

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.

On August 20, 2008, I issued DEC. NO. 7330 and DEC. NO. 7331. DEC. NO. 7330 granted Grievance No. 07-335. DEC. NO. 7331 denied Grievance No. 07-364. DEC. NO. 7330 states the following:

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.

In a September 26, 2008 e-mail, the parties requested that I retain jurisdiction over the matter through at least October 10. In October 10 e-mails, the parties requested that a mediation/arbitration date be established to informally resolve the remedial issues and, if an informal resolution proved impossible, to make a record for a Supplemental Award. The parties agreed to set December 17, in Chilton, Wisconsin, for this proceeding.

A December 4, 2008 e-mail "sent . . . on behalf of both parties", states:

On page 17 of the Decision, the Arbitrator held as follows:

"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."

The parties are asking clarification regarding this finding. In that regard, the parties request clarification and if such finding was intended to provide:

1). The hours worked provide a base rate, and time and one half is then applied to that rate, the impact of which is two and one-quarter times the regular rate for the applicable hours.

Or

2). The hours worked allow for time an one half plus time and one half, the impact of which is three times the regular rate for the applicable hours.

Or

- 3). The Arbitrator will need more information from the parties before making such determination.

Please advise at your earliest convenience. If you are able to review and advise us before our hearing scheduled for December 17, upon choosing 1 or 2 above, we would be able to cancel this hearing and foresee being able to work out the remedy between the parties. Upon choosing 3, we would need to proceed as scheduled . . .

In e-mails exchanged between December 4 and December 8, the parties agreed that I should address the options noted above via a teleconference to be held on December 12.

On December 12, 2008, I conducted a teleconference regarding the above noted issues and agreed to memorialize that process with this Supplemental Award. I supplied a draft copy of the Supplemental Award via e-mail to the parties on December 15 to assure that the draft accurately stated the issues covered at the teleconference and the parties responded by December 17.

DISCUSSION

The teleconference was free-flowing, starting with the parties stating their positions on the options noted in the December 4, 2008 e-mail. The County asserted that Option 1) best reflected the Association's statement of position on the grievance and that Option 2) stretched the evidentiary record. The Association contended that the remedial issues were addressed in passing during the hearing, that Option 2) stated its position and that Association agreement to Option 1) would have to result from a formal order.

I noted my opinion that Option 2) reflected my view of the record. My reference to "base pay" on PAGE 17 of DEC. NO. 7330 was to establish that under the Overall Agreement, holiday pay at Section 11.01b) was distinguished from the overtime premium at Section 10.01. Section 11.01b) provides 1½ times the normal rate for all hours actually worked on a holiday, thus establishing base holiday pay to which hours worked outside the normal schedule had an overtime rate of 1½ times added under Section 10.01. The holiday pay of Section 11.01b) thus was a base to which the Section 10.01 premium was added, rather than one overtime rate that "pyramided" another. The reference in the original award to "base" pay was to note that the parties define contract terms and that the holiday base could or could not be considered an overtime rate depending on whether the governing agreement defined holiday pay as a rate distinguishable from an overtime premium rate. I noted that the two grievances diverged on this point. The pre-ratification clarification during bargaining in the CCC unit established that the County clearly communicated its view that the Section 11.01b) set a premium rate subject to Section 10.07. The subsequent ratification of the agreement without further discussion made it impossible to conclude the Overall Agreement viewed in light of bargaining history and past practice impacted the application of Section 10.07. In the CCDSA unit, no such clarification occurred. The County stated its position clearly, but there was no reliable

evidence of Association assent to the County's view comparable to the the CCC unit. Rather, the parties left the joint caucus without a mutual understanding regarding whether Section 10.07 altered the Overall Agreement's application of overtime to holiday pay. This meant that the Overall Agreement, viewed in light of bargaining history and past practice, had meaning in the application of Section 10.07 to the CCDSA unit under the current agreement.

