new or improved methods or facilities.
- E. To change existing methods or facilities.

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ARTICLE VIII – GRIEVANCE PROCEDURE

A. Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract. The Association may be the Grievant in cases where it feels that it has a collective grievant of its members. The term, “Representative” shall mean that member of the Association appointed by it to fulfill the functions enumerated in this article.

B. Steps of Grievance Procedure:

1. The Grievance Procedure shall consist of four (4) steps hereinafter set forth. All grievances not initiated or filed by the grievant or his representative within the applicable time limits specified in this Article, shall be deemed abandoned. A grievant may initiate, present and process his grievance with or without a representative or representatives. All times hereinafter set forth in this Article, unless otherwise specified, are working days and are exclusive of Saturdays, Sundays, and any Holiday recognized by this Agreement. All time requirements set forth in this Article may be waived or extended by mutual agreement of the parties.
2. A grievance affecting a group or class of Employees may be submitted in writing by the Association Board to the Sheriff or Chief Deputy or his designee directly and the processing of such grievance shall commence at Step 2.
3. All grievances, whether individual or group, shall be submitted to and reviewed by an Association Board prior to Step 2 of the Grievance Procedure. It shall be the responsibility of the Association Board Member(s) reviewing the grievance not to cause it an undue delay in its processing.

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f. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement without written approval of both parties.

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ARTICLE XI – WORK WEEK, OVER-TIME, CALL IN TIME, ETC.

- A. 1. The normal work week is forty (40) hours of time on duty. The hourly rate shall be computed by dividing the annual salary by 2080.
- 2. The normal work day is eight (8) hours with one-half (1/2) hour mid-shift meal, with one (1) break in the first four (4) hour period and one (1) break in the second four (4) hour period. Breaks are not to exceed fifteen (15) minutes and shall be taken as close to the middle of the four (4) hour period as the flow of work permits.
- B. Any time worked in excess of eight (8) hours per day, or outside the normal work schedule, shall be over-time and paid at one and one-half (1.5) times the employees rate except the first fifteen (15) minutes of over-time in any given day shall be without charge to the Employer. Thereafter, increments of over-time shall be calculated on a half (1/2) hour basis of time worked.
- C. All over-time shall be approved by the Sheriff, Chief Deputy, or his designee.

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ARTICLE XX – HOLIDAYS

- A. All regular full-time Employees shall receive additional pay for the following nine (9) holidays if worked:

- New Year's Day
- Memorial Day
- July 4th
- Easter Sunday
- Labor Day
- Thanksgiving Day
- Christmas Day
- Day after Thanksgiving
- Veterans Day

An additional two (2) floating holidays shall be scheduled at any time during the year with the approval of the Sheriff, Chief Deputy or his designee upon the request being made at least two weeks in advance. There shall be no pyramiding of holidays.

- B. Holiday Pay: Holiday pay will be paid to those Employees who have worked their scheduled hours the day before and the day after the holiday, except if they are on vacation or on a paid leave.
- C. Holiday pay shall be computed on the straight time hourly rate of pay currently received by the Employee under the contract.
- D. Holiday pay shall be based on the Employee's regular rate of pay, and Employees who are required to work on a holiday shall be paid at one and one-half (1 1/2) times their regular hourly rate for hours actually worked in addition to their regular weekly salary. Employees not working on the holiday shall be paid one (1) day's pay in addition to their regular salary. Holiday pay shall be paid in the pay period following the holiday.

Overtime pay for holidays will be computed at the straight time rate.

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BACKGROUND AND FACTS

This grievance was filed on May 4, 2005 on behalf of the entire Union membership alleging that the County "failed to pay properly for holiday." The grievance was filed following the distribution of a memorandum by the County Personnel Department:

TO: Sheriff's Department Employees
FROM: Personnel Department
DATE: March 26, 2004
RE: New Time Card

Effective March 28, 2004 begin using the attached time card. Spreadsheet time cards will no longer be accepted for payroll processing. The reason for this change is that there had been some confusion regarding the spreadsheet format of the time card. The new time card is designed for ease in completing, less confusion and more efficient payroll processing.

In addition, effective immediately payment for holidays will be paid as outlined in your respective collective bargaining agreement. Please see attached for reference. Examples are provided for your information.

