

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CALUMET COUNTY SHERIFF'S DEPARTMENT CORRECTIONS,
COMMUNICATIONS, & CLERICAL EMPLOYEES UNIT,
REPRESENTED BY LEER DIVISION OF
THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION**

and

CALUMET COUNTY

Case 140
No. 67329
MA-13836

Appearances:

Andrew D. Schauer, Staff Attorney, The Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, for Calumet County Sheriff's Department Corrections, Communications, & Clerical 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. 07-364, filed by the Association on behalf of the civilian employees it represents in the County Sheriff's Department, as well as Grievance No. 07-335, filed by the Association on behalf of the sworn employees it represents in the County Sheriff's Department. When necessary to distinguish these two units, the unit consisting of Corrections, Communications and Clerical Employees will be referred to as the CCC unit, and the unit consisting of Deputies will be referred to as the CCDSA unit. 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 by 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. 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. . . .

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; 7.5 hours per day or 37.5 hours in a week in the case of part-time secretaries. 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, for those employees residing within the required response time specified in Article XXI, 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 – Corrections & Communications. 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) Observed Holidays – Clerical. The above-mentioned holidays, shall be observed on the dates established by the Personnel Department, and shall be a scheduled day off from work.
 - 1) If a holiday falls during an employee's vacation, the employee will be paid holiday pay for that day and not vacation pay.
- c) 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 07-364 names "the Association" as the grievant, alleges County violation of Sections 10.01 and 11.01c), and seeks that the County,

Pay all employees (including but not limited to; Deputies Pat Meyers and Brenda Lisowe) who worked outside their normally scheduled hours of work on Wednesday, July 4, 2007, Overtime and Holiday Work Pay for those hours worked outside their normally scheduled work hours.

Much of the background is undisputed. Prior to the 2007-08 labor agreement noted above, the members of the CCC unit were part of an overall unit, including deputies, of Sheriff's Department employees. 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 CCC unit 2007-08 labor agreement. Beyond this, the Overall Agreement did not specifically mention "Holiday Allowance" as specified at Subsection 11.01a) of the 2007-08 agreement covering the CCC 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.

After an exchange of initial proposals, the parties conducted their first face-to-face bargaining session for the CCC unit on November 7, 2007. Patrick Glynn, the County's Human Resource Director issued a letter to Ed Vander Bloomen, the Association's Business Agent, dated November 6, which 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 tentatively agreed on a 2007-08 labor agreement on November 17. On or about December 13, the Association ratified the tentative agreement. At the same meeting, the Association installed a new slate of officials. Marie Oosterhouse became the Association’s President. At that meeting, the Association asked Oosterhouse and the Steward to refer a series of questions regarding the tentative agreement to Glynn. Glynn ultimately scheduled a meeting for January 4, 2007.

Glynn notified meeting participants of the meeting arrangements via e-mail. His e-mail states:

Possible topics of discussion:

- Holidays: How compensated ... OT on a holiday ...
- Requests for Vacation: Issues w/ first-come, first served ...
- HSA Accounts: Banking and flexibility ...
- Residency: concerns ...
- Duration: Possibility of a third year ...

Please note that all of the above appear to be mandatory subjects of bargaining. While the County is willing to discuss interpretation of the collective bargaining agreement, and is willing to hear the union's concerns, we intend to preserve any and all rights to maintain the contract, as bargained. In our telephone conversation I conveyed that this wasn't meant to "draw a line in the sand" at this point, but to preserve our rights should it become necessary to do so in the future.

The parties met on January 4, 2007. They ultimately executed the tentative agreement. 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.

Steve Baer

Baer has served the County as a Jailer and as a Dispatcher for roughly twenty-nine years. He has also served as an Association official for twenty of those years. He served on the Association's bargaining team for the 2007-08 agreement covering the CCC unit. He served on the Association's bargaining team for a number of other agreements, including the Overall Agreement.

