

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**CALUMET COUNTY LAW ENFORCEMENT EMPLOYEES UNIT,
REPRESENTED BY LEER DIVISION OF
THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION**

and

CALUMET COUNTY

Case 139
No. 67328
MA-13835

Appearances:

Andrew D. Schauer, Staff Attorney, The Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, for Calumet County Law Enforcement Employees Unit, represented by LEER Division of the Wisconsin Professional Police Association, which is referred to below as the Association.

James R. Macy, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, for Calumet County, which is referred to below as the Employer or as the County.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement, which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve Grievance No. 07-335, filed by the Association on behalf of the sworn law enforcement employees it represents in the County Sheriff's Department, as well as Grievance No. 07-364, filed by the Association on behalf of the civilian employees it represents in the County Sheriff's Department. When necessary to distinguish these two units, the unit consisting of Deputies will be referred to as the CCDSA, and the unit consisting of Corrections, Communications and Clerical Employees will be referred to as the CCC. The parties agreed to have the two grievances consolidated for purposes of hearing. Hearing was held on March 4, 2008, in Chilton, Wisconsin. Carla Burns filed a transcript of the hearing with the Commission on March 20, 2008. The parties filed briefs on May 19, 2008 and waived the filing of a reply brief on June 2, 2008.

ISSUES

The parties stipulated the following issues:

Did the County violate Article 10 and/or Article 11 of the collective bargaining agreement when it paid employees for time and a half for all hours actually worked by deputies on Monday, May 28th, 2007, and by employees of the CCC unit on July 4th, 2007 in addition to the holiday allowance paid at straight time?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VII – GRIEVANCE PROCEDURE

. . .

7.07 Step 5 – Arbitration . . .

- e) Authority of the Arbitrator. The arbitrator shall not have the power to add to, subtract from, or alter the Agreement. . . .

ARTICLE VIII – MANAGEMENT RIGHTS RESERVED

. . .

- 8.04** The Employer agrees that all amenities and practices now in effect but not specifically referred to in this Agreement shall continue for the duration of this Agreement. . . .

ARTICLE X – PREMIUM PAY

- 10.01 Overtime.** Regular full-time employees shall be compensated at the rate of one and one-half (1½) times their regular rate of pay for all hours worked outside of their normally scheduled hours of work. . . .
- 10.02 Call-In Time.** Employees who shall be called to work at other than the regularly scheduled starting time shall be entitled to at least two (2) hours call-in pay at time and one-half (1½). Regular part-time employees shall be eligible for two hours call in at the overtime rate if the hours worked are in excess of 8.3 hours per day or 41.5 hours in a week. This provision does not apply to an employee who starts work

early and continues into regularly scheduled hours or who continues past regularly scheduled hours. . . .

10.04 Training .

- a) Employees requested or required by the management of the department to attend school and/or training classes shall be compensated at their appropriate straight time rate of pay for a regular work day. In addition, travel time outside of the regular work day, in a private automobile, shall be compensated at a rate of one and one-half (1½) times the appropriate straight time rate of pay.
- b) Employees required to attend school and/or training classes out of their normal schedule of work shall receive compensation at a rate of one and one-half (1½) times their regular rate of pay for such attendance. . .

10.07 Pyramiding of Hours. There shall be no pyramiding or duplicating of overtime provisions. Hours compensated under one overtime provision shall be excluded from any other overtime provision. When two or more provisions requiring the compensation of overtime rates are applicable, the single provision most favorable to the employees shall apply.

ARTICLE XI – HOLIDAYS

11.01 Observed Holidays. All employees shall be entitled to eight (8) specific holidays with full pay. The specific holidays are as follows: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, day before Christmas, Christmas Day and day before New Year's Day.

- a) Holiday Allowance. On the paycheck following each of the above-mentioned holidays, employees shall have a full-day's pay added to their paycheck at the straight-time rate of pay. Said amount shall be pro-rated for part-time employees.
- b) Work on a Holiday. Employees working on one of the specific holidays described above, as well as working on Easter Sunday, will receive pay at the rate of one and one-half (1½) the regular rate of pay for the hours actually worked.

BACKGROUND

The grievance form for Grievance 07-335 names “WPPA/LEER, for and on behalf of the CCDSA” as the grievant, alleges County violation of Sections 10.01 and 11.01b), and seeks that the County,

Pay all employees of the CCDSA (including, but not limited to, Baldwin, Kucharski, Matuszak, Nicolais, Reimer, and Tenor) who worked outside of their normally scheduled hours of work on Monday, May 28, 2007, “overtime” and “holiday work” pay for all hours worked outside of their normally scheduled hours . . .

Much of the background is undisputed. Prior to the 2007 labor agreement, the members of the CCDSA unit were part of an overall unit, including civilian jailers, dispatchers and secretarial employees of the Sheriff’s Department. The last labor agreement covering the combined unit was in effect from January 1, 2004 through December 31, 2006. This agreement is referred to below as the Overall Agreement. The Association proposed the division of the bargaining units and the County agreed to it.

