BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PRICE COUNTY

and

PRICE COUNTY PROFESSIONAL DEPUTIES ASSOCIATION, LOCAL 116

Case 91
No. 65258
MA-13169

Appearances:

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of Price County Professional Deputies Association, Local 116.

Lori Blair-Hill, Human Resources Coordinator, Price County Human Resources, 126 Cherry Street, Phillips, Wisconsin 54555 appearing on behalf of Price County.

ARBITRATION AWARD

Price County, hereafter County or Employer, and Price County Professional Deputies Association, Local 116, hereafter Association or Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Staff member Coleen A. Burns was so appointed on November 24, 2005. A hearing was held on January 10, 2006 in Phillips, Wisconsin. The hearing was not transcribed and the record was closed on February 25, 2006, upon receipt of the parties' post-hearing written arguments.

ISSUE

The parties stipulated to the following statement of the Issue:

> Did the Employer violate the terms and conditions of the collective bargaining agreement when they did not award the employee pay for attending the employer required EAP assessment for disciplinary issues?

BACKGROUND

In June of 2005, as part of a disciplinary action, the County referred the Grievant to EAP for alcohol assessment. This disciplinary action also included a three day suspension without pay.

The Grievant, a Deputy with the County's Sheriff's Department, scheduled three EAP counseling sessions in Wausau, Wisconsin for days on which he was scheduled off work, *i.e.,* June 22nd, July 12th, and August 2nd, 2005. These days were not the days on which the Grievant served his suspension without pay.

The Grievant requested 1.25 hours of overtime for the counseling session on June 22; 4 hours of overtime for the counseling session on July 12; and 4 hours of overtime for the counseling session on August 2. The overtime requests for June 22 and July 12 were denied by the County on the basis that the requirement to attend EAP assessment was part of a disciplinary action and, therefore, the responsibility of the Grievant. The overtime request for August 2 was paid by the County because the County did not understand that this was time spent on the EAP counseling.

The Grievant grieved the denial of his overtime pay requests. This grievance was denied at all steps and, thereafter, submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Deputies Association

On June 6, 2005, the County notified the Grievant that he was required to attend Employee Assistance Program counseling sessions as a result of discipline received by the Grievant. The County's Human Resources Coordinator, Lori Blair-Hill, advised the Grievant that he may want to consider seeking EAP counseling from someone outside of the County in order to protect his privacy.

The Grievant complied with the County's order to attend EAP counseling and attended three sessions in Wausau, Wisconsin. As the Grievant testified, the EAP program required that he attend three counseling sessions and that, any additional counseling sessions, were the responsibility of the employee. The sessions were scheduled for the Grievant's off-time.

Article 13 of the parties' collective bargaining agreement provides that all hours "in excess of the scheduled work day or work week" shall be compensated "at time and one-half (1-1/2) or compensatory time off at time and one-half (1-1/2) at the employee's discretion." The Grievant submitted a request for overtime for the time required to travel to and attend the counseling sessions and for appropriate mileage reimbursement for 356 miles of travel.

The Grievant submitted the relevant time sheets pursuant to Department Policy and the parties' collective bargaining agreement. The request for mileage reimbursement was subsequently dropped by the Association on the basis that there are no contractual provisions addressing mileage.

The Fair Labor Standards Act (FLSA) requires that all time spent by an employee performing activities which are job-related is potentially "work time." This includes the employee's regular "on the clock" work time, plus "off the clock" time spent performing job-related activities (which benefit the Employer). Potential work is actual work if the Employer "suffered or permitted" the employee to do it. An Employer suffers or permits work if it knows the employee is doing the work (or could have found out by looking), and lets the employee do it.

The Grievant complied with a direct order from his Employer to attend the counseling sessions. The direct order was "job related" because the Employer "suffered or permitted" the Grievant to attend the sessions and the Grievant was subject to further discipline if he did not comply with the Employer's order. Since the sessions were scheduled on the Grievant's off-duty time, Article 13 of the collective bargaining agreement provides that all hours "in excess of the scheduled work day or work week" shall be compensated "at time and one-half (1-1/2) or compensatory time off at time and one-half (1-1/2) at the employee's discretion."

The disciplinary documents received by the Grievant do not prohibit the Grievant from receiving compensation for his counseling sessions. If the Employer intended to require the Grievant to attend the sessions without pay, then the Employer should have made that clear to the Grievant.

