

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**THE LABOR ASSOCIATION OF WISCONSIN, INC., (LAW)  
WINNEBAGO COUNTY DEPUTIES ASSOCIATION, LOCAL 107**

and

**WINNEBAGO COUNTY**

Case 422  
No. 69468  
MA-14616

(Grievance 2009-25)

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**Appearances:**

**Benjamin Barth**, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of LAW.

**Anna Pepelnjak**, Attorney, Weiss, Berzowski, Brady, LLP, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of Winnebago County.

**ARBITRATION AWARD**

The Labor Association of Wisconsin, Inc., Winnebago County Deputies Association, Local 107, hereinafter LAW or the Association, and Winnebago County, hereinafter the County, requested a list of five arbitrators from the Wisconsin Employment Relations Commission from which to select a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Raleigh Jones, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on May 21, 2010, in Oshkosh, Wisconsin. The hearing was transcribed. The parties submitted briefs and reply briefs, the last of which was received by July 27, 2010 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUE**

The parties were unable to stipulate to the issue(s) to be decided in this case. The Association framed the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement when it elected to compensate members of the Association in compensatory time off rather than overtime pay for being required to attend a physical exam outside of the regularly scheduled workday or workweek? If so, what is the appropriate remedy?

The County framed the issues as follows:

1. Did Winnebago County violate Article 8 of the collective bargaining agreement between Winnebago County and the Winnebago County Deputies Association by providing compensatory time at the straight rate to Deputy Nick Manthey for participating in a physical examination related to respirator use capability during his off-duty hours?
2. Does the record support the Association's contention that Winnebago County violated Article 8 of the collective bargaining agreement between Winnebago County and the Winnebago County Deputies Association by providing compensatory time at the straight rate to Deputies Amber Rozek, Tracy Handy, Wayne Pettit, Ky Rasmussen and Dave Kasper for participating in physical examinations related to respirator use during their off-duty hours?

I have not adopted either side's proposed issue(s). Based on the entire record, I find that the issue which is going to be decided herein is as follows:

Did the County violate Article 8 of the collective bargaining agreement when it paid six members of the bargaining unit with compensatory time at the straight time rate for attending a mandatory physical exam during their off-duty hours? If so, what is the appropriate remedy?

### **PERTINENT CONTRACT PROVISIONS**

The parties' 2007-09 collective bargaining agreement contained the following pertinent provisions:

#### Article 2

#### Management Rights

Except to the extent expressly abridged by a specific provision of this Agreement, the County reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement

with the Association. Nothing herein contained shall divest the Association from any of its rights under Wisconsin Statutes, Section 111.70.

...

#### Article 7

#### Work Week

The regular workweek for all employees shall consist of an average of 38.2 hours. The four least senior Corrections Officers and Narcotics Investigator may be scheduled to work various shifts and days as needed.

...

All other employees of the Department shall work a schedule consisting of six (6) consecutive days of eight (8) hours and ten (10) minutes each followed by three (3) consecutive days off. Provided, however, detective sergeant, detectives and juvenile officer shall work five (5) consecutive duty days followed by two (2) off days, followed by five (5) work days, followed by two (2) off days, followed by four (4) duty days, followed by three (3) off days, then repeating the cycle. A normal duty day shall consist of eight (8) hours and ten (10) minutes. Such employees shall be provided a paid lunch period within the duty shift as has been provided in the past.

...

#### Article 8

#### Extra Time

Time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half. To the extent permissible by law, time worked in excess of the regularly scheduled workday or workweek involving in-service training, schooling, departmental and shift meetings shall be paid at the rate of straight time, or time off at the same rate at the employee's option, however no accumulation of compensatory time shall be carried over from one year to the next. Paid vacation, paid holidays, paid compensatory time off shall be considered as hours worked for purposes of computing overtime.

Overtime rate shall be computed on base pay, plus school credits. Overtime shall be paid in quarter-hour increments with the last increment worked rounded to the nearest quarter hour.

It is understood that disciplinary actions resulting in the calling in of an employee at the end of this normal work shift for the purpose of redoing or properly completing work that should have been completed during the employee's regular shift shall not constitute compensable work.

...

#### Article 10

#### Call In Provisions

A minimum of two (2) hours calculated at the rate of time and one-half is guaranteed an employee who is requested to and returns for duty at a time when he would not otherwise have to be on duty.

...

#### BACKGROUND

The County operates a Sheriff's Department. That department, in turn, runs the County jail. The Association is the exclusive collective bargaining representative for certain Sheriff's Department employees, including the corrections officers who work at the jail.

...