If you have any questions please contact our department or your supervisor.

Attached to the memorandum was a copy of Article XX of the labor agreement and the new Waupaca County Employee Bi-Weekly Time Report with sample entries for various situations. The sample form contained an entry for work performed on a holiday. The entry indicated that the employee was scheduled and worked a 10 p.m. to 6 a.m. shift on a holiday. The employee earned 8 hours payment at regular time for hours worked and 8 holiday hours worked at time and one-half. The time card did not indicate whether the hours worked were outside the employee's normal work schedule. The sample time report did not provide an example for an employee working on a holiday in excess of the eight (8) hour regular shift.

Roselene Lund testified at hearing. Lund retired from the County Sheriff's Department in 1988 after 13 years of employment. Lund had been responsible for the processing of Sheriff's Department payroll at the time of her retirement. Lund testified that she followed a "time and a half plus time and a half plus eight hours" formula for compensating employees that worked on holidays. When provided with a scenario of an employee working four hours beyond their shift on a holiday, Lund indicated the employee would receive "time and a half, regular pay - or holiday pay of 8 hours for the holiday and, well, she would get 6 hours pay for the hours worked over the, her shift." Tr. 17-18.

Sandra Artz testified at hearing. S. Artz currently works in the County Clerk's office, but previously worked in the Sheriff's Department. S. Artz was responsible for processing payroll between 1988 and 1990 and was trained by Lund. S. Artz's spouse is an officer in the bargaining unit. S. Artz testified that if an employee worked on a holiday, the employee would receive eight hours pay for the holiday plus time and one-half plus time and one-half.

Carl Artz testified at hearing. C. Artz is a 22 year employee of the County Sheriff's Department and currently holds the rank of detective sergeant. C. Artz testified that if an employee worked overtime on a holiday they were compensated at four times the regular rate which is calculated by adding the number of overtime hours at time and one-half for the overtime computation plus the same number of overtime hours at time and one-half for the holiday computation.

C. Artz testified to the County's procedure for paying overtime on holidays when the County was using "split slips." C. Artz estimated this occurred during Lund's employment with the Department. C. Artz stated that when the County utilized split slips, employees completed an overtime slip and a holiday slip. C. Artz testified that if he worked overtime on a holiday, he would receive 8 hours pay because of the holiday plus 12 hours at time and one-half for the holiday plus overtime at time and one-half. C. Artz testified that the calculations are different if the employee is regularly scheduled to work the shift and if the employee is called in to work the shift. It is C. Artz's belief that the County, after issuing the March 24 memorandum, is paying employees at three times pay for overtime hours worked.

Darold Krueger testified at hearing. Krueger is a 22 year employee of the Sheriff's Department currently at the rank of Detective Sergeant. Krueger testified that the County had been paying employees time and one-half plus time and one-half plus 8 hours if an employee worked overtime on a holiday. Krueger testified that he has consistently been paid four times regular pay for overtime worked on a holiday.

Amanda E. Welch, testified at hearing. Welch has been employed by the County since 1997, initially as a Personnel Assistant and as the County Personnel Director for the last five years. Welch testified that during the time that payroll was prepared by Sheriff's Department personnel there were questions regarding the interpreting and paying employees properly. To resolve the questions, the Sheriff's Department payroll was moved to the Finance Department, a new time recording document was developed and she issued the March 24, 2005 memorandum to clarify how the coordination of payroll would occur. Welch testified that she reviewed past Sheriff's Department payroll with regard to holidays and determined that mistakes had been made and that employees had been overpaid.

Welch prepared a summary of time paid on holidays for the time period 1999 to 2004 and specifically it identified all time paid to law enforcement and correction officers for holidays. During that time period the summary did not differentiate between the two bargaining units, did not differentiate between holidays worked and holidays not worked and did not differentiate whether the employee was in overtime status. The summary reads as follows:

<u>Year</u>	<u>Occurrences</u>	<u>Breakdown</u>
1999	194	162 paid @ 2 ½ times 27 paid @ 3 times 5 paid @ 3 times + 8 additional hours
2000	210	160 paid @ 2 ½ times 1 paid @ 1 ½ times 4 paid @ 3 times 5 paid @ 3 times + 8 additional hours
2001	307	257 paid @ 2 ½ times 41 paid @ 3 times 2 paid @ 3 times + 8 additional hours 5 paid @ 4 times 1 paid @ 4 ½ times
2002	313	278 paid at 2 ½ times

