BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION FOR AND ON BEHALF OF THE DANE COUNTY DEPUTY SHERIFFS' ASSOCIATION

and

DANE COUNTY (SHERIFF'S DEPARTMENT)

Case 192
No. 68124
MA-14131

(Grievance #08-091, Overtime Calculation)

Appearances:

Mr. Roger W. Palek, WPPA Staff Attorney, 340 Coyier Lane, Madison, Wisconsin 53713, on behalf of the Association.

Ms. Kristi A. Gullen, Assistant Corporation Counsel, 210 Martin Luther King, Jr. Boulevard, Room 419, Madison, Wisconsin 53703-3345, on behalf of the County.

ARBITRATION AWARD

The Dane County Deputy Sheriffs' Association, affiliated with Wisconsin Professional Police Association Law Enforcement Employee Relations Division (herein Association), and the Dane County Sheriff's Office (herein the County) are parties to a collective bargaining agreement covering the period from December 24, 2006 through December 19, 2009 (herein the Agreement). On July 1, 2008, the Association filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning a dispute relating to the method for overtime calculation, and to provide the parties with a list of five WERC-employed arbitrators from which to select. The parties thereafter selected the undersigned to arbitrate the dispute. On December 15, 2008, in lieu of a hearing, the parties submitted a stipulation and nine documentary exhibits. The parties filed initial briefs by March 1, 2009, the Association chose not to file a reply brief, and (following an extension of the reply briefing schedule) the County filed a reply brief on April 13, 2009, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Does Section 14.01 of the Collective Bargaining Agreement require the inclusion of Section 7.09 undesirable pay and Section 7.06/Appendix B educational incentive pay within the calculation of non-FLSA overtime for hours worked outside of an employee's regular schedule?

If so, what is the remedy?

PERTINENT CONTRACT LANGUAGE

. . .

ARTICLE VI -GRIEVANCE PROCEDURE

. . .

6.03 Arbitration.

(c) The impartial Arbitrator shall have the authority to determine issues concerning the interpretation and application of all Articles or Sections of this Agreement. He shall have no authority to change any part; however, he may make recommendations for changes when in his opinion such changes would add clarity or brevity which might avoid future disagreements.

. . .

ARTICLE VII --CLASSIFICATION AND COMPENSATION

7.01 WPPA DEPUTY SHERIFFS' ASSOCIATION SALARY SCHEDULE
[the Salary Schedule consists of tables of classification title, range, step and hourly rates at six different effective dates during the Agreement's duration. The rates at the two highest paid steps in each range contain footnotes to the effect that those steps are reached after earning 160 and 260 longevity credits, respectively.]

7.02 The basic scheduled workday shall consist of eight (8) hours and the basic scheduled workweek of forty (40) hours except that the Employer may, for those employees on the Boat Patrol and Airport Duty, assign a workweek which consists of four (4) consecutive ten-hour days. No other change in the length of the existing workday or workweek is intended. However, the average annual workweek for Sheriffs employees shall be 37.5 hours as set forth in 7.03 below.

Employees shall first be given the opportunity to work the ten-hour day schedule on a voluntary basis. In the event that less employees request said schedule on a voluntary basis than are deemed necessary by Employer, employees shall be assigned to this schedule in the reverse order of seniority. Employees who work in excess of their scheduled workday or workweek, shall be compensated for such excess as defined in 14.01 of this Agreement.

. . .

7.06 Educational Incentive Pay Plan.

(a) Prior to December 27,1992, the educational incentive pay plan will be administered pursuant to 7.06 and Appendix B of the 1990-91 labor agreement.

(b) Effective December 27, 1992, the educational incentive pay plan shall be as provided in Addendum B of this labor agreement.

7.07 Longevity. All employees covered by the terms of this agreement shall receive 1/2 longevity credit for each biweekly pay period in which the employee is compensated for forty (40) or more hours, and shall receive longevity pay as hereinafter provided:

(a) Each employee's basic rate of pay shall be increased by:

1. 3% to start on the first full biweekly pay period after employee has earned 52 longevity credits.