The parties bargained a number of changes from the Overall Agreement. Of significance to this grievance, the Overall Agreement did not include any provision governing the pyramiding of overtime hours. The County proposed the provision which now appears as Section 10.07 of the CCDSA unit 2007 labor agreement. Beyond this, the Overall Agreement did not specifically mention “Holiday Allowance” as specified at Subsection 11.01a) of the 2007 agreement covering the CCDSA unit. The Overall Agreement did include, as part of Article X, the following:

10.03 Holiday Pay – Employees working on one of the specific holidays set forth in Article XI will receive holiday pay plus compensation at the rate of one and one-half (1½) the regular rate of pay for the hours actually worked.

The bargaining history and past practice surrounding these changes are at the core of much of the parties’ interpretive dispute.

Michael Goetz, the Association’s Business Agent, and Patrick Glynn, the County’s Human Resource Director, exchanged initial proposals for a successor to the Overall Agreement via e-mail on December 4, 2006. On December 4, Glynn issued a letter to Goetz that states:

While we’ve already exchanged offers for the successor agreement to the 2004-2006 collective bargaining agreement . . . there are a few matters that need to be addressed prior to formal negotiations.

Although the employees in this unit have been represented in the past, this is technically a first contract for this particular union. To that end, Calumet County is committed to making substantial progress toward concluding negotiations within three or four bargaining sessions, and solicits the Union's cooperation in doing so to the mutual benefit of all concerned.

The other reason for this letter is to identify practices that the County intends to repudiate effective December 31, 2006. They are as follows:

. . .

- ❖ Article 9.02 reads: "Overtime. Regular full-time employees shall be compensated at the rate of one and one-half (1½) times their regular rate of pay for all hours worked outside of their normally scheduled hours of work. Regular part-time Correctional Officers shall be compensated at the rate of one and one-half (1½) times their regular rate of pay for all hours worked in excess of 8.3 hours in a day. Regular part-time Secretaries shall be compensated at the rate of one and one-half (1½) times their regular rate of pay for all hours worked in excess of 7.5 hours in a day. . . . (emphasis added)"

Unbeknownst to me, the practice of the County has been to count paid leave time (vacation, sick leave, etc.) into the "hours worked" for purposes of calculating overtime. The express language of the contract is "hours worked", and it is the intention of the County to apply this provision exactly as written. . . .

- ❖ Article 10.03 reads: . . .

There have been instances where an employee works on a holiday, and they either work hours in excess of their "normally scheduled hours of work". There may have been occasions when employees have "pyramided" their hours and received overtime on top of overtime. This has been unintentional, and I believe is contrary to the collective bargaining agreement. While the County disputes whether or not this actually rises to the level of a past practice, given the unambiguous language of the contract, we still feel it is appropriate to inform the union of this oversight and our intent to correct it from this point forward. . . .

You will also note upon receipt and review of the County's initial proposal, that there are proposed changes to Articles that are entirely, or partially, permissive in nature. Absent a change to the collective bargaining agreement, it is the contention of the County that these

permissive clauses evaporate upon expiration of the collective bargaining agreement.

This is not to say that the County isn't willing to negotiate appropriate language into the contract to deal with the issues mentioned above. However, if we are unable to agree on any new language, the County will repudiate these past practices, and evaporate the permissive language, effective December 31, 2006, and will proceed as indicated above.

I look forward to the upcoming negotiations, and to reaching an agreement mutually acceptable to both parties.

The parties met on December 5 and reached a tentative agreement on a 2007 labor agreement on December 20. The background set forth to this point is essentially undisputed, and the balance of the background is best set forth as an overview of witness testimony. Witnesses were sequestered.

Craig Wendling

Wendling has served as a Patrol Deputy for over ten years, and currently serves the Association as its President. He was a member of the Association bargaining team during the negotiations for the 2007 Agreement. Section 10.07 came into existence during that negotiation, and resulted from a County proposal. The parties discussed the proposal at the table, and the Association discussed it during separate caucuses. Wendling could not recall the County specifically linking the anti-pyramiding language to holiday pay, although he acknowledged the County "probably did (Transcript at 122)". In his view, holiday pay is a premium payment for working a holiday, not an overtime rate.

The CCC unit had reached a tentative agreement by the time the CCDSA started to bargain. There was some discussion between the units regarding the CCC tentative agreement. County payment of time worked on a holiday was among the issues discussed. Wendling was aware that the CCC unit brought certain issues back to the County for clarification following their reaching a tentative agreement, but was unsure of the specific timing or substance of the clarification meeting.