	3 paid @ 1 ½ times 24 paid @ 3 times 0 paid @ 3 times + 8 additional hours 3 paid @ 4 times 5 paid @ 4 ½ times
2003	302
	282 paid @ 2 ½ times 1 paid @ 1 ½ times 15 paid @ 3 times 3 paid @ 3 times + 8 additional hours 1 paid @ 4 times 0 paid @ 4 ½ times
2004	63 (January 1 – April 30, 2004)
	1 paid @ 1 ½ times 1 paid @ 1 ½ times + 8 57 paid @ 2 ½ times 1 paid @ 3 times 3 paid @ 3 times + 8 additional hours 0 paid @ 4 times 0 paid @ 4 ½ times

Attorney Edward J. Williams testified at hearing. Williams is a labor and employment attorney with the law firm of Davis & Kuelthau. Williams negotiated labor agreements on behalf of the County. Williams was involved in bargaining and drafted the language of Article XX that exists in the parties' current agreement. Williams' bargaining notes indicate that an employee working on a holiday would receive time and one-half for the holiday hours worked in addition to regular salary for a total of 20 hours payment. Williams testified that his notes do not address an overtime situation.

Additional facts, as relevant are contained in the DISCUSSION section below.

POSITIONS OF THE PARTIES

The Union's Initial Brief

The County unilaterally terminated the agreed upon manner in which overtime/holiday compensation has been determined in violation of the collective labor agreement. Moreover, the County failed to take any affirmative steps prior to the termination of the status quo.

The language of the parties' labor agreement is ambiguous. In reading the holiday and overtime computation portions of the agreement, they are susceptible to more than one

interpretation, and therefore it is necessary to rely on extrinsic evidence. The Union notes that there are two equally plausible interpretations of the relevant portions of the agreement. The first relies on Article 20, Section B for holiday pay, and Article 11, Section D for overtime at time and one-half which results in compensation at the rate of four times the normal rate. The second interpretation relies on Article 20, Section D for overtime at straight time which results in compensation at the rate of three and one-half times the normal rate. Thus, two separate and distinct interpretations exist from the agreement. As a result of the ambiguity, it is necessary to look to the parties past practice to determine how employees were intended to be paid when working overtime on a holiday.

The Union and the County have entered into a binding past practice of utilizing an additive computation of overtime on a holiday. All elements of a binding past practice have been met. Roselene Lund and Sandra Artz testified that for at least 20 years the County has followed a consistent practice of adding the overtime premium and the holiday premium together whenever an officer was obligated to work overtime on a holiday. The County accepted the practice. No evidence was presented by the County to contradicting the testimony that overtime on a holiday is paid at time and one-half. Although County Exhibit 22 is a history of compensation paid on holidays, it fails to segregate overtime from that group and therefore the exhibit does not provide any guidance.

The evidence is uncontroverted that the County has utilized an additive method of compensating employees who work overtime on holidays. This testimony was not refuted by the County and therefore it is the customary method of payment. Accepting Richard Mittenthal's analysis of past practice, the parties have agreed to utilize this method of calculation and any effort on the County's part to deviate from this long-standing practice must be repudiated. The record is void of any effort or claim by the County that it has repudiated this past practice. In fact, the County Personnel Director admitted that she unilaterally made the decision to terminate the past practice.

As to the County's interpretation of how overtime is to be paid, it requires that the discrete overtime provisions contained in Article XI, Section B are isolated from the remainder of the agreement. If two and one-half times the employees' regular rate is the maximum payment for officers who work overtime on a holiday, then there is no distinction between those that work overtime or those that do not work overtime.

The County offered unreliable testimony regarding bargaining history. When asked by the Union representative if the bargaining notes provide any examples of what would happen if some worked a holiday in overtime status, the County's bargaining representative unequivocally responded that there were no examples. On the issue of overtime on a holiday, the longstanding, mutually acknowledged past practice is to provide separate and additive premium payments for officers working overtime on a holiday.

With regard to pyramiding, the County's bargaining history argument supports the Union's position. Although the County argues otherwise, there is but one reference to pyramiding in Mr. Williams' notes suggesting that the genesis for the last sentence of Article XX, Section A was specifically limited to the pyramiding of the (floating) holidays with the identified holidays. It was not intended to address overtime on holidays.

