BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 592
No. 65772
MA-13318

(Steven Wolf Grievance)

Appearances:

Rachel Pings, Cermele & Associates, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53212, appearing on behalf of 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 Steven Wolf 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

At the hearing, the parties stipulated to the following issue:

Did Milwaukee County violate Section 3.09 of the Agreement when it paid Detective Wolf the Deputy rate of pay rather than the Sergeant rate of pay for the vacation period ending December 17, 2005? If so, what is the appropriate remedy?

When the County filed their brief though, it worded the issue differently. Their new wording was this:

Did Milwaukee County violate Section 3.09 of the Agreement when it paid out newly granted vacation time to Deputy Wolf at the pay rate of his permanent appointment rather than at the rate of pay of his temporary assignment to a higher classification? If so, what remedy?

While there is little substantive difference between the County's wording of the issue and the wording of the stipulated issue, in the decision which follows, I will answer the issue which the parties stipulated to at the hearing.

PERTINENT CONTRACT PROVISIONS

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

3.09 TEMPORARY ASSIGNMENTS

(1) Employees may be assigned to perform duties of a higher classification for which they are qualified. When so assigned, the employee shall be paid as though promoted to a higher classification for all hours credited while in such assignment. Employees on an established eligible list for the higher classification under the same appointing authority shall be given the temporary assignment before such assignment is given to any other employees provided that:

(a) Such assignment is made in writing on the Temporary Assignment Form; provided, however, that the omission of such written assignment shall not bar a grievance requesting pay for work in the higher classification.

(b) Such employee works in the higher classification for not less than three (3) consecutive scheduled working days. Paid time off shall not be included in the computation of the three (3) consecutive scheduled working days but said days shall not be interrupted thereby and

(c) Such employee performs the normal duties and assumes the responsibilities of the incumbent of that position during that period.

(2) Employees who accrue compensatory time while on temporary assignment shall liquidate such time at the rate of pay of the classification to which assigned at the time of liquidation.

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs.

In the fall of 2005, the parties reached agreement on a successor collective bargaining agreement. Among other things, that agreement gave employees an additional week (i.e. 40 hours) of vacation. The County required that employees attempt to schedule this extra week of vacation for use before the end of the 2005 calendar year. To avoid the possibility that most Deputies would choose to take that additional week of vacation over the December holiday, the County gave employees the option of receiving a lump sum cash payment equal to the value of the extra week of vacation rather than actually taking the week off from work. Each employee was permitted to choose between either scheduling the additional week of vacation or having it paid out in a cash lump sum.

FACTS

Steven Wolf is a long-term bargaining unit employee who holds the permanent classification of Deputy Sheriff I.

Beginning May 1, 2005, Wolf was temporarily assigned to a higher classification. The acronym which the County uses to describe this situation is TAHC which stands for Temporary Assignment to a Higher Classification. Wolf was TAHC'd to the position of Sergeant which paid him about $3.00 an hour more than his Deputy Sheriff I position. While Wolf was TAHC'd into the Sergeant position, he was paid at the Sergeant rate. Wolf was temporarily assigned to the Sergeant classification at all times pertinent herein.

Wolf took a week of vacation (i.e. 40 hours) in December, 2005. He was paid at the Sergeant rate of pay ($29.31/hour) for his vacation.

About the same time, Wolf selected the lump sum cash payment option for the extra week of vacation (i.e. 40 hours) which was referenced in the **BACKGROUND** section. The County paid him at the Deputy rate of pay ($26.10/hour) for his lump sum cash payment – not at the Sergeant rate like it did for his vacation payment.

Wolf filed a grievance which contended that he should have paid him at the Sergeant rate rather than the Deputy rate for his lump sum cash payment. The grievance was processed through the contractual grievance procedure. When the Department's Human Resources Manager, Minnie Linyear, responded to the grievance, she averred that vacation payments are handled as follows for employees who are TAHC'd: if the employee uses the vacation, the employee is paid at the (higher) TAHC rate; if the employee takes a cash payout though, the vacation is paid out at the employee's regular rate of pay and not at the (higher) TAHC rate. Linyear further averred that this was the "historical practice." When the grievance was appealed to the County's Director of Labor Relations, Troy Hamblin, he also averred "there is a longstanding practice that when employees are paid out for vacation they receive their regular rate of pay for all of these hours." The grievance was ultimately appealed to arbitration.

The payout of vacation in the Department is unusual. At the hearing, the Department's Accounting Manager, George Brotz, acknowledged that the reason Wolf's vacation was paid out at his permanent rate (i.e. the Deputy rate) rather than his higher TAHC rate (i.e. the Sergeant rate) is because the Human Resources Department told him to do it that way. He testified that the Human Resources Department makes a distinction between time off and time paid, with the former being paid at the employee's (higher) TAHC rate, and the latter being paid at the employee's permanent rate. He did not know why the Human Resources Department made a distinction between time off and time paid, but he averred that it has always been done this way.