The County stated its view that this enforced an interpretation of the agreement at odds with that pursued at hearing by the Association, but indicated its understanding that the agreement bound it to that view under the terms of the grievance procedure. The Association did not agree with the County's interpretation of its view of the remedy, but underscored that it viewed the award, as supplemented, as binding.

The County added that it understood itself to be bound by the award regarding the grievance and regarding holidays arising after the implementation of a remedy, but underscored that it had, throughout the arbitration process, consistently challenged the Association's assertion that Grievance 07-335 applies to all holidays arising after the filing of the grievance. In the County's view, the Association was obligated to either file grievances on those holidays or to secure County agreement that the remedy requested in Grievance 07-335 would, if granted, apply to all holidays. Under the County's view, the issue was not the applicability of Grievance 07-335 to the affected employees or to holidays arising after the Supplemental Award, but to holidays falling between those points in time. The Association noted this did nothing but encourage repeat grievance filings. Apart from encouraging unnecessary litigation, this view flies in the face of the September 25, 2007 letter from the Association to Glynn (Association Exhibit 11), which noted the Association's belief that Grievance 07-335 applied to all holidays and which sought that if Glynn did not agree he should "indicate the same . . . in writing at your earliest ability." Glynn's failure to respond establishes County agreement on the point.

Considerable and animated discussion took place on this point which underscored the lines of argument noted above. I noted that the record put me on the horns of a dilemma. On one side, the agreement terms granting an arbitrator compulsive authority must be honored by applying that authority as narrowly as possible to the contract terms and evidence at issue. A contrary conclusion strains the limits of contractual authority and undermines the bargaining process in favor of the arbitration process. On the other hand, arbitration authority means little if it is not paralleled with remedial authority. Circumscribing the remedial authority undermines the informal processes of bargaining with legal technicalities.

I noted that the remedy request of Grievance 07-335 reads thus:

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 . . .

I noted my view that if the County had challenged the applicability of my reading of the contract to any holiday other than the Memorial Day questioned by the grievance, there would be no persuasive option on my part beyond stating that my view of the contract applies to any holiday. The County did not, however, challenge the interpretation of the contract, but its applicability between the grievance's filing and the final resolution of the remedial issues. As the parties' discussion highlighted, Grievance 07-335 and 07-364 are characterized by wide-ranging and specific agreements regarding their processing. The parties did not expressly state an agreement on this point and Grievance 07-335 is, on its face, limited to employees who worked on Memorial Day of 2007.

At a minimum, this poses the irony that the merit of Grievance 07-335 rests on my reluctance to imply Association assent to the County's clear statement of its view of the applicability of Section 10.07 in the absence of express Association action, while the merit of the Association's remedial request demands that I infer County assent to its September 25, 2007 letter in the absence of express County action. I indicated my view that more than irony is involved in that view and that I thought it stretched my authority as arbitrator past the breaking point. Against this background, I view the risk of making the grievance process too technical as less considerable than the risk of extending my authority as arbitrator farther than the parties' agreements reasonably permit.

I underscore the interpretive difficulty posed by the record underlying the consolidated grievances. Each party requested that the remedial discussions be memorialized to state the lines drawn with sufficient background for their clients' review. The Supplemental Award noted below states the lines and this **DISCUSSION** the background. As noted in the prior Award, "splitting the baby" is no balm to any good faith advocate. The initial Award and the Supplemental Award establish my view of what the evidence demands.

SUPPLEMENTAL AWARD

Option 2) from the parties' December 4, 2008 e-mail establishes the appropriate remedy for the County's violation of Subsection 11.01b) and Section 10.01 regarding its calculation of the deputies' "hours actually worked" on May 28, 2007. Any employees "who worked outside of their normally scheduled hours of work on Monday, May 28, 2007" shall be made whole for the difference between the wages and benefits they earned on that holiday and the wages and benefits they would have earned but for the County's failure to apply Option 2) of the December 4, 2008 e-mail. The County will apply Option 2) regarding holidays occurring after the date of this Supplemental Award.

Dated at Madison, Wisconsin, this 18th day of December, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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