The County drafted the language of Article XX. This language conflicts with overtime language. It is well-accepted that ambiguous language is to be construed against the drafter. The County failed to harmonize the two conflicting provisions and therefore the parties past practice becomes an interpretive aid in determining what the parties intended when the language was drafted. For 20 years the County has added the overtime premium and the holiday premium together whenever an officer was obligated to work overtime on holidays. The County has accepted the notion that the inconvenience incurred by the officer when working overtime on a holiday demanded that a separate premium payment was paid above and beyond the inconvenience of working a normal shift.

Finally, the County shredded all previous time card documents and pay slip documents after the issuance of the March 26, 2004 memorandum. The County's decision to shred any and all remnants of the prevailing practice while instituting a new interpretation of how overtime on a holiday is suspicious.

The Union asks the Arbitrator to uphold the grievance and restore the status quo ante.

The County's Initial Brief

The contract language is clear and unambiguous and supports the County method of compensating employees that work on a holiday. The language of Article XX states that there will be no pyramiding and then continues to explain how holiday pay is based. There is nothing confusing, arbitrary, capricious or vague in the language. There will be no pyramiding and employees working on a holiday will receive one and one-half times their regular pay in addition to their regular straight time. If the employee does not work the holiday, they will receive their regular straight time rate and one times their regular hourly rate. The parties only chose to distinguish between those that work and those that do not work on the holiday. For those employees that work overtime on the holiday, they receive straight time for those extra hours. There is no language that automatically provides the employee their salary plus holiday pay plus overtime pay.

The County's method of payment is consistent with the contract language. The County sent out the March 26, 2004 clarifying memorandum in order to ensure that holidays would be paid on a consistent basis in compliance with the labor agreement. The memorandum did nothing more than incorporate the contract language and implement the method of payment that was used in the vast majority of cases in the past. Recognizing that they had made a few errors in the past, the County sought to establish consistency.

In addition to the clear language of the agreement, bargaining history supports the County method of payment. The unrefuted testimony of the chief spokesperson for the County confirmed that the parties' intent was to pay employees on holidays in the manner outlined in the March 2004 memorandum. When the language was implemented prior to 1982, there was no pyramiding of overtime. The parties bargained this language and specified the exact number of hours an employee would receive; they would be paid 16 hours if they did not work the holiday and 20 hours if they worked the holiday. There was never an intent to pyramid or otherwise pay overtime in any amount over and above the base rate of pay.

Assuming the contract language isn't clear and to the degree that a past practice exists, that practice supports the County. Two bargaining unit members who prepared payroll in the past testified at hearing. Roselene Lund testified that if an employee works over the hours of the regular shift on a holiday, that is when overtime is applied. Sandy Artz testified that overtime was only paid for the hours worked in addition to the normal hours scheduled on the holiday. The Union witnesses supported the County position.

The County prepared a summary of how employees have been paid on holidays since 1999. That document clearly establishes that although a few mistakes were made, the vast majority of pay for holidays was calculated in the exact manner that the contract spells out and that the County has implemented.

The County In Reply

Contrary to the Union's contention, the contract language at issue is not ambiguous. The Union offers two interpretations to the language, both of which are self-promoting. The first interpretation attempts to pyramid specific language in Article XX with the general language of Article XI to create four times pay for employees not regularly scheduled to work a holiday, but who elect to work a holiday. This argument fails for numerous reasons. First, specific language is provided more weight than general language. UNITOG COL, 85 LA 740 (1985). The language states that employees will receive one days pay for the holiday and time and one-half for hours worked. Overtime is provided to employees who work beyond the normal scheduled work hours at straight time and therefore to apply the general time and one-half overtime would eliminate the specific language for straight time pay for overtime.

Additionally, the language specifically states that no pyramiding shall occur. No language exists to automatically provide salary plus holiday pay plus overtime using the holiday bonus as the base. That would be pyramiding time which the contract prohibits.