Deputies in the Department are required to participate in mandatory drug tests in at least three separate situations: (1) if they are randomly selected to undergo a drug test, (2) if they are awarded a promotion or (3) if they receive a special assignment. The record indicates that since at least 2005, at least half a dozen officers who participated in drug tests during their off-duty hours received compensatory time at the straight time rate for doing so. Thus, the employees just referenced were not paid overtime for attending the drug tests during their off-duty hours. No grievance has been filed challenging that method of payment received by the affected employees (i.e. their receiving compensatory time at the straight time rate for attending drug tests during their off-duty hours).

...

All members of the Department's Corrections Division undergo mandatory annual tuberculosis (TB) skin tests. The test is administered in two parts: (1) the skin test and (2) reading the test within 48 hours. If either the testing or the reading or both cannot be accomplished during on-duty hours, they occur during off-duty hours. With one exception which will be noted later, the record indicates that when the testing or reading or both occurred during the employee's off-duty hours, they received compensatory time at the straight time rate for doing so. Thus, the employees were not paid overtime for either the testing or reading of a

TB test that occurred during the employee's off-duty hours. No grievance has been filed challenging the method of payment received by the affected employees (i.e. their receiving compensatory time at the straight time rate for either the testing or reading of a TB skin test that occurred during the employee's off-duty hours).

In 2003, Deputy Jason Freeman underwent TB testing and reading while he was off duty. He put in for overtime pay for each event. Initially, his request for overtime pay was denied, but eventually, the County paid him four hours of overtime pay for same.

### FACTS

OSHA regulations require the use of respirators in certain emergency situations in the County Jail. As a result, the County requires corrections officers to answer certain questions on a form regarding their ability to wear a respirator. The answers which they supply on these forms are subsequently reviewed by non-County medical personnel. The medical professionals identify employees whose responses require additional analysis. Those employees are required to participate in an off-site, non-County physical examination to determine if they are physically capable of donning and using a respirator.

On May 21, 2009, Lt. Mack notified Officer Nicholas Manthey, in writing, that "[t]he nurse that evaluated your 'Respirator Medical Exam' has determined that you need a physical exam." The memo then went on to specify when and where Manthey was to report for the physical exam. The memo then went on to say "This is an employment requirement so you are required to attend and you will be compensated." The memo did not specify how he would be compensated though. Manthey did as directed and attended the physical exam on June 5, 2009. Five other bargaining unit employees were also directed to attend physical exams for the same reason, but the record does not indicate who directed them to attend or when they attended. Thus, six unit employees were directed to attend a physical exam. The six employees were Manthey, Amber Rozek, Tracy Handy, Wayne Pettit, Ky Rasmussen and Dave Kasper. One of the employees who attended the physical exam – Officer Manthey – described his examination as "pretty thorough", involving lung function testing, color blindness testing and "basically almost everything that you'd get in a regular physical exam going to your regular doctor."

All six of the officers just referenced attended their physical exam outside their regular work shift. Afterwards, each submitted a request for overtime for attending the physical exam during their off-duty hours. Their request for overtime was denied. Instead, each was paid compensatory time at the straight time rate for attending their physical exam.

The Association grieved the denial of overtime pay for the six employees. The grievance was processed through the contractual grievance procedure. When it was appealed to the third step, the Employer's Human Resources Director averred that its past practice was to pay employees for the time spent at physical exams as compensatory time – not overtime. The grievance was ultimately appealed to arbitration.

## POSITIONS OF THE PARTIES

### Association

The Association contends the Employer violated the collective bargaining agreement when it paid the six unit employees who were required to attend a physical exam while off duty with compensatory time at the straight time rate rather than overtime. It elaborates on this contention as follows.

First, it addresses what it calls the relevant contract language, namely the first two sentences in the first paragraph of Article 8. According to the Association, those sentences are clear and unambiguous in providing that overtime applies to all “time worked” in excess of the “regularly scheduled workday or workweek”, except in four named situations, to wit: training, schooling, departmental and shift meetings. The Association contends that physical exams do not fall under any of the four situations just noted, so the directive contained in the first sentence that all “time worked” in excess of the “regularly scheduled workday or workweek” applies here.

Next, the Association argues that notwithstanding the County’s contention to the contrary, this case should not be controlled by an alleged past practice. Instead, as the Association sees it, the contract language should be controlling. Here’s why. The Association cites the standard arbitral principle that when the contract language is clear and unambiguous (which the Association maintains is the situation here), then there is no need for the arbitrator to even consider an alleged past practice. The Association asks the arbitrator to follow that principle here.