. . .

7. Effective September 21, 2003 an additional 1% (total 12%) to start on the first full biweekly pay period after employee has earned 273 longevity credits.

(b) Longevity pay shall be included in employee's regular biweekly pay and shall have the effect of increasing the employee's basic pay in the amounts indicated above.

(c) "Basic rate of pay" as referred to in (a) includes actual gross amounts of payroll checks written to each employee prior to the taking of any deductions except for incentive pay, and any vacation, sick leave, etc., taken in excess of credit earned.

. . .

7.09 Personnel working between the hours of 6:00 p.m. and 6:00 a.m. and on Saturdays, Sundays and holidays shall be compensated at the rate of fifty cents ($ .50) per hour.

. . .

ARTICLE XIV –OVERTIME

14.01 Overtime Rate. Unless mutually agreed otherwise, under all circumstances employees shall receive one and one-half (1½) times their straight time hourly rate (including longevity pay) for all hours worked in excess of their normal, regular scheduled workdays or workweek as defined in 7.02 above. Effective December 20, 1998 overtime worked in excess of fourteen (14) consecutive hours shall be compensated at two (2) times the straight time hourly rate. Should the accumulation of compensatory time beyond a biweekly payroll period remain legal without additional penalty to the Employer, the employee may, at his/her option elect to accrue compensatory leave time at the rate of one and one-half (1½) time in lieu of overtime cash payment up to a one time annual maximum of one hundred and twenty (120) hours. On the pay period prior to the expiration date of the contract, the employer shall pay in cash to the employee for any accrued compensatory time hours in excess of sixteen (16) hours at the employee's regular rate of pay. Overtime earned while serving on a mutual aid basis outside Dane County may not be taken as compensatory time.

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ADDENDUM B

DANE COUNTY SHERIFFS' DEPARTMENT
EDUCATIONAL INCENTIVE PAY PLAN

Effective December 27, 1992, the following incentive plan will be implemented in lieu of all other incentive plans:

After an employee completes forty-six (46) longevity credits, if he/she has an Associate Degree (or equivalent), he/she will receive 12% incentive; if he/she has a Bachelors Degree, he/she will receive 18% incentive. Equivalency means sixty (60) credits* en route to Bachelor's degree. A degree must be from a school or university accredited by an authority recognized by the U.S. Department of Education. These percentages shall be on base salary only. Base salary does not include longevity pay, overtime pay or other forms of compensation not specified in the salary schedule contained in 7.01 of the agreement.

. . .

STIPULATIONS / BACKGROUND

In lieu of a hearing, the parties submitted the following Stipulation, along with the nine joint exhibits referenced therein which are not set forth below:

1. The term "FLSA" refers to the Fair Labor Standards Act, 29 USC 201 *et seq*.

2. The parties are signatories to a collective bargaining agreement that was effective December 24, 2006 and which expires on December 19, 2009 (Joint Exhibit 1).

3. The Association filed a grievance on March 21, 2008. The grievance was denied by the County on June 19,2008 (Joint Exhibit 2).

4. The dispute is properly before the arbitrator.

5. The issue to be addressed by the arbitrator is:

   Does Section 14.01 of the Collective Bargaining Agreement require the inclusion of Section 7.09 undesirable pay and Section 7.06/Appendix B educational incentive pay within the calculation of non-FLSA overtime for hours worked outside of an employee's regular schedule? If so, what is the remedy?

6. The parties agree that the material facts are not in dispute. The parties also agree that there does not appear to be any evidence that the issue to be addressed has been raised or discussed in bargaining.

7. For the purposes of calculating overtime under the FLSA, the Dane County Sheriffs Office uses a 28-day "work period." 29 CFR 553.230 provides when a 28-day work period is used, no overtime compensation is required under section 7(k) of the FLSA until the law enforcement employee has worked in excess of 171 hours during that work period. The parties agree that this dispute does not: involve the manner of calculating overtime compensation for hours in excess of 171 during the 28-day work period (FLSA overtime).