Grievance 07-335 resulted from County payment for work on Memorial Day of 2007. More specifically, Captain Paul Rusch altered the "Holiday Wrk" entry on the time card of Investigator Wendy Baldwin to change her entry of "12.0" to an entry of "8.0". On Patrol Deputy Mary Nicolais' time card, Mary Pagel, who works in the County's payroll department, altered the "Holiday Wrk" entry from the "8.8" entry made by Nicolais to an entry of "8.3". The effect of these changes was to reduce the "Holiday Wrk" entry for each time card to reflect the normally scheduled hours of each employee's shift.

Michael Goetz

Goetz has served as the Business Agent for the CCDSA since November of 2006, and was the Association's chief spokesman in the bargaining that produced the 2007 Agreement. On November 17, 2006, Edward Vander Bloomen, the CCC unit's Business Agent, e-mailed Goetz a copy of the tentative agreement reached between the CCC unit and the County on that date. A week prior to that e-mail, Glynn had e-mailed Goetz a copy of the tentative agreements between the County and its AFSCME represented units. Goetz understood that all but one of those agreements included a provision precluding the pyramiding of overtime. Goetz was not familiar with County payroll practices when he received Glynn's December 4 letter, but he did not associate it or the other documentation with County payment for hours worked on a holiday.

The parties met on December 5 and December 20 in face-to-face bargaining sessions. Each session was lengthy, with the final session lasting from mid-morning until late in the evening. The December 5 session dealt primarily with identifying and discussing the many sections of the Overall Agreement which would apply to the CCDSA unit after its expiration. Although the parties discussed the anti-pyramiding proposal during each session, the discussion on December 20 was more detailed and substantive. Goetz discussed the matter with the Association in caucus and eventually came back to joint session with the County to request that Glynn clarify it. Goetz understood Glynn's response to be that the anti-pyramiding proposal precluded County payment of overtime on overtime. At some point in Glynn's explanation of the provision, he stated his position that the anti-pyramiding proposal was linked to holiday pay. Goetz did not take that statement to be anything beyond Glynn's belief. The Association did not discuss a link between the anti-pyramiding proposal and work on a holiday in caucus, and Goetz does not believe the Association ever indicated its agreement to Glynn's belief that the anti-pyramiding proposal impacted holiday pay.

The County proposed moving what appears as Subsection 11.01b) of the 2007 agreement from its placement in Article X of the Overall Agreement. Goetz noted the Association agreed with the move because it did no more than move a provision governing holiday from the article governing overtime to the article governing holiday. In Goetz' view, this clarified the labor agreement rather than altering it.

At some point during the bargaining process, Goetz and Vander Bloomen discussed the CCC unit's tentative agreement, including the County's position regarding the impact of the anti-pyramiding proposal on holiday pay. Until the processing of Grievance 07-335, Goetz was not aware that the CCC unit had met with Glynn to clarify its tentative agreement, and was not aware of the substance of the discussions of that meeting.

Patrick Glynn

Glynn has served as the County's Human Resource Director for roughly seven years. He also serves as the chief spokesman of the County's collective bargaining team for each of

its five bargaining units. By the time Glynn began bargaining with the Association represented units, each of the bargaining units represented by the American Federation of State, County and Municipal Employees had reached tentative agreement. Each included an anti-pyramiding proposal initiated by the County.

While preparing for the most recent round of collective bargaining with the CCDSA and the CCC unit, Glynn noted that certain employees were “getting paid fairly large sums of money on their paycheck when it came to overtime worked on a holiday” (Transcript at 168). After a review of the contract, he came to the conclusion that the payments lacked contractual support. This prompted the issuance of the December 4 letter. From his perspective, the letter at a minimum addressed the operation of Section 8.04:

I was unsure of whether or not a practice existed. I wanted to cover my bases, that if for some reason or another this rose to the level of a practice, we put the union on notice that it was unacceptable to us. (Transcript at 170)

Glynn’s review of County records convinced him there was at least a risk the payments had been sufficiently frequent that a basis might exist to infer a past practice. At the December 5 bargaining session with the CCDSA unit he explained his view of the December 4 letter and explained the anti-pyramiding proposal. In his view, the discussions tied the anti-pyramiding proposal directly to the holiday pay issue since that was the only reason why the pyramiding language would exist. As the discussions grew more substantive, Glynn used holiday pay as an example of paying overtime on overtime.

The County also proposed to the CCDSA during bargaining that Section 8.04 be eliminated from the labor agreement. It dropped this proposal after considerable discussion on December 20, during which Glynn specifically asked the CCDSA unit to identify specific practices covered by the provision. The CCDSA unit mentioned one practice regarding the scheduling of sergeants and the County agreed to continue the practice. Because no other practices were identified, the County agreed to drop its proposal to delete Section 8.04, and specifically stated its intent in a written counterproposal which states,

The County intends to drop its proposal to delete Article 8.04, but with the caveat that existing practices, unless accepted and known by both parties exist only for the “duration of this agreement” . . .

The CCDSA ratified the tentative agreement reached on December 20 and did not seek any clarification of its terms or make any express objection to Glynn’s view of the anti-pyramiding proposal prior to the execution of the labor agreement. Glynn acknowledged that the Association never expressly agreed with his interpretation during this period.

In Glynn’s view, the past accounting for overtime worked beyond a scheduled shift on a holiday reflected an accounting error in allowing the number of hours recorded as time worked on a holiday to exceed the number of hours in a normally scheduled shift. Working overtime

on a holiday is uncommon in the AFSCME units, but the Highway Department can generate such overtime, particularly in the snow season. He found no examples of overtime pyramiding in those units comparable to that in the Association-represented units.

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

THE PARTIES' POSITIONS

The Association's Brief

The Association characterizes the grievances as “a case of contract interpretation, and the distinction between times when management can and cannot repudiate a past practice.” Glynn’s letters of November 6 and December 4 of 2006 did not “repudiate” any practice because the payment at issue “was a past practice that simply clarified what was already in the contract, and not one that filled a hole in the contract.” A practice that clarifies contract language cannot be repudiated short of bargaining a modification of the disputed language.

Oosterhouse’s testimony establishes the “standard operating procedure” regarding holiday pay. More specifically, her analysis of the Meyers’ pay stub for New Year’s Eve of 2000 establishes: one individual entry for the holiday allowance under Subsection 11.01a); a second individual entry for “all hours worked at time and one half” under Subsection 11.01b); and a third individual entry for “the time . . . worked past her normal shift” under Section 10.01. Of particular significance here is that Meyers’ pay stub requested less for the second entry than she was ultimately paid. A supervisor marked her card up, thus establishing the standard operating procedure relevant here. That the County paid Meyers “a good sum of money for the time she worked on her scheduled shift and after it” cannot obscure that this “is what was clearly provided for in past Contracts, and is clearly provided for in the current Contract.” Wendling’s testimony mirrors that of Oosterhaus.

In contrast to this standard operating procedure, as of Memorial day in 2007 for the CCDSA unit, the County has read Section 10.07 to require no payment beyond the holiday allowance plus time and one half for hours actually worked on a holiday, without regard to “whether they are called in outside of heir normal shift.” This reading of the anti-pyramiding clause is “in violation of the Contract and of the clarifying past practice of the parties.”

The County’s reading of Section 10.07 unpersuasively reads a reference to “holidays” into an overtime provision containing no such reference. The parties bargained the removal of the “holiday” provisions from Article X, which “lays to waste any argument that holiday pay is overtime pay” and further establishes that “holiday pay clearly stands on its own, and cannot be interpreted as overtime pay.” Witness testimony confirms this. The provisions governing the grievance are, in any event, clear and unambiguous, thus making any dispute over past practice irrelevant. Glynn’s communications prior to and throughout bargaining are not sufficiently clear to establish Association agreement to the view of Section 10.07 the County asserts here. The context to the bargaining establishes that the County “all but forced” the

Association to agree with the anti-pyramiding language. This reflects no more than a conscious Association agreement to give the County what it proposed, “and spend its leverage in getting other concessions”. What the County then proposed is not as sweeping as what it now seeks in arbitration. The Association’s reading of Section 10.07 does not render the provision meaningless, since it still operates to preclude pyramiding of overtime under Sections 10.02 and 10.04.

Glynn’s letters of November 6 and December 4 cannot explain away the County’s actions regarding Meyers and in any event cannot work the repudiation of a past practice which clarifies the contract. Arbitral precedent confirms this, and establishes that language clarified by a practice must be altered, if at all, through collective bargaining modifying the disputed terms.

The record demands that the grievance be granted and that “a full make whole remedy be entered for each Association member who was improperly paid on a holiday on or after the date of the appropriate grievance.” The make whole order must “apply to any subsequent incidents where an employee works overtime on a holiday.”

The County’s Brief

After a review of the evidence, the County asserts that Section 10.07 “is clear and unambiguous.” Neither party disputes that “employees receive their normal hours of pay for the holidays listed in the Contract.” That pay, known as the “holiday allowance” grants time and one-half for all hours worked. The grievance reads more into that provision than “is intended and expressly provided.” More specifically, Section 10.07 clearly denies the pyramiding of overtime rates that the grievance seeks. Glynn’s November 6, 2006 letter to Vander Bloomen as well as his December 4 letter to Goetz placed the CCDSA as well the CCC on notice that if any pyramiding practice regarding holiday overtime existed, the County disavowed it. The County expressly noted its position throughout bargaining with each unit and in the January 4, 2007 clarification meeting with the CCC. The CCDSA was aware of the existence and content of the January 4 meeting. Each unit ratified the tentative agreement and thus each unit accepted the County’s view of the effect of Section 10.07. To conclude otherwise would stretch the interpretation of Section 10.07 beyond the authority granted an arbitrator under Section 7.07, Step 5, e).

A review of the evidence establishes that, “In this case, the County did everything right.” Glynn’s letters of November 6 and December 4, 2006 note County concern with “pyramiding” of hours resulting in payment of “overtime on top of overtime.” This notice has clear impact on the continuation of any “practice” enforceable under Section 8.04. Glynn’s testimony establishes that the County alerted each unit throughout bargaining that the anti-pyramiding concern applied to overtime on a holiday. County AFSCME units agreed with the no pyramiding language prior to the County’s tentative agreement with the CCC on November 17, 2006. CCDSA members in fact were so concerned about this point that they urged the CCC to clarify it prior to ratification. After Glynn again explained the County’s

position on January 4, 2007, the CCC ratified the tentative agreement without any objection to County views on the effect of Section 10.07. The CCDSA unit reached tentative agreement with the County on December 20, 2006, and ratified the tentative agreement after the “clarification” meeting with the CCC during which Glynn detailed County views on the effect of Section 10.07 on the payment of holiday overtime.

Since Section 11.01 specifically governs holiday pay and is more specific than the overtime provisions of Article X, it follows that the premium pay for hours worked on a holiday is not subject to the compounding the grievances seek. There is no dispute that the County paid the holiday allowance and thus there should be no dispute that they were obligated to pay more.

Even though the Association failed to meet its burden of proving a binding past practice, the “no pyramiding” language of Section 10.07 is clear and “trumps” past practice.” More specifically, the Association showed only two instances of the alleged “practice.” Those instances prove no more than County error in accounting for the holiday allowance. What evidence there is on the point establishes that the County clearly notified the Association of the mistake. Nor is there evidence of County acquiescence in the Association’s view of the practice over time. Even if there was, the record lacks evidence of any mutuality to the practice.

Arbitral authority confirms the County’s view of Section 10.07. A number of cases confirm that “employees are entitled to one premium rate, not two.” More specifically here, it is not clear what Section 10.07 would refer to if not the holiday allowance. Viewing the record as a whole demands that each grievance be denied.

DISCUSSION

The issue on the merits of the grievance is stipulated, but demands focus regarding the interpretive issue posed. The issue spans Articles X and XI, but focuses on the relationship of Sections 10.01 and 10.07 to Subsection 11.01b) regarding hours worked outside of an employee’s normally scheduled hours of work. Viewed on the facts posed by the grievance, there is no dispute that the Investigator should receive 8.0 hours or that the Patrol Deputy should receive 8.3 hours at straight time pay for Memorial Day of 2007 under Subsection 11.01a) and, because they were working on Memorial Day, 8.0 and 8.3 hours, respectively, at time and one-half under Subsection 11.01b). The dispute concerns the final four of the 12 or 12.3 hours worked, respectively, by the Investigator and the Patrol Deputy on Memorial Day. Under the Association’s view, Subsection 11.01b) demands holiday pay at time and one half for those four hours since they were “actually worked”, together with overtime pay for those four hours at time and one-half under Section 10.01. The County argues that this triple time rate cannot be paid under Section 10.07, since it pyramids two time and one-half premiums. From the Association’s view, there is no pyramiding, since Subsection 11.01b) does not duplicate “overtime premiums”. Rather, it pays one overtime rate on the agreed-upon rate for those employees who work a holiday.

Even a casual reading of the record in light of the contractual background shows that the interpretive issue is a tangled knot. Essentially, the parties' positions demand a view of what the Overall Agreement established regarding the disputed overtime and a determination regarding how, if at all, the bargaining for the CCDSA unit's 2007 Agreement changed that result. The complexity of untangling this knot is manifested by the parties' agreement that the grievances be consolidated for hearing purposes only, thus posing the possibility that the evidence conceivably could yield differing results.

The analysis must start with the CCC unit, since that unit reached a tentative agreement on a successor to the Overall Agreement prior to the CCDSA unit. The decision regarding Grievance No. 07-335 flows from that governing Grievance No. 07-364, and incorporates the bulk of the discussion contained in that decision.

Since Section 10.07 came into existence after the expiration of the Overall Agreement, a view of what existed under that agreement focuses on Section 10.03, which was the predecessor of Subsection 11.01b) of the 2007 agreement. The parties agree that they intended no substantive change in the provision through the move from Article X to Article XI.

The strength of the Association's position is that Section 10.03 unambiguously establishes that those employees who work a holiday separately receive "holiday pay" which is "full pay" under Section 11.01 for the normally scheduled hours of work "plus compensation at" the time and one-half rate "for the hours actually worked." This creates a triple time rate for hours worked outside of normally scheduled hours because the base holiday rate for an employee working a holiday is time and one-half the employee's normal rate. The addition of any overtime premium thus demands triple time payment. To the County, "hours actually worked" is no more than a single reference to reflect that employees under the Overall Agreement worked different normal daily schedules, varying from 7.5 to 8.3 hours per day. Under this view, the holiday rate is no more than the "full pay", i.e. the payment of one day's pay, for a holiday under Section 11.01, but paid at the time and one-half rate. This view limits the holiday time and one-half premium to the normally scheduled hours. Under the Association's view, this impermissibly reads "actually worked" as "normally scheduled".

If Section 10.03 stood alone, the Association's view that the language is unambiguous appears persuasive. It does not, however, stand alone, and must be read with the holiday provisions of Article XI. The relationship of these sections is less than clear, since the County states a plausible view of that relationship. As I read the Overall Agreement, Section 10.03, viewed alone or with Section 11.01, strongly favors the Association's view, but falls short of being the only available interpretation of the governing language. Viewing Section 10.03 together with the terms of Section 11.01 also favors the Association's view, since the "with full pay" reference of Section 11.01 is not incorporated into Section 10.03, which separately refers to "hours actually worked." This makes it difficult to read the "hours actually worked" reference as no more than the incorporation of a normal day's pay for a holiday.

Thus, the relevant provisions of the Overall Agreement are not clear and unambiguous. Resolution of the grievance demands not simply that the terms of the Overall Agreement be examined, but also that their relationship to the successor agreement be established. This demands consideration of Section 10.07, and the County's view that it unambiguously precludes payment of an overtime rate on another overtime rate.

The County's view that Section 10.07 unambiguously addresses the grievance has considerable persuasive force. That the time and one-half rate under Subsection 11.01b) coupled with the time and one-half rate under Section 10.01 can constitute "two or more provisions requiring the compensation of overtime rates" needs no elaboration. The strength of this view cannot, however, obscure that it is not the only plausible reading of the governing terms or the only plausible reading of the relationship of those terms to other agreement provisions. If the establishment of a time and one-half rate for "hours actually worked" on a holiday represents the establishment of base pay for all holiday hours worked rather than a single reference to reflect the varying numbers of hours worked by different employees in a normally scheduled day, then there is no "overtime" rate to pyramid. Rather, there is base holiday pay to which a single overtime rate is added. This is the Association's view and that view is plausible. That Article XI establishes holiday pay, while the anti-pyramiding provision is contained in Article X, which governs "premium" rates, underscores that the Association's view is plausible.

Because the governing terms are ambiguous, recourse to interpretive guides is necessary. In my view, past practice and bargaining history are the most persuasive interpretive guides since each focuses on the conduct of the bargaining parties whose intent is the source and the goal of contract interpretation.

Application of these guides to the evidence is the interpretive knot referred to above. The persuasive force of past practice turns on the agreement manifested by the parties' conduct. Here, the necessary preface to past practice evidence is to determine what type of practice is in dispute. The significance of this point is best stated by Arbitrator Richard Mittenthal's analysis of the use and the implications of the uses of past practice. In *The Proceedings of the 14th Annual Meeting of National Academy of Arbitrators*, at 30-58 (BNA Books, 1961), Mittenthal put the point thus:

Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For . . . if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc.

The Association argues that the past practice evidence affords clarity to the meaning of Subsection 11.01b) and its relationship to Section 10.07. This point is significant, since the evidence establishes that the County unequivocally renounced its willingness to support the practice, to the extent it existed, beyond the duration of the Overall Agreement. Even though Section 8.04 would grant such a practice binding force through the duration of the successor labor agreement, the evidence establishes that the County, through Glynn's December 4 letter, unequivocally renounced any such practice. Beyond this, the County afforded the Association ample opportunity in bargaining to address any dispute on whether the relationship included free-standing practices.

Thus, the issue regarding past practice is whether the Association established the existence of a past practice that clarifies the ambiguity posed by Section 10.07 and its relationship to Subsection 11.01b). The evidence supporting the Association's view of practice is solid, but less than determinative. Rusch's action to increase the hours on Meyers' December, 2000 time card affords a basis to infer that the parties had a mutual understanding on how to compensate employees for hours worked beyond normal scheduled hours on a holiday. However, this falls short of determining the point. It represents a single instance. That instance may afford some basis upon which to infer agreement, but represents something less than a consistent course of conduct over a significant period of time. The latter affords a

sounder basis for the inference of agreement, see, for example, *CELANESE CORP. OF AMERICA*, 24 LA 168, 172 (Justin, 1954). More significantly here, if the single instance is to be made the basis for the inference the Association seeks, what is to be made of Meyers' initial entry of "8.3" rather than "12.3" on her time card to indicate the holiday hours worked? If there was clear understanding that the holiday rate was time and one-half for her "hours actually worked" on New Years Eve of 2000, why did she initially enter her normally scheduled hours on the time card Rusch had to adjust up to her hours actually worked?

Nor is the County's dismissal of the past practice evidence determinative. Glynn's testimony that he could see no contractual basis for any practice is tenuous. His testimony, viewed against the December 4 letter, affords some support for the Association's assertion that the parties shared a view of how to administer Section 10.03 of the Overall Agreement. That letter renounces a practice in reference to "Section 9.02". The language quoted in the December 4 letter as Section 9.02 is that of Section 10.01 of the Overall Agreement submitted into evidence as Joint Exhibit 1. More to the point, Glynn's letter notifies the Association that the County intended "to apply" the "hours worked" reference "exactly as written." The "exactly as written" demands that "hours worked" be restricted to "hours actually worked" rather than to "hours in pay status", such as vacation or sick leave. This view is not reconcilable to the assertion later in the December 4 letter that the reference in Section 10.03 to "hours actually worked" is a reference to something other than hours physically worked. Glynn's assertion that "hours actually worked" in Section 10.03 is sufficiently ambiguous to be read as "normal scheduled hours" rather than as "hours actually worked" is not reconcilable to his reading of the "hours worked" reference of Section 10.01. His reading of "hours worked" regarding Section 10.01 is consistent with the Association's reading of Section 10.03 as well as Rusch's action regarding Meyers' time card. This underscores rather than undermines the Association's assertion of a practice clarifying the terms of Article X. The significance of this point should not, however, be overstated. The December 4 letter's repudiation of practice regarding "hours worked" appears to repudiate a practice clarifying contract language. The silence of the record on an Association response is difficult to square with the Association's response regarding the practice it asserts to underlie Section 10.03. In sum, the evidence affords solid, but not determinative, evidence of a binding past practice.

Evidence of bargaining history must be assessed against this background. While Glynn's December 4 letter afforded the Association internally inconsistent views on how to construe contractual references to "hours worked", it was unequivocal regarding the impact of the County's proposal to create Section 10.07 of the 2007 agreement. Glynn's testimony that he consistently linked Section 10.07 to the payment of holiday overtime stands un rebutted. This establishes clarity regarding the County's intent to disavow past practice and to contractually alter future payment of "overtime on overtime." Establishment of Association agreement to this clearly stated intent is more problematic. Wendling's testimony indicates Glynn "probably" linked the anti-pyramiding proposal to overtime payment, and the face-to-face bargaining between the County and the CCDSA unit was more lengthy and detailed than with the CCC unit.

Goetz' testimony must be assessed against this background, and it establishes a tenuous link between County statements of its intent and Association assent. On Goetz' request, the parties conducted a joint session on December 20 that included questions regarding the County's purpose in proposing Section 10.07. Glynn's and Goetz's testimony confirm that the parties mutually understood that Section 10.07 precluded the payment of one overtime premium on top of another. Goetz' notes of this discussion confirm that the parties' discussions included consideration of Section 10.03. It is clear that Goetz understood Glynn's position at this session to reflect the belief noted in the December 4 letter that the County linked pyramiding to the payment of holiday pay. The difficulty with this is that throughout bargaining, Glynn and Goetz did not share an understanding of what Section 10.03 demanded of the County. Goetz did not view the section's requirement of a time and one-half rate to be the statement of an overtime rate, but the statement of a base rate for "hours actually worked" on a holiday. The December 4 letter was, to the Association, not the repudiation of a free-standing practice, but an attempt to change the meaning the parties had given to Section 10.03. This does not resolve, but restates, the interpretive issue posed by Grievance No. 07-335.

The interpretive dilemma is that parties did not, as with CCC unit, ever clarify this point in any other face-to-face discussions. Wendling's testimony establishes that there was some discussion between the CCC and CCDSA units. This falls short of establishing specific communication of the substance of the discussions between the County and the Association concerning the payment of overtime on a holiday in light of the creation of Section 10.07. The clarification meeting at which those discussions occurred came, in any event, roughly two weeks after the County and the CCDSA unit reached a tentative agreement. Goetz' testimony is unequivocal that he did not know of the substance of the clarification meeting until after the Association filed Grievance No. 07-335. There is no basis on which to infer that the CCC and CCDSA units communicated in any detail regarding the January 4, 2007 clarification meeting, and reason to doubt this since the splitting of the overall unit into two separate pieces resulted from an Association proposal. Such a proposal does nothing to support an inference that the two units coordinated bargaining. It implies the contrary. That the agreements covering the two units do not share a common duration underscores this. This record thus lacks significant evidence of Association assent to the County's view of the impact of Section 10.07. This is significant because it is not uncommon for parties to reach a tentative agreement on a labor agreement knowing that the broader agreement may pose interpretive issues for the future. It is a difficult balance to know when to hold a tentative agreement on an entire labor agreement hostage to a specific or narrow interpretive issue.

Each party engaged in a certain level of brinksmanship on the issue of the impact of Section 10.07 on holiday pay. As noted above, Glynn's December 4 letter is internally inconsistent on how to interpret "hours worked." His testimony that Section 10.07 served no purpose other than its application to holidays cannot account for the potential impact of the premium rates of Sections 10.02 or 10.04 coupled with their placement in the same article as the anti-pyramiding proposal. Association arguments on this point have some force, but obscure that Section 10.02 already has language that limits, if not eliminates, the possibility of pyramiding its overtime rate. In any event, it is difficult to understand why, if the sole

purpose of Section 10.07 was to eliminate pyramiding of the holiday premium for hours actually worked, it was placed in Article X, with no specific mention of “holiday” but replete with general references to “overtime”. Against this stands the Association’s use of silence to indicate its disagreement with Glynn’s assertions on the scope of Section 10.07.