As to the Union's second interpretation of the language, is also misapplies the language and ignores the history between the parties. This interpretation results in the pyramiding of the premium holiday pay with the overtime language resulting in three and one-half times pay. Had the parties intended this result, they would have stated that overtime pay for holidays

would be computed at the holiday bonus rate of pay or that the employee would be paid two and one-half times pay in addition to their regular salary. The language does not say this and in order for the arbitrator to reach this conclusion, it would be necessary to add to or delete from the terms of the labor agreement which Article VIII specifically prohibits.

The Union's assertion that a past practice supports its positions fails because the threshold test to establish a past practice cannot be met. There is no unequivocal manner in which holiday pay has been calculated. The Union posits that holiday pay should be either at four times pay or three and one-half times pay. If the manner was unequivocal, clearly enunciated and acted upon, the Union would argue that there is only one way to calculate, not two. The Union's argument is based upon incomplete recollection with no reference to actual records. The Union testimony reflected inconsistency and confusion while the County's records indicate that to the degree a practice exists, employees were paid two and one-half times pay when working on a holiday.

As to the Union's challenge that the County's summary fails to differentiate between scheduled hours and those hours that are "picked up" by an employee, the express contract language makes no distinction, so neither did the County. Pay only changes on a holiday if the employee works and how someone ends up working does not matter.

The evidence offered by the County regarding bargaining history is reliable and unrefuted. It may be that the Union disagrees with the impact of the testimony, but that does not make it inherently invalid.

Finally, there is no conspiracy or inappropriate action by the County to deny or destroy records. The Sheriff's administration ordered employees to begin using a new three-part time card in an attempt to avoid confusion.

For these reasons and the reasons stated in the County's Initial Brief, the grievance should be denied.

DISCUSSION

The issue to be determined in this case is what is the accurate method of calculating overtime worked on a holiday.

This is a contract interpretation case. As with all contract interpretation cases, the method of analysis begins with the contract language in dispute. If that language is clear and unambiguous and conveys a single distinct meaning, then it is unnecessary to resort to extrinsic evidence. But, if the language is not so clear and a plausible contention can be made for conflicting interpretations, then bargaining history, past practice and the parties' manner of dealing is relevant to ascertain the intended meaning. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6TH ED. (2002) P. 434.

The parties disagree as to its meaning of the holiday pay section. The Union asserts that employees are entitled to the overtime premium (time and one-half) for overtime hours worked on a holiday while the County maintains that overtime is earned at the regular rate. Article XX – Holidays, Section D reads as follows:

Holiday pay shall be based on the Employee's regular rate of pay, and Employees who are required to work on a holiday shall be paid at one and one-half (1 ½) times their regular hourly rate for hours actually worked in addition to their regular weekly salary. Employees not working on the holiday shall be paid one (1) day's pay in addition to their regular salary. Holiday pay shall be paid in the pay period following the holiday.

Overtime pay for holidays will be computed at the straight time rate.

This language provides that if an employee is required to work on the holiday, they are to receive their regular weekly salary for that day and they shall be paid one and one half times their regular hourly rate for hours actually worked.¹ This language is very specific. It differentiates between an employees regular weekly salary for purposes of calculating the holiday day premium and the employees regular hour rate for purposes of compensating the employee for the hours actually worked. It is presumed that the parties knew what they were doing when they bargained the labor agreement and the specific contract language and therefore I must conclude that the parties knew and intended to make a distinction between the employee's regular shift and "hours worked" on the holiday. By compensating the employee for "hours worked" on the holiday rather than the regular shift or scheduled shift, the premium holiday pay rate applies to all hours worked, including overtime hours.

Moving to the conflict between the overtime computation language of Article XX, Section D and Article XI, Section B, it is a broadly observed principle of contract interpretation that specific provisions of an agreement prevail over general provisions of an agreement. *Id.* At p. 470. In this instance, Article 11 is the general provision which establishes the work week, overtime, call-in time, and related items. Inclusively, Section B articulates the parties' definition of overtime and states when it is earned and how it is earned. In direct contrast, Article 20 addresses how overtime is earned on the nine holidays designated by the parties. The holiday overtime language states that overtime worked on holidays is earned at straight time which explicitly contradicts the language of Article 11 that states all overtime is earned at time and one-half. Accepting that "...in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language." I therefore conclude that the parties intended for overtime worked on holidays would be earned at straight time.