8. Section 14.01 of the collective bargaining agreement between the parties provides, *inter alia*, that "employees shall receive one and one-half (1-1/2) times their straight time hourly rate (including longevity pay) for all hours worked in excess of their normal regular scheduled workdays or

workweek as defined in 7.02 above." (Contract overtime). By practice, overtime compensation pursuant to Section 14.01 of the collective bargaining agreement has never included any additional type of pay other than longevity.

9. The practice of the parties has been to include Section 7.07 longevity pay within the calculation of Section 14.01 non-FLSA overtime pay. Since at least 1980, the collective bargaining agreements between the parties have provided that overtime under Section 14.01 includes longevity pay. (1980-1981 Agreement between Dane County and the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association for and on Behalf of The Dane County Law Enforcement Officer's Association) (Joint Exhibit 3).

10. The practice of the parties has been that neither undesirable pay under Section 7.09 of the collective bargaining agreement (aka "U-Pay" or "shift differential pay") nor educational incentive pay under Section 7.06 and Addendum B of the collective bargaining agreement (aka "incentive pay"), are included within the calculation of Section 14.01 non-FLSA overtime pay.

11. Beginning with the 1993-1995 Agreement, the collective bargaining agreements between the parties have contained "Addendum B" regarding the Educational Incentive Pay Plan which went into effect December 27, 1992. (1993-1995 Agreement between Dane County and the Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association for and on Behalf of The Dane County Law Enforcement Officer's Association) (Joint Exhibit 4).

12. When overtime compensation is owed to law enforcement employees under the Fair Labor Standards Act, additional forms of compensation are included. When calculating overtime for hours in excess of 171 during a 28-day work period (FLSA overtime), the County includes longevity, undesirable and educational incentive pay.

13. Since December 2000, payroll for the members of the Association has included a spreadsheet that contains contractual and FLSA overtime, as well as details for the calculation of FLSA overtime. The spreadsheet is provided to the Association every 28 days.

14. The parties have had two arbitration decisions that have involved undesirable pay: Case No. A/P M-97-64 (Briggs, 1998) (Joint Exhibit 5) and Case No. A/P M 98-335 (Kessler, 1999) (Joint Exhibit 6).

15. Since the date of the decisions referred to in paragraph 14 above, the parties have entered into collective bargaining agreements dated: December 19, 1999-December 15, 2001; December 16, 2001-December 13, 2003; December 14, 2003-December 23, 2006: and the agreement currently in effect and referred to herein as Joint Exhibit 1.

16. Attached as Joint Exhibits 7, 8 and 9 are Articles VII, XIV and Addendum B from the collective bargaining agreements referred to in paragraph 15 above.

17. That from the date of the arbitrator's decision in Case No. A/P M 98-335 (Kessler, 1999) (Joint Exhibit 6) and through the date the grievance referred to in paragraph 3 was filed, (March 21, 2008); the Association did not file any grievances regarding the manner in which 14.01 (contract) overtime was calculated.

18. The parties agree to provide their respective contractual and legal arguments through written briefs.

19. The parties' briefs will be postmarked and sent to the arbitrator no later than February 27, 2009. The arbitrator will be responsible for the exchange of briefs. There will be no reply briefs unless requested by a party within 10 days of receipt of the other party's brief. In the event a party requests a reply brief, such briefs must be postmarked no later than March 13, 2009.

These stipulations are being made only for the purposes of the above captioned hearing and are not intended to be binding on either party for any other purpose or proceeding.

POSITIONS OF THE PARTIES

The Association

The Association asserts that the pivotal term "straight time hourly rate" in Sec. 14.01 is ambiguous. It asserts that in the absence of bargaining history, three recognized contract interpretation aids should be relied upon: the principle of *noscitur a sociis* (determining the meaning of the phrase from its association with other words and the purpose of the provision in which it appears); the direct application of external law, and interpreting the language in light of external law.