In sum, the interpretive knot posed by the grievance is that the language of 10.03 of the Overall Agreement, which was brought essentially unchanged into the 2007 agreement as Subsection 11.01b), is not unambiguous, but affords strong support for the Association’s view that Section 10.03 demanded a triple time rate for holiday hours worked in excess of a normal schedule. Evidence of practice affords solid, but not determinative support for this view. Since the parties agree that the move of Section 10.03 of the Overall Agreement to Article XI of the 2007 agreement had no substantive significance, the evidence points strongly to the conclusion that Section 10.03 of the Overall Agreement granted the Association the benefit it seeks in this grievance. However, the County’s introduction of Section 10.07 into the 2007 agreement affords strong indication that it altered past overtime practices and contract interpretations. The December 4 letter offers internally inconsistent views on how to interpret contractual references to “hours worked”, but affords unequivocal evidence that the County sought to alter standard operating procedure regarding the calculation of overtime. The ambiguity of the relationship between Section 10.03 of the Overall Agreement and Section 10.07 and Subsection 11.01b) of the 2007 Agreement was restated, without clear resolution, in the face-to-face bargaining between the County and the CCDSA unit.

Thus, the language of Subsection 11.01b), viewed with its predecessor in the Overall Agreement, affords strong support for the Association’s view that the grievance seeks no more than the Overall Agreement provided. Evidence of past practice is less than determinative, but favors this view over the County’s. The parties’ face-to-face bargaining did no more than communicate their disagreement on the impact of Section 10.07 regarding the application of Section 10.03 or its successor, Subsection 11.01b). The absence of evidence indicating Association agreement or at least acquiescence to the County’s view undercuts the County’s view of Section 10.07 more than the Association’s, because the balance of the evidence indicates that the County sought to alter how holiday pay impacts hours actually worked on a holiday outside of normally scheduled hours. In the absence of strong evidence of past practice or bargaining history, this demands the alteration of the contract language providing the benefit. Thus, the Association’s interpretation of the impact of Section 10.07 on the interpretation of Subsection 11.01b) must be favored over the County’s. The provision of a time and one-half rate in Subsection 11.01b) must, then, be viewed as the establishment of a base rate for “hours actually worked” on a holiday rather than as an “overtime” rate subject to the anti-pyramiding provisions of Section 10.07.

No specific discussion of remedy is appropriate here. At hearing, the parties noted a potential dispute regarding the scope of a make-whole award. Rather than present evidence on remedial issues, the parties agreed that I should retain jurisdiction over the matter if I found a contract violation. The Award noted below thus generally states a make whole remedy coupled with my retention of jurisdiction for the purpose of addressing any remedial issue.

The retention of jurisdiction for not less than forty-five days is to assure that the parties have time to address the issue of remedy informally prior to resort to further litigation.

Before closing, it is appropriate to elaborate the basis of the conclusions stated above in a bit more detail. Because separate grievances prompted the consolidated hearing, the issuance of a decision granting one and denying the other can carry the perception of “splitting the baby.” The metaphor, if not the perception, is apt. Splitting the baby cannot satisfy any good-faith litigant. The differing results, if appropriate, must accurately reflect different records. Here, granting either party’s assertion that the labor agreement, either at Section 10.07 or at Subsection 11.01b) or c), is unambiguous, would require a consistent result across the units. The conclusion that neither agreement, nor their predecessor, clearly governs the grievance opens the possibility of differing results as a contractual matter. As a factual matter, the differing results reflect that although the contract language and evidence of past practice is consistent across the two grievances, the evidence of bargaining history is not. Because that evidence is stronger for the County on Grievance 07-364 than on Grievance 07-335, differing results are possible. They are necessary in my view, because the evidence of bargaining history in Grievance 07-364 includes evidence of face-to-face discussions dictating the conclusion that the County secured an agreement to alter the payment of overtime for hours actually worked on a holiday in the CCC bargaining unit that it failed to achieve with the CCDSA unit.

AWARD

The County did violate Article 10 and/or Article 11 of the collective bargaining agreement when it paid employees for time and a half for all hours actually worked by deputies on Monday, May 28th, 2007 in addition to the holiday allowance paid at straight time.

As the remedy for the County’s violation of Subsection 11.01b) and Section 10.01 regarding its calculation of the deputies’ “hours actually worked”, the County shall make any affected employee(s) whole. To address the existence of any issue regarding the appropriate remedy, I will retain jurisdiction of the grievance for a period of not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 20th day of August, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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