POSITIONS OF THE PARTIES

Association

The Association contends that the County violated Section 3.09 of the collective bargaining agreement when it paid Wolf the Deputy rate rather than the Sergeant rate for his 40 hours of lump sum cash payout. It elaborates on this contention as follows.

First, it relies on the contract language contained in the second sentence of Section 3.09(1) wherein it provides thus: "When so assigned, the employee shall be paid as though promoted to a higher classification for all hours credited while in such assignment." According to the Association, that sentence is clear and unambiguous in providing that when an employee is TAHC'd, they will be paid at the temporary classification rate of pay for "all hours credited" while in their temporary assignment. The Association avers that this sentence does not make an exception for lump sum payouts, nor does it say that payouts are to be based on the employee's "permanent classification". The Association calls attention to the fact that the phrase that the County uses (i.e. "permanent classification") is not found in Section 3.09. Building on the foregoing, the Association asserts that the County is trying to create an exception in Section 3.09 that simply does not exist. The Association asks the arbitrator to reject the Employer's proposed interpretation because, as the Association sees it, it is nonsensical. To support that premise, the Association notes that if Wolf had worked the week

in question, or taken that week off (instead of getting the cash payout), he would have been paid at the Sergeant rate of pay. Why then, the Association asks rhetorically, should he be paid at the Deputy rate of pay for the week in question just because that week was paid out in cash? According to the Association, that makes no sense. The Association contends that the 40 vacation hours in question were "hours credited" within the meaning of Section 3.09 (while Wolf was TAHC'd to the Sergeant position), so he was contractually entitled to be paid at the Sergeant rate of pay for those hours.

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, it notes that the Department's Accounting Manager, Brotz, admitted he had to contact the Human Resources Department for guidance on how employees should be paid for the vacation lump sum payout. The Association avers that if a consistent 30-year past practice really existed, then an experienced employee like Brotz would not have needed guidance on how to effectuate a lump sum payout. Second, the Association submits that given the County's own uncertainty as to what classification rate of pay the lump sum should have been made, the Association cannot be held to have acquiesced to the manner in which it was paid. Building on this point, the Association argues that the Employer's assertion that the practice is "unrebutted" lacks credibility and should be rejected. Third, the Association maintains that the County did not offer any convincing evidence of its purported practice other than the self-serving assertion that it "has always been done this way." The Association submits that without such evidence, taken together with the fact that Brotz himself resorted to seeking guidance on the proper procedure, the Employer's past practice contention is dubious and should be rejected.

The Association therefore contends that the grievance should be upheld. In order to remedy this contract violation, the Association asks that Wolf be made whole by paying him the difference between the Deputy rate of pay and the Sergeant rate of pay for 40 hours.

County

The County contends that it did not violate Section 3.09 of the collective bargaining agreement when it paid out newly granted vacation time to Wolf at the pay rate of his

permanent appointment (i.e. the Deputy rate) rather than at the pay rate of his temporary assignment to a higher classification (i.e. the Sergeant rate). 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 vacation payments for employees who are TAHC'd that is dispositive herein. According to the County, the practice is this: if the employee uses the vacation, the employee is paid at the (higher) TAHC rate; if the employee takes a cash payout though, the vacation is paid out at the employee's regular rate of pay (i.e. their permanent rate) and not at the (higher) TAHC rate. To support that contention, the County relies exclusively on the testimony of Accounting Manager Brotz who testified that that was the practice. The County acknowledges that Brotz did not know why the Human Resources Department made a distinction between time off and time paid (with the former being paid at the employee's (higher) TAHC rate and the latter being paid at the employee's permanent rate), but what is important is that he averred that it has always been done this way. According to the County, this practice stands unrebutted. While Association President Felber asserted he was not aware of the practice, the County submits that is not controlling. The County asserts that since this has been its long-term practice and has never been previously challenged, the Association has acquiesced to the Employer's interpretation of Section 3.09. The County contends that this practice establishes how the applicable contract language has been interpreted by the parties themselves: namely, that vacation payments for employees who are TAHC's are handled as follows: if the employee uses the vacation, the employee is paid at the (higher) TAHC rate; if the employee takes a cash payout though, the vacation is paid out at the employee's regular rate of pay (i.e. their permanent rate) and not at the (higher) TAHC rate.

The County avers that it followed that practice when it paid Wolf at the Deputy rate rather than the Sergeant rate for the week in question.

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

At issue here is whether the County violated Section 3.09 of the collective bargaining agreement when it paid Wolf at the Deputy rate of pay rather than the Sergeant rate of pay for the week of vacation in question. Based on the rationale which follows, I answer that question in the affirmative, meaning that the County violated the collective bargaining agreement by its actions here.