The Association asserts that both Sec. 14.01 and the FLSA deal with overtime and exist for the purpose of providing a premium rate of pay for overtime hours outside of or in excess of an established norm. It argues that because the FLSA has existed for nearly seventy years,

it can reasonably be assumed that when the parties wrote Sec. 14.01 language to provide for "overtime," they did so based on a general understanding of that term deriving directly from the FLSA. The Association argues that laymen negotiators who were presumably familiar with the concepts of overtime would have intended that their use of the term "straight time hourly rate" in Sec. 14.01 be synonymous with the FLSA's use of the term "regular hourly rate," which, in turn, undisputedly includes both the undesirable pay and the educational incentive pay at issue in this case.

The Association asserts that the Agreement does not expressly define the term "straight time hourly rate." It asserts that the Sec. 14.01 parenthetical "(including longevity pay)" merely emphasizes that longevity pay is included within the overall definition of that term, but does not thereby exclude undesirable pay and educational incentive pay. It further argues that because the parties undisputedly recognize that any overtime that lies within the parameters of the FLSA includes undesirable pay and educational incentive, it follows that the same must have been intended as regards non-FLSA overtime as well. It asserts that the County's interpretation of Sec. 14.01 as excluding undesirable pay and educational incentive from the calculation of overtime rate must be rejected because it would -- as regards FLSA overtime -- provide for a calculation that is inconsistent with the requirements of the FLSA. In contrast, it asserts that the Association's interpretation is entirely consistent with that external law and can therefore more reasonably be presumed to have been intended by the parties.

The Association asserts that "overtime" referred to in Sec. 14.01 must be considered "overtime" whether it falls within the FLSA or not. It argues that it is only rational and logical that the parties would intend that the Sec. 14.01 "straight time hourly rate" would be calculated the same way for all overtime hours covered by Sec. 14.01, not one way for Sec. 14.01 overtime hours that qualify for FLSA and another way for Sec. 14.01 overtime hours that do not. The Association asserts that when Sec. 14.01 is interpreted in light of the FLSA, the Association's interpretation is rational and logical whereas the County's is not.

For those reasons the Association requests that the Arbitrator define "straight time hourly rate" in Sec. 14.01 consistent with the definition of the FLSA's "regular rate" and direct the County to comply with that definition retroactive to the date of the filing of the instant grievance.

The County

The County asserts that the clear and unambiguous language of the Agreement does not support the Association's claim that undesirable pay and educational incentive pay must be included in contract overtime under Sec. 14.01. It argues that, read together with Sec. 7.02, the Sec. 14.01 overtime provisions apply when an employee works more than eight hours per day or forty hours per week. It argues that the "hourly rate" referred to in Sec. 14.01 is the rate set forth in Sec. 7.01 of the Agreement. It further argues that, read together with Sec. 7.07(b), the Sec. 14.01 modifiers "straight time" and "(including longevity pay)" make it clear that the calculation of the overtime rate under Sec. 14.01 is based on the employee's

hourly rate before any additional forms of compensation are added, except for the specifically mentioned longevity pay.

The County asserts that when rules of construction are applied, they further demonstrate that Sec. 14.01 overtime does not include anything other than longevity pay to be added to the hourly rate. It points out that Sec. 14.01 specifically refers to longevity and does not mention any other form of pay to be added to the straight time hourly rate when calculating contractual overtime. Applying the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the County asserts that Sec. 14.01 can only mean that longevity, but no other form of pay besides the Sec. 7.01 rate, is included when calculating contractual overtime. To the same effect, the County notes that whereas Sec. 7.07(b) expressly provides that "Longevity pay shall be included in the employee's regular biweekly pay and shall have the effect of increasing the employee's basic pay . . ." neither the undesirable pay language in Sec. 7.09 nor the educational incentive pay language in Sec. 7.06 and Addendum B contains a similar provision regarding those forms of compensation.