The parties did discuss the County's anti-pyramiding proposal during the November, 2006 negotiations, but he did not believe the parties reached a clear mutual understanding that the proposal would affect payment of overtime for hours actually worked in excess of a scheduled shift on a holiday. He could recall the County specifically discussing its anti-pyramiding proposal, and specifically discussing Glynn's November 4 letter, but could not specifically recall whether the County specifically tied its proposal to the payment of overtime on a holiday. The parties did not, prior to the 2007-08 agreement, use the term "pyramiding" in the labor agreement. As in past negotiations, the County prepared a list of tentative agreements prior to the ratification process. The list specifically highlighted the changes made from the predecessor labor agreement to its successor.

Prior to the January 4, 2007 meeting, the Association met and asked that a number of questions be presented to the County. Baer noted that how holiday pay was calculated was "probably one of the aspects" (Transcript at 49) to those questions. He did not attend the January 4 meeting and did not know what conclusions were reached.

Marie Oosterhouse

Oosterhouse has served the County as a Dispatcher for over fourteen years, and became Association President at its meeting on or about December 13, 2006. She has served as an Association official, including its President, throughout her tenure. She did not, however, serve on the Association's bargaining team for the 2007-08 labor agreement.

At its December, 2006 meeting, the Association voted to ratify the agreement and to present a series of questions to the County regarding the tentative agreement. The questions included Association concerns with the County's anti-pyramiding proposal. Even after discussions with Vander Bloomen and with Glynn, Oosterhouse was sufficiently confused on the point to ask Glynn to demonstrate how unit members should fill in a time card under the new labor agreement. She requested that Glynn prepare a sample timecard, but no such sample was ever developed.

Oosterhouse researched time cards regarding County payment of hours worked beyond a scheduled shift on a holiday. Among those time cards was one of Patricia Meyers, a Jailer, for December 31, 2000. The time card Meyers originally submitted includes: a "4.0" entry in a box for "Day OT HRS"; an "8.3" entry in a box for "Holiday Wrk."; her own signature; and no supervisory signature. The time card for the same day, which includes her supervisor's signature, includes a modification of the "Holiday Wrk." entry from "8.3" to "12.3". The modification includes the initials of the supervisor next to the amended entry. The effect of the modification was to pay Meyers four more hours at the holiday rate of time and one-half. Two Jailers who worked on Independence Day in 2007 submitted their time cards to Oosterhouse. In each case, the time card as submitted by the employee contained an entry of "12.3" in the "Holiday Wrk" box, but was returned under a supervisor's signature with a corrected entry of "8.3" in the "Holiday Wrk" box. The effect of the modification was to limit the payment of the time and one-half holiday rate to four fewer hours, reflecting the County's view of the impact of Section 10.07.

Oosterhouse understood her role in the January 4, 2007 meeting to be to present Glynn with the concerns of the CCC unit. During that meeting, Glynn explained that the County viewed the tentative agreement to incorporate its view of Section 10.07, which limits the payment of the holiday time and one-half premium to the normally scheduled hours without regard to the number of hours worked beyond that schedule on a holiday. The Association did not file any objection to this view in the time period following this meeting and preceding the execution of the tentative agreement.

Oosterhouse views Meyers' December 31, 2000 time card to reflect the way holiday pay should be accounted for, and the County's treatment of the two Independence Day, 2007 times cards as an unwarranted change.

Patrick Glynn

Glynn has served as the County's Human Resource Director for roughly seven years. He also serves as the chief spokesperson 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 of those tentative agreements included a County initiated anti-pyramiding proposal.

While preparing for the most recent round of collective bargaining with the CCC and the CCCDSA 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 November 6 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 initial bargaining session with the CCC unit he explained his view of the November 6 letter and explained the anti-pyramiding proposal. In his view the discussions tied the anti-pyramiding proposal “directly to the holiday pay issue” since “the only reason why the pyramiding language would exist was for the holiday pay” (Transcript at 171). The County also proposed to the CCC during bargaining that Section 8.04 be eliminated from the labor agreement. It dropped this proposal after the CCC unit acknowledged that they had no specific, unidentified past practices that it covered.