However, if the arbitrator does consider the alleged past practice, the Association submits that the County did not present sufficient evidence to establish a binding past practice which is entitled to contractual enforcement. The Association cites the standard arbitral principles for establishing a past practice (i.e. that it be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time) and asserts they were not met here. The Association points out that while ten witnesses testified at the hearing about the supposed “practice”, they all testified about their experience dealing with TB and drug tests. The Association emphasizes that this case does not involve a TB test or a drug test. Instead, it involves a physical exam. The Association maintains that distinction is important. Building on that premise (i.e. that a physical exam is not the same thing as a TB test or a drug test), it’s the Association’s view that the Employer did not prove the existence of a practice that employees are paid at compensatory time for attending physical exams while off duty.

The Association therefore asks the arbitrator to sustain the grievance and find a contract violation. As a remedy, the Association seeks two hours of overtime pay for each of the affected employees.

## County

The County contends it did not violate the collective bargaining agreement when it paid six employees with compensatory time at the straight time rate for participating in a physical exam related to respirator use during their off-duty hours. As the County sees it, overtime was not owed them pursuant to a past practice. It elaborates on this contention as follows.

While it will be noted in more detail later, the County sees this case as a past practice case. That being so, it first argues that the contract language which the Association relies on (namely, Article 8) should not govern the outcome of this case. Here's why. As the County sees it, that provision is not as clear and unambiguous as the Association contends it is. In that regard, the County cites the legal doctrine of "latent ambiguity" for the proposition that there can be no such thing as a clear and unambiguous contract provision. The County asserts that Article 8 is ambiguous for the following reasons. First, "the record lacks evidence upon which to conclude that the drafters intentionally omitted medical exams and screenings" when considering the four named exceptions referenced in the second sentence of Article 8 (i.e. in-service training, schooling, departmental and staff meetings). Second, the County maintains that the phrase "regularly scheduled workday or workweek" is also ambiguous in that it "can either be considered in the general or the particular." As the County sees it, Article 8 is ambiguous, so past practice should be used to fill in the contract's gaps.

Next, as just noted, the County avers there is a past practice that is dispositive of the outcome here. According to the County, the practice is this: when employees attend what it characterizes as "mandatory medical testing" while off duty, they are paid with compensatory time at the straight time rate rather than overtime. It relies on the following to support that contention. First, the County points to the half dozen witnesses who testified at the hearing that they were paid with compensatory time at the straight time rate (rather than overtime) for attending TB tests and drug tests. Second, while the County acknowledges that a physical exam is more significant than a TB test and a drug test, the County submits that should not matter. According to the County, it's not the complexity of the exam that matters; rather, what matters is that it qualifies the employee to perform the essential functions of their job. The County argues that a physical exam is similar in that respect to TB tests and drug tests. Third, the County points out that with one exception, those employees who had TB tests and drug tests did not challenge the fact that they were paid at straight time rather than overtime. The County submits that their failure to grieve that payment means that the Association has acquiesced to the "practice" covering "mandatory medical testings." With regard to the previously-cited exception (i.e. the situation where Deputy Freeman was paid overtime rather than straight time for participating in a TB test), the County implies that instance was an aberration because it occurred just once and has not been repeated since 2003. Fourth, the County maintains that "[i]n fact, an argument could be made that these tests are not compensable at all because they are just part of being ready for work." Having broached that argument, the County then backs off and emphasizes that here, though, it did pay the six officers for attending their physical exams while off duty (albeit with compensatory time at the straight time rate rather than overtime). Putting all the foregoing together, the County

maintains that it has shown a clear and unequivocal past practice that “mandatory medical testing” is compensated at straight time rather than overtime.

Given the foregoing, it is the County’s position that it did not violate the collective bargaining agreement by its actions herein. It asks the arbitrator to enforce the practice and deny the grievance.

In the event that the arbitrator finds a contract violation, the Employer implies that no remedy is owed to employees Rozek, Handy, Pettit, Rasmussen and Kasper because they failed to appear and/or testify at the hearing. It notes in this regard that just one of the individuals named in the grievance – namely, Deputy Manthey – took the stand at the hearing.

### DISCUSSION

This dispute involves the payment due those employees who attended physical exams outside their regular work shift. The County paid them with compensatory time at the straight time rate. The Association contends overtime was owed instead. Based on the rationale which follows, I find that overtime was owed under the circumstances.

I begin with a description of how my discussion is structured. Attention will be focused first on the applicable contract language. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves an alleged past practice.