The County asserts that, if extrinsic evidence is considered, the Association's claim also fails. It argues that, as stated in Stipulation 8 (and reaffirmed in Stipulation 12), "By practice, overtime compensation pursuant to Section 14.01 of the collective bargaining agreement has never included any additional type of pay other than longevity." In that regard, the County points out that longevity pay was introduced into the parties' agreements in 1980; that parties' agreements have contained materially the same undesirable pay provisions since 1999 and materially the same educational incentive pay provisions since December of 1992. The County asserts that by entering into contract after contract without raising the issue of including undesirable pay and educational incentive pay in Sec. 14.01 overtime, the Association must be deemed to have acquiesced in the practice of including only longevity in overtime paid under Sec. 14.01 of the Agreement. The County also cites as further support for its position that, in 1998 and 1999, grievance arbitrators rejected Association claims that undesirable pay must be included in the time and one-half then payable for holiday work under the agreements involved.

Finally, the County asserts that the FLSA does not apply to the non-FLSA overtime at issue here, so that the requirements of that law are irrelevant to the Arbitrator's determination of the issues submitted in this case. The County notes that, as described in Stipulations 8, 12 and 13, Association bargaining unit members receive two forms of overtime compensation: FLSA overtime and Sec. 14.01 contract overtime. Whenever an employee works in excess of 171 hours in a work period, overtime is paid using the methodology set forth in the FLSA, which includes longevity, undesirable pay and educational incentive pay in the calculation of FLSA overtime. Since December of 2000, the Association has received the overtime calculation information referenced in Stipulation 13 every every 28 days. Whereas the FLSA does not require payment of the overtime rate until the employee exceeds a set number of hours worked in a work period, the County pays the overtime rate specified in Sec. 14.01 for "hours worked in excess of their normal regular scheduled workdays or workweek as defined

in Sec. 7.02" that do not qualify for overtime under the FLSA. The County argues that if the Association somehow believed that Sec. 14.01 overtime should be calculated in a similar manner as FLSA overtime, it should have raised the issue long before now. The County asserts that this dispute only involves the overtime pay the Association bargained for and receives by contract up to the point where federal law controls. As to that contractual question, the rules of contract interpretation completely resolve the matter, such that any reliance by the Association on FLSA overtime methodology must be ignored.

For all of those reasons, the County asserts that the grievance must be denied.

Association Reply

The Association elected not to file a reply brief.

County Reply

The County argues that the Association is asking the Arbitrator to exceed his role as defined in Sec. 6.03(c) by effectively changing the term "straight time hourly rate" to "regular rate" and then interpreting it based on the history and administration of the FLSA. The County's interpretation is supported by uniform, longstanding and unequivocal practice. The "straight-time hourly rate" language has been in Sec. 14.01 since at least 1980. It therefore predates the U.S. Supreme Court's 1985 ruling in GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY that the provisions of the FLSA apply to state and local governments. There is no basis in the record to support the Association's speculation that those who negotiated the "straight-time hourly rate" language were laymen or that they intended that term to be synonymous with the FLSA's definition of "regular rate." On the contrary, if the parties had intended the provisions of the FLSA to be incorporated into the contract, the parties could have used language consistent with that of the FLSA or stated that the FLSA was incorporated into the Agreement. It is true that the FLSA provides that undesirable pay and educational incentive pay are included in the calculation of the FLSA "regular rate," but it is also true that the FLSA does not make those calculations applicable to hours that are not worked beyond the 171 hours in a 28 day work period. The Association improperly seeks to rely on parts of the FLSA while asking for more than the FLSA requires in other respects.

The phrase at issue has a meaning clear within labor parlance and is equally clear within the confines of the collective bargaining agreement. That clarity is reinforced by the fact that the language has remained unchanged for many years and over the course of many contracts. If the Association wants the language changed, it should do so at the bargaining table and not by attempting to contort the language and speculate about its genesis.

DISCUSSION

The language of the Agreement provides strong support for the County's position in this case.