At the clarification meeting on January 4, 2007, the parties specifically discussed how the County proposed to pay overtime on holidays, with the County explaining that its anti-pyramiding proposal “would prevent that compounding that had occurred in the past” (Transcript at 174). The Association asked that a number of points be clarified, but did not object to any of the points raised by the County and the parties executed the labor agreement a couple of months later.

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 letter of November 6, 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 11.01c); 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 Independence Day in 2007 for the CCC 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 their 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 November 6 letter 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 placed 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 CCC ratified the tentative agreement, thus accepting 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 November 6 letter notes 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 the County’s view of Section 10.07.

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.” They 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 11.01c) 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 Jailers should receive 8.3 hours at straight time pay for Independence Day of 2007 under Subsection 11.01a) and, because they were working on Independence Day, 8.3 hours at time and one-half under Subsection 11.01c). The dispute concerns the final four of the 12.3 hours worked by the Jailers on Independence Day. Under the Association's view, Subsection 11.01c) 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 11.01c) 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 of how, if at all, the bargaining for the CCC unit's 2007-08 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 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.

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 11.01c) of the 2007-08 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 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 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 11.01c) 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 generally 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 use 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 11.01c) 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 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 November 6 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 11.01c). 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 November 6 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 November 6 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 November 6 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 November 6 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 November 6 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 2007-08 agreement. Glynn's testimony that he consistently linked Section 10.07 to the payment of holiday overtime stands unrebutted. This establishes the clarity of the County's intent to disavow past practice and to contractually alter future payment of "overtime on overtime."

The establishment of Association agreement to this clearly stated intent is more problematic. Baer's testimony that he was not clear on the linkage of the anti-pyramiding proposal to holiday pay has support in Glynn's acknowledgement that the bargaining from initial session to tentative agreement went quite swiftly. Given the amount of ground covered by the parties, some lack of clarity on this narrow point is understandable. That cannot, however, account for subsequent actions to clarify the tentative agreement. Glynn's e-mail notice of the January 4, 2007 clarification meeting, viewed together with testimony on the substance of that meeting, establish that whatever ambiguity Baer pointed to in face-to-face bargaining did not characterize the post-ratification discussions. Glynn clearly stated the County's intent to treat as "pyramiding", banned by Section 10.07, any claim for a time and one-half premium under Section 10.01 to be added to a time and one-half premium under Subsection 11.01c). Association silence in the face of that clear statement of intent is difficult to interpret as anything other than acquiescence to the County's stated view.

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 2007-08 agreement as Subsection 11.01c), is not unambiguous, but affords strong support for the Association's view that Section 10.03 demands 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 2007-08 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 2007-08 agreement affords strong indication that it altered past overtime practices and contract interpretations. The November 6 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. Whatever ambiguity existed in face-to-face bargaining was directly addressed in the January 4, 2007 clarification meeting. The Association's ratification of the tentative agreement coupled with

the absence of any Association objection to the County's clearly stated interpretation of Section 10.07 at the clarification meeting affords stronger evidence of mutual agreement than does the past practice evidence submitted by the Association. Thus, the County's interpretation of the impact of Section 10.07 on the interpretation of Subsection 11.01c) must be favored over the Association's. The provision of a time and one-half rate in both Section 10.01 and Subsection 11.01c) must, then, be viewed as "two or more provisions requiring the compensation of overtime rates" subject to the anti-pyramiding provisions of Section 10.07.

AWARD

The County did not 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 employees of the CCC unit on July 4th, 2007 in addition to the holiday allowance paid at straight time.

Grievance No. 07-364 is, therefore, denied.

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

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