¹ Article XX, Section D states that only those employees "required" to work are entitled to the bonus compensation. Neither the Union nor the County challenged this language. As such, I will conclude that all employees that work on a holiday are "required" to work on that holiday.

The Union asserts that a past practice exists which supports its position. The Union argues that for greater than 20 years the parties have adhered to an implied agreement to compensate officers working overtime on a holiday at the overtime rate rather than the straight time rate. To be binding on both parties, a past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. LABOR AND EMPLOYMENT ARBITRATION, 2ND ED., VOL. 1 (2002) 10-4. In this instance, the evidence does not reliably establish that the parties have consistently compensated officers at four times their hourly rate or three and one-half times their hourly rate when working overtime on a holiday.

Four witnesses testified regarding how overtime was paid on holidays. Roselene Lund was a credible witness, but her testimony conflicted as to how she computed overtime pay on a holiday. Carl Artz's testimony was very clear during direct examination, but he was unable to respond to specific scenarios during cross examination when presented with specific scenarios. Most believable was Darold Krueger who unequivocally testified he has historically received time and one-half plus time and one-half and regular pay when working overtime on a holiday. The Union offered Krueger's time reports from April 11, 2004 as evidence that officers are losing compensation as a result of the March 26 memorandum. In reviewing the exhibits and Krueger's testimony, "3 O.T. Holiday" hours were crossed off the first time report and the second time report adds the three hours to the previous total in the "Overtime or Holiday Hours Worked" column increasing the total from 11.5 to 14.5 hours. The Union also submitted two payroll documents entitled Overtime/Holiday Work Sheet that were completed and approved for an employee that worked five and one-half overtime hours on November 11, 1992 for a transport. Both forms were for the same date and time and indicate that overtime was earned at time and one-half in addition to holiday premium at time and one-half. The two time sheets for November 11 support the Union's position, but the evidence does not allow for the conclusion that four times regular pay was consistently paid to all employees for overtime hours worked on holidays.

Recognizing the deficiencies of Exhibit 22 and its failure to differentiate between regular hours worked and with overtime hours worked, the document provides credence to the conclusion that there is no consistent practice. Payment was issued at two and one-half times, three times, three times plus 8 hours, four times and four and one-half times. Had the parties agreed to a single calculation method thus meeting the unequivocal and regularly occurring over a period of time components to establishing a binding past practice, there would be two ratios; one for hours worked on a holiday and one for overtime hours worked on a holiday.

The Union points out that the County did not take any affirmative steps to discontinue the practice of four times regular pay for holidays. While it is generally understood that an employer desiring to discontinue a past practice must provide notice to the union during negotiations prior to eliminating the past practice, that scenario is not applicable in this case. This is not a situation where employees were induced to believe that overtime on a holiday is earned at time and one-half above and beyond the holiday time and one-half premium. As

previously discussed, the evidence does not establish a viable past practice. As a result, the County's memorandum is not disavowing the practice, but rather is clarifying how it will proceed.

As to the County's assertion that the last sentence in Article 20, Section A, negates the Union's position that overtime is paid at time and one-half in addition to the holiday time and one-half premium, I do not find that it is applicable to this fact scenario. The sentence, which states that "[t]here shall be no pyramiding of holidays" follows the listing of all holidays and is part of a paragraph which creates two floating holidays for employees. The sentence does not relate to Section D. Rather, it is part of Section A and limits an employee's right to add to or pyramid a floating holiday onto a designated holiday. It does not provide guidance as to how overtime earned on a holiday is to be paid.

Finally, the evidence does not support the Union's contention that the purpose of Chief Deputy Al Kraeger's direction to all members of the Sheriff's Department to delete the old time sheet from their computers was intended to wipe out evidence of the parties' past practice. While I agree with the Union that the timing of the destruction of the documents was suspicious, I am unable to conclude on this record that the County's actions were inappropriate. It may be that the County directed employees to remove the data from the computer hard drives, but the data for 1999-2004 was not destroyed and therefore available for the Union to review since the County utilized these documents to prepare Exhibit 22.

AWARD

1. No, the County did not violate Article XX or Article XI when it paid employees for overtime hours worked on an approved holiday at the holiday rate of time and one-half rather than at the overtime rate of time and one-half combined with the holiday rate of time and one-half thus totaling three times the regular hourly rate.

2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 14th day of March, 2006.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator