BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 593
No. 65773
MA-13319

(Uniform Allowance Grievance)

Appearances:

Rachel Pings, Cermele & Associates, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53212, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the uniform allowance grievance. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on July 31, 2006. The hearing was not transcribed. The parties filed briefs by September 19, 2006. The Association filed a reply brief on October 2, 2006, and the County elected not to file a reply brief that same date, whereupon the record was closed. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did Milwaukee County violate Section 3.06(1)(b) of the Agreement when it did not provide the grievants with the full annual uniform allowance amount of $425.00? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2005-2006 collective bargaining agreement contained the following pertinent provisions:

3.06 UNIFORM ALLOWANCE

(1) Uniform allowance shall be paid by separate check to all employees in the bargaining unit as follows:

(a) Uniformed employees shall be furnished with a full uniform at the time of hire or as soon thereafter as practicable. The uniformed items furnished shall be in accordance with the regulations of the Sheriff's Department setting forth prescribed minimum equipment for each employee. Any employee whose employment is terminated within two (2) years from the date of hire shall return all uniform items furnished by the County to the Sheriff's Department within seven (7) days of termination.

(b) The annual allowance for all employees shall be four hundred twenty five dollars ($425.00).

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Matthew Hendren and Donnie Rutter are deputy sheriffs and thus members of the bargaining unit.

This case involves the contractual uniform allowance. When deputies are hired, the County provides them with a uniform. While deputies receive a uniform at no cost to them, they still have to purchase additional items out of their own pocket before they can function as a deputy. Specifically, they have to purchase expandable batons, flashlights, flashlight and radio holders, boots, and under uniform garments such as shirts and socks. Deputies are required to launder, repair and replace all uniform items at their own expense. The parties' collective bargaining agreement provides that employees will be paid an annual uniform allowance of $425.00. This uniform allowance is paid to employees in a lump sum in the last pay period of each calendar year.

The record indicates that the Department does not give deputies a uniform allowance in their first year of employment. As noted above, new deputies are given a uniform by the County when they began their employment.

The record further indicates that for many years, the Department has prorated the uniform allowance it gives deputies in their second year of employment. The amount is prorated based on the employee's date of hire. The record contains 14 instances in the past five years where the Department prorated the uniform allowance for deputies in their second year of employment. None of these deputies grieved the prorating of their uniform allowance.

In 1999, grievances were filed by Deputies Liam Looney and Elizabeth Freuck concerning their uniform allowance payment for that year. The grievances contended that the deputies should have received the full uniform allowance, but instead received a prorated amount. The Employer denied the grievances. In its response to Association President Robert Hillman on March 25, 1999, the County's Director of Labor Relations, Henry Zielinski, averred as follows: employees receive no uniform allowance in their first year of employment because the Employer provides them with a new uniform; in their second year of employment, the employee's uniform allowance is provided; and in their third year of employment, the employee receives the full uniform allowance. He further averred that this had been the Employer's practice for ten years and that the Association had acquiesced to that practice. Zielinski's letter indicated that if Hillman agreed "with the disposition of this grievance", he was to sign the letter; if he did not agree with this disposition, he was to note it in the margin. Hillman chose the latter option because he struck out the word "approved" on the letter and wrote "not approved". The County's Labor Relations office subsequently denominated the grievances as "not resolved". The Association did not appeal these unresolved grievances to arbitration.

FACTS

The parties stipulated to the following facts:

1. Deputy Rutter was hired April 17, 2003, was terminated December 20, 2003, and was rehired December 17, 2004. Deputy Hendren was hired January 3, 2003, was terminated December 20, 2003, and was rehired December 27, 2004.

2. Rutter and Hendren were issued uniforms by the County both times they were hired.

3. In calendar year 2003, the County did not pay a uniform allowance to either Rutter or Hendren.

4. In calendar year 2004, the County did not pay Rutter or Hendren the full uniform allowance of $425. Instead, the County paid them a prorated amount. The amount reflected the number of days each employee worked in 2004.

. . .

In December 2005, Rutter and Hendren received their uniform allowance for calendar year 2005. Neither was paid the full uniform allowance of $425.00. Instead, Rutter was paid $17.47 and Hendren was paid $5.82.

Rutter and Hendren grieved the County's failure to pay them the full uniform allowance of $425.00. The grievance was processed through the contractual grievance procedure. When it was appealed to the third step, the Employer averred that a practice existed whereby the uniform allowance is prorated in the employee's second year of employment. The grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the County violated Section 3.06(1)(b) of the collective bargaining agreement when it did not pay grievants Rutter and Hendren the full annual uniform allowance. It elaborates on this contention as follows.

First, it relies on the contract language contained in Section 3.06(1)(b) which provides thus: "the annual allowance for all employees shall be. . .$425.00. . ." According to the Association, that sentence is clear and unambiguous in providing that "all employees" are to receive the full uniform allowance on a yearly basis. The Association avers that this sentence has no exceptions. The Association also avers that this sentence makes no reference, either explicitly or implicitly, to prorating the uniform allowance. That being so, the Association contends that the plain meaning of the sentence is that "all employees" (meaning from their first year on) are to receive the full uniform allowance regardless of time served in the department.

Next, the Association argues that notwithstanding the County's contention to the contrary, this case should not be controlled by an alleged past practice. Instead, as the Association sees it, the contract language should be controlling. Here's why. The Association cites the standard arbitral principle that when the contract language is clear and unambiguous (which the Association maintains is the situation here), then there is no need for the arbitrator to even consider an alleged past practice. The Association asks the arbitrator to follow that principle here.

However, if the arbitrator does consider the alleged past practice, the Association submits that the County did not present sufficient evidence to establish a binding past practice which is entitled to contractual enforcement. The Association cites the standard arbitral principles for establishing a past practice (i.e. that it be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time) and asserts they were not met here for the following reasons. First, while the County relies on the March 25, 1999 letter to the former Association president to prove that the Association knew of the (alleged) practice and acquiesced to it, it is the Association's view that this letter actually proves the

converse because President Hillman specifically struck the word "approved" on it and wrote "not approved". According to the Association, Hillman's meaning in writing this was clear: the Association rejected the County's purported past practice. Second, with regard to the fact that the Association did not appeal that grievance to arbitration, the Association avers that there is no evidence in the record that the Association's motivation for not appealing the grievance to arbitration had anything to do with acquiescing to the (purported) practice. Third, the Association cites the testimony of current Association President Roy Felber that he was unaware of any practice regarding the uniform allowance. According to the Association, his lack of knowledge about the alleged practice calls into question whether such a practice exists. Fourth, with regard to the document which the County offered to prove the existence of the practice (i.e. County Exhibit 1), the Association avers that document was fatally flawed because it does not prove that each and every deputy in the department received a prorated uniform allowance in their second year of employment – just those selected for inclusion on that document. The Association notes that both grievants in this case were left off the list even though they received a prorated uniform allowance. The Association asks rhetorically who else was left off the list. Building on the foregoing, it is the Association's view that the sample in County Exhibit 1 is inherently biased and lacks credibility.

The Association therefore contends that the grievance should be upheld. In order to remedy this contract violation, the Association asks that Rutter and Hendren be paid "the entire uniform allowance for 2003 and 2004", and that the County be ordered "to administer all future uniform allowances according to the plain language of Section 3.06."

County

The County contends that it did not violate Section 3.06(1)(b) of the collective bargaining agreement when it did not pay the full annual uniform allowance to grievants Rutter and Hendren. It elaborates on this contention as follows.

The County sees this case as a past practice case. Building on that premise, the County avers there is a past practice concerning the clothing allowance that is dispositive herein. According to the County, the practice is this: the County gives no uniform allowance to employees in their first year of employment (because they receive a uniform from the County that year) and prorates the uniform allowance in the employees' second year of employment. To support that contention, the County first relies on the fact that in 1999, two deputies received a prorated uniform allowance and they grieved it. In denying their grievance, the Employer identified the aforementioned practice and averred it had been the Employer's practice for ten years. The County calls attention to the fact that the Association did not appeal the Employer's denial (of that grievance) to arbitration. The County submits that the Association's failure to appeal that grievance to arbitration means the Association acquiesced to the Employer's interpretation of the uniform allowance language (whereby no uniform allowance is paid in the employee's first year of employment and the uniform allowance is prorated in the employee's second year of employment). Second, the County avers that the Association also acquiesced to the Employer's interpretation of the uniform allowance

provision in the years that followed because County Exhibit 1 identifies 14 separate occasions over the five years between 2001 and 2005 where various deputies did not get the full uniform allowance in the second year of employment, but rather received a prorated amount. The County emphasizes that none of those 14 deputies grieved their prorated uniform allowance payment. The County contends that this practice establishes how the uniform allowance language has been interpreted by the parties themselves: namely, that no uniform allowance is paid to employees in their first year of employment and that the uniform allowance is prorated for employees in their second year of employment.

Given the foregoing, it is the County's position that it did not violate the collective bargaining agreement by its actions herein. It asks the arbitrator to enforce the practice and deny the grievance.

DISCUSSION

I begin with a description of how my discussion is structured. Attention will be focused first on the scope of this decision. Next, the focus turns to the applicable contract language. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves an alleged past practice.

I've decided to comment first on the scope of this decision. Here's why. The record indicates that the parties disagree about two separate aspects of the uniform allowance. Specifically, they disagree about whether the uniform allowance is to be paid to employees in their first year of employment and whether employees are to receive the full uniform allowance in their second year of employment (or a prorated portion thereof). Had the parties wanted to, they could have submitted both the former and the latter questions to me for a response. They did not. Instead, they just submitted the latter question. This finding is based on my reading of the stipulated issue. The stipulated issue asked whether the County violated Section 3.06(1)(b) when it did not pay the full uniform allowance to the grievants. The record indicates that when the grievance was filed in December, 2005, grievants Rutter and Hendren were in their second calendar year of employment. That being so, the stipulated issue only references the second question noted above (i.e. whether employees are to receive the full uniform allowance in their second year of employment). In their briefs though, both sides indirectly addressed the first question noted above (i.e. whether any uniform allowance is to be paid to employees in their first year of employment). I considered accepting the parties' implicit invitation to address that question, but decided against it. The reason is this: in my view, the question of whether a uniform allowance is to be paid to employees in their first year of employment is beyond the scope of the stipulated issue. Thus, in the decision which follows, I will not decide the question of whether a uniform allowance is to be paid to employees in their first year of employment. That issue is left for another day. Instead, I will only decide the question of whether employees are to receive the full uniform allowance in their second year of employment.

The focus now turns to making that call. Based on the rationale which follows, I find that employees are to receive the full uniform allowance in their second year of employment – not a prorated amount.

The applicable contract language is found in Section 3.06(1)(b). It provides thus: "The annual allowance for all employees shall be four hundred twenty five dollars ($425.00)." The "allowance" referenced in this sentence, of course, is the uniform allowance. In very plain, clear and unambiguous terms, this sentence allots a yearly uniform allowance of $425.00 to "all employees". It does not elaborate further, or make any exceptions, or say – either explicitly or implicitly – that this uniform allowance will be prorated for certain employees. It is a general principle of contract interpretation that when no exceptions exist in the language, none will be inferred. Application of that general principle to this language means that Section 3.06(1)(b) neither provides for, nor envisions, the prorating of the uniform allowance to employees in their second year of employment. Thus, employees in their second year of employment are contractually entitled to receive the full uniform allowance – not a prorated portion thereof.

Notwithstanding the contract interpretation just noted, the County contends it can prorate the uniform allowance for employees in their second year of employment because of its past practice concerning same. According to the County, its practice has been to prorate the uniform allowance for employees in their second year of employment.

Past practice is a form of evidence which is commonly used and applied in contract interpretation cases. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means. Arbitrators traditionally look at past practice when the contract language is ambiguous. The key word in the previous sentence is "ambiguous". The reason that word is key is because that is not the case here. After reviewing Section 3.06(1)(b), the undersigned found its meaning to be plain and clear. That being so, there is no need in this particular case to resort to using past practice to interpret the meaning of the contract language.

That said, the County sees this case exclusively as a past practice case. Obviously, were I to decide this case without reviewing the alleged past practice, I would not have addressed the County's contention regarding same. I have therefore decided in this particular case to review the alleged past practice in order to complete the record.

While the Association disputes the existence of a practice whereby the uniform allowance is prorated for employees in their second year of employment, I have decided to assume for the purpose of discussion that the Employer's practice has indeed been to prorate the uniform allowance for employees in their second year of employment. My reason for making this assumption will become apparent at the end of my discussion.

That practice is contrary to the contract language in Section 3.06(1)(b). Here's why. I previously found that Section 3.06(1)(b) does not provide for the prorating of the uniform allowance to employees in their second year of employment. However, the Employer has long been doing just that (i.e. prorating the uniform allowance for employees in their second year of employment). That being so, the situation present here is that there is contract language which is plain and unambiguous (in giving employees in their second year of employment the full uniform allowance), and a practice which is contrary to that language (because the Employer has instead been giving those employees a prorated amount).

It is a generally accepted principle of contract interpretation that contract language which is clear and unambiguous outweighs or trumps a past practice. Even a well-established and long-standing practice cannot be used to give meaning to, or countervail, a provision which is clear and unambiguous. When a conflict exists between the clear and unambiguous language of the contract and a long-standing practice, arbitrators usually follow the contract, and not the practice. In accordance with that generally-accepted view, the undersigned holds likewise. Accordingly, in this case, the plain language of Section 3.06(1)(b) prevails, not the contrary practice.

Application of that language here means that the County should have paid grievants Rutter and Hendren a full uniform allowance in 2005. Since that did not happen, the Employer violated Section 3.06(1)(b).

Having found a contract violation, the final question is how far back the make whole remedy should go. The Association asks that grievants Rutter and Hendren be paid "the entire uniform allowance for 2003 and 2004" (i.e. that the make whole remedy should go back to 2003). When faced with backpay retroactivity questions, arbitrators usually hold that the backpay runs from the date the grievance was filed. In this case, the grievance was filed in December, 2005 and sought the full uniform allowance for that year (i.e. 2005). In accordance with the generally accepted view just noted, the undersigned finds that the make whole remedy only covers the year 2005 – it does not cover the years 2003 and 2004.

In light of the above, it is my

AWARD

That the County violated Section 3.06(1)(b) of the Agreement when it did not provide the grievants with the full annual uniform allowance amount of $425.00. In order to remedy this contractual breach, the County shall pay grievants Rutter and Hendren the full uniform allowance for 2005, less the amount they were already paid for their 2005 uniform allowance.

Dated at Madison, Wisconsin, this 24th day of January, 2007.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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