As the County argues, Sec. 14.01 specifically and expressly provides that the "straight-time hourly rate" includes longevity pay. By making an express reference including longevity pay in the Sec. 14.01 overtime rate calculation, and by not making any similar express reference to undesirable pay or to education incentive pay, the language strongly implies that only longevity pay is to be included in that calculation along with the hourly rate specified in Sec. 7.01. To the same effect is the presence of language in Sec. 7.07(a) and (b), which provides that "Longevity pay shall be included in the employee's regular biweekly pay and shall have the effect of increasing the employee's basic pay in the amounts indicated above." There is no similar language in Sec. 7.09 regarding undesirable pay or in Sec. 7.06/Appendix B regarding educational incentive pay. Again, the strong implication is that longevity pay is to be included in the calculation of the Sec. 14.01 "straight-time hourly rate," but undesirable pay and educational incentive pay are not.

Compared with those rather strong indicators, the Association offers unpersuasive factually-unsupported speculation about what the drafters of Sec. 14.01 intended when they agreed to the term "straight-time hourly rate" several years before the U.S. Supreme Court Garcia decision determined that the FLSA was applicable to state and local governmental employers.

Also unpersuasive is the Association's attempt to rely on the principle that an interpretation that is consistent with external law should be favored over one that is not. As the County points out, the FLSA does not apply to the non-FLSA overtime at issue in this case. Thus, the County is not asking the Arbitrator to adopt or endorse an interpretation that would authorize or require the County to violate the FLSA as regards the non-FLSA overtime at issue here.

The Association does persuasively argue that the County's interpretation involves one overtime rate calculation method for "hours worked in excess of [the employee's] normal, regular scheduled workdays or week as defined in 7.02" which also qualify as for overtime under the FLSA, and a different overtime rate calculation method for such hours if they do not qualify as overtime under the FLSA. In contrast, the Association's interpretation would involve a single, consistent overtime rate calculation -- and hence a single, consistent meaning for "straight-time hourly rate" -- for both of those categories of overtime. In that regard the Association's interpretation is arguably more consistent with the Sec. 14.01 phrase ". . . in all circumstances . . .".

On balance, the Arbitrator nonetheless finds the County's interpretation to be more firmly supported by the language of the Agreement than the Association's.

If there were any doubt in that regard, the evidence concerning the history of administration of Sec. 14.01 persuasively resolves the matter in the County's favor. The longstanding, uniform and unequivocal past practice evidence squarely supports the County's interpretation and squarely contradicts the Association's. The Stipulations establish that since at least 1980 the County has always included longevity pay and only longevity pay in addition

to the employee's Sec. 7.01 hourly rate within the calculation of non-FLSA overtime for hours worked outside of an employee's regular schedule. That practice remained the same notwithstanding the subsequent introductions to the Agreement of undesirable pay and of educational incentive pay and their inclusions in materially the same form as they exist in the Agreement in 1999 and 1992, respectively. The County has complied with the FLSA where it requires compensation over and above that required by Sec. 14.01 and the Agreement, by paying overtime calculated as required by the FLSA. Stipulation 13 establishes that since December of 2000, payroll for the members of the Association bargaining unit has included a spreadsheet that contains contractual and FLSA overtime, as well as details for the calculation of FLSA overtime; and that the spreadsheet is provided to the Association every 28 days.

In the face of what therefore appears to have been clear knowledge of those practices, the Association has not sought a change in the pertinent Agreement language during successive rounds of negotiation, and has not filed a grievance on the subject since 1999, as noted in Stipulation 17. The Association has therefore effectively acquiesced to the propriety of the County's interpretation at issue in this case. If the Association wants to change the language and associated practices, it will need to do so at the bargaining table.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

Section 14.01 of the Collective Bargaining Agreement does not require the inclusion of Section 7.09 undesirable pay and Section 7.06/Appendix B educational incentive pay within the calculation of non-FLSA overtime for hours worked outside of an employee's regular schedule. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 14th day of July, 2009.

John R. Emery /s/
John R. Emery, Arbitrator

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