My discussion is structured as follows. First, I will address the applicable contract language. After that, the focus turns to an alleged past practice.

The applicable contract language is found in Section 3.09. Here is an overview of that section. The first sentence says that employees may be assigned to work in a higher classification. Although this sentence does not say that such an assignment is temporary, that is implicit because the word "temporary" is used in the title of the section (i.e. "Temporary Assignments"). The County's acronym to describe this situation is TAHC (which stands for Temporary Assignment to a Higher Classification). The second sentence deals with how employees will be paid when they work in a higher classification (i.e. when they are TAHC'd). The third sentence establishes a procedure for determining which employees will be given the temporary assignments. This particular case involves a vacation pay dispute relating to a temporary assignment, so just the second sentence is involved herein.

The focus now turns to that specific contract language. The second sentence provides thus: "When so assigned, the employee shall be paid as though promoted to a higher classification for all hours credited while in such assignment." In very plain, clear and unambiguous terms, this sentence says that when an employee is temporarily assigned to work in a higher classification (i.e. when they are TAHC'd), they will be paid at the higher classification rate of pay for "all hours credited while in such assignment." The sentence does not say that employees will get paid at the higher classification rate of pay for just some of their hours. Instead, it specifically says they will get paid at the higher classification rate of pay for "all hours credited". Similarly, the sentence does not make an exception for vacation lump sum payouts, or say that vacation payouts are to be based on the employee's permanent classification. In fact, this section makes no reference whatsoever to the employee's permanent classification. 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 the second sentence of Section 3.09 neither provides for, nor envisions, an exception for vacation lump sum payouts.

Having interpreted the second sentence of Section 3.09, the focus now turns to its application here. The 40 vacation hours in question were "hours credited" within the meaning of Section 3.09. Here's why. Had Wolf worked the week in question, it is undisputed that he would have been paid at the Sergeant rate (as opposed to the Deputy rate). Similarly, had Wolf taken that week off, it is also undisputed that he would have been paid at the Sergeant rate (as opposed to the Deputy rate). Rhetorically speaking, since he would have been paid at the Sergeant rate under both those scenarios, why should he be paid at the Deputy rate just because he took the cash payout option for the 40 hours of vacation in question? Contractually speaking, that distinction makes no sense. That result would be understandable, of course, if the second sentence of Section 3.09 said that vacation payouts were to be paid at the employee's regular rate (as opposed to their TAHC'd rate). However, as previously noted, the language does not say that. That being so, Wolf was contractually entitled to be paid at the Sergeant rate for the 40 hours of vacation in question.

Notwithstanding the interpretation just noted, the County contends it could pay Wolf at his permanent Deputy rate, as opposed to his TAHC'd Sergeant rate, for the vacation time in question because of a practice concerning vacation payments for employees who are TAHC'd.

According to the County, its practice is this: if the employee uses the vacation, the employee is paid at the (higher) TAHC rate; if the employee takes a cash payout though, the vacation is paid out at the employee's regular rate of pay and not at the (higher) TAHC rate.

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 the second sentence of Section 3.09, 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 TAHC'd employees who take a vacation cash payout are paid at the employee's regular rate of pay and not at the (higher) TAHC rate, I have decided to assume for the purpose of discussion that that has indeed been the Employer's practice. My reason for making this assumption will become apparent at the end of my discussion.

That practice is contrary to the contract language in the second sentence of Section 3.09. Here's why. I previously found that the second sentence of Section 3.09 does not provide for paying TAHC'd employees who take a vacation payout at their regular rate. However, the Employer has long been doing that (i.e. paying TAHC'd employees who take a vacation payout at their regular rate). That being so, the situation present here is that there is contract language which is plain and unambiguous (that TAHC'd employees who take a vacation payout are to be paid at the higher rate) and a practice which is contrary to that language (because the Employer has instead been paying TAHC'd employees who take a vacation payout at their regular rate).

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 the second sentence of Section 3.09 prevails, not the contrary practice.

Application of that language here means that the County should have paid Wolf at the Sergeant rate for the 40 hours of vacation in question. Since that did not happen, the County violated Section 3.09.

Having found a contract violation, the final question is what remedy is appropriate. I find that the appropriate remedy is for the County to pay Wolf the difference between his Deputy rate of pay and his Sergeant rate of pay for 40 hours.

In light of the above, it is my

AWARD

That the County violated Section 3.09 of the Agreement when it paid Detective Wolf the Deputy rate of pay rather than the Sergeant rate of pay for the vacation period ending December 17, 2005. In order to remedy this contract violation, the County shall pay Wolf the difference between his Deputy rate of pay and his Sergeant rate of pay for 40 hours.

Dated at Madison, Wisconsin, this 7th day of February, 2007.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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