The requested remedy, *i.e.*, to order the County to cease and desist from violating the terms and conditions of the collective bargaining agreement; to compensate the Grievant for the time spent traveling to and from Wausau and attending EAP counseling on June 22nd and July 12th; and to order any other appropriate remedy, is reasonable. The Grievant has received the requested compensation for August 2nd.

County

The County denies that Article 11, Drug Testing, is applicable to this dispute. The denial of the Grievant's pay requests is justified because it was part of the disciplinary action and was a requirement in order to retain his employment with the County. If the time requested had been paid, it would have nearly negated the Grievant's three day suspension. Such a result is unreasonable in that the Grievant would not suffer any serious consequence for the conduct that lead to his discipline.

The County never told the Grievant to go outside of Price County. It was suggested that the Grievant may want to consider not going to someone in Price County due to possible professional relationships. The Grievant was free to go wherever he wished. The number of sessions was dictated by the Assessment Counselor.

The County is not obligated to pay the Grievant for his time attending the EAP.

DISCUSSION

The issue of whether or not the County had the right to discipline the Grievant by issuing the three day suspension and requiring the Grievant to undergo an EAP alcohol assessment is not before the undersigned. As stipulated to by the parties, the only issue to be decided by the undersigned is:

> Did the Employer violate the terms and conditions of the collective bargaining agreement when they did not award the employee pay for attending the employer required EAP assessment for disciplinary issues?

At hearing, there was testimony regarding the meaning and applicability of Article 11, Drug Testing. In post-hearing written argument, the County claims that Article 11 is not applicable and the Union claims that the two relevant collective bargaining provisions are Article 2, Management Rights, and Article 13, Overtime. The undersigned is satisfied, therefore, that the parties agree that Article 11 is not relevant to the disposition of this grievance.

Under the express terms of Article 2, Management Rights, the rights contained therein cannot be used to interfere with rights established under the collective bargaining agreement. In this case, the Union, contrary to the County, claims that the Grievant is entitled to receive the overtime that the Grievant requested for attending EAP counseling sessions on June 22, July 12 and August 2, 2005. Thus, the contract language that specifically addresses overtime, *i.e.*, Article 13, is controlling.

Article 13, in relevant part, states as follows:

> A. Investigators, Law Enforcement Officers and Jail Officers who are required to work in excess of the scheduled work day or work week shall receive pay at time and one-half (1-1/2) or compensatory time off at time and one-half (1-1/2) at the employee's discretion. Overtime must be approved by the Sheriff or Chief Deputy in advance except in an emergency. Time and one-half (1-1/2) payment, if the employee selects pay instead of compensatory time, shall be rendered to the employee no later than the last pay period of the following month.
>
> B. **Scheduling.** Whenever the employer is aware of overtime with at least forty eight (48) business hours notice, excluding Saturdays, Sundays and holidays, the overtime shall be filled as follows: The overtime will be offered to part-time employees. If there are no part-time employees who are available, it will be offered to the full-time employees on a seniority basis within their respective classifications. If none of the employees volunteer for the overtime,

the least senior employee in the classification in which the overtime is occurring shall be ordered to fill the overtime slot.

. . .

The Union asserts that the time that the Grievant spent in attending the EAP sessions is "work" within the meaning of the FLSA and, thus, should be considered to be "work" within the meaning of Article 13, Section A. The record, however, provides no reasonable basis to conclude that the parties mutually intended the provisions of Article 13, Overtime, to be construed by reference to the FLSA.

Commonly and ordinarily, the "work" for which employees are compensated by an employer is "work" that is performed by the employee on behalf of the employer. It follows, therefore, that the overtime provided for in Article 13, Section A, is compensation for work that is performed on behalf of the employer.

In undergoing the EAP alcohol assessment at issue, the Grievant was establishing his fitness for duty in a disciplinary situation. In establishing his fitness for duty in a disciplinary situation, the Grievant was not performing work on behalf of the County.

Conclusion

The County agrees that it required a referral to EAP alcohol assessment as part of the discipline imposed upon the Grievant in June of 2005. The County does not agree that it required the Grievant to attend three EAP counseling sessions in Wausau. Regardless of whether or not there was such a County requirement, the undersigned is satisfied that, by attending the three EAP counseling sessions in Wausau, the Grievant was not performing work on behalf of the County. Accordingly, the undersigned concludes that the Grievant did not perform "work" within the meaning of Article 13, Section A, and denies the grievance claim for overtime pay.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the terms and conditions of the collective bargaining agreement when they did not award the employee pay for attending the employer required EAP assessment for disciplinary issues.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of June, 2006.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
6998