The contract language relevant to this contract dispute is contained in the first two sentences of Article 8 (which is entitled “Extra Time”). The first sentence deals with overtime and when it applies. It provides that “time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half.” The plain meaning of that sentence is that if an employee works outside their “regularly scheduled workday or workweek”, they will receive overtime pay for same. The next sentence goes on to create some exceptions. It says that in four situations, overtime will not be paid and employees will instead be paid at straight time even if they work outside their “regularly scheduled workday or workweek.” Said another way, the second sentence in Article 8 says that in four situations, when an employee works outside their “regularly scheduled workday or workweek”, they will not receive overtime, but rather will get paid at straight time. The four situations are “in-service training, schooling, departmental and shift meetings”. When these two sentences are read together, they say that overtime applies to all “time worked” in excess of the “regularly scheduled workday or workweek”, except in four situations, to wit: in-service training, schooling, departmental and shift meetings.

Application of that language here yields the following results. The record indicates that six bargaining unit employees were directed to have physical exams. All did as directed. Additionally, the record indicates that all six employees took their physical exam at a time when they were off duty. While the Employer implies that going to a mandatory doctor’s

appointment does not qualify as “time worked”, I have no qualms finding that an employee’s getting a physical exam at the Employer’s directive qualifies as “time worked” within the meaning of the first sentence of Article 8. Since all six employees “worked” on the day they got their physical exam at the Employer’s directive, and did so at a time which was outside their regular work shift, it follows that they qualified for overtime within the meaning of the first sentence of Article 8. The next question is whether a physical exam falls under any of the four situations named in the second sentence (i.e. “in-service training, schooling, departmental [or] shift meetings”). I find it does not.

The foregoing discussion shows that the six employees qualified for overtime pay under the first sentence of Article 8. Additionally, the “work” they did that day (i.e. attend a physical exam) does not fall under any of the four situations named in the second sentence. That being so, if my analysis stopped right here, my finding would be this: physical exams do not fall under any of the four situations named in the second sentence of Article 8, so the directive contained in the first sentence of Article 8 that all “time worked” in excess of the “regularly scheduled workday or workweek” applied to the time involved here.

Notwithstanding the contract interpretation noted above, the County contends that overtime did not have to be paid to the employees because of a past practice concerning same. According to the County, the practice is this: when employees attend “mandatory medical testing” while off duty, they are paid with compensatory time at the straight time rate rather than overtime.

Past practice is a form of evidence which is commonly used and applied in contract interpretation cases. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means. Arbitrators traditionally look at past practice when the contract language is ambiguous. The key word in the previous sentence is “ambiguous”. The reason that word is key is because that is not the case here. In my view, the meaning of the first two sentences in Article 8 is clear and unambiguous. As a result, it is unnecessary in this case to use past practice to interpret the meaning of the contract language.

That said, the County sees this case exclusively as a past practice case. Obviously, were I to decide this case without reviewing the alleged past practice, I would not have addressed the County’s contention regarding same. I have therefore decided to address the alleged past practice to complete the record.

The following facts pertain to the alleged past practice. Since at least 2005, at least half a dozen officers who participated in drug tests during their off-duty hours received compensatory time at the straight time rate for doing so. Thus, the employees just referenced were not paid overtime for attending the drug tests during their off-duty hours. No grievance has been filed challenging that method of payment received by the affected employees (i.e. their receiving compensatory time at the straight time rate for attending drug tests during their

off-duty hours). Additionally, for a number of years, all members of the Department's Corrections Division have undergone mandatory annual tuberculosis (TB) skin tests. With one exception which occurred in 2003, when the TB testing or reading or both occurred during the employee's off-duty hours, they received compensatory time at the straight time rate for doing so. Thus, the employees were not paid overtime for either the testing or reading of a TB test that occurred during the employee's off-duty hours. No grievance has been filed challenging the method of payment received by the affected employees (i.e. their receiving compensatory time at the straight time rate for either the testing or reading of a TB skin test that occurred during the employee's off-duty hours).

For the purpose of discussion, it is assumed that the above-noted facts establish a practice that employees who have drug tests and TB tests performed while off-duty are paid at straight time rather than overtime for same.

The Employer argues that the practice is broader than what I just stated. According to the Employer, the practice is that when employees attend any "mandatory medical testing" while off duty, they are paid at straight time rather than overtime. I find the phrase "mandatory medical testing" is too broad given the factual circumstances. The following shows why. The facts referenced above just deal with drug tests and TB tests. That's it. This case though does not involve a drug test or a TB test. Instead, it involves a physical exam. The Employer contends that physical exams are similar to drug tests and TB tests and, as a result, should be subsumed into the existing practice. While I acknowledge that a physical exam has some similarities to a drug test and a TB test, I decline the Employer's implicit invitation to expand the practice beyond its current scope to include physical exams.

Here's why. It would be one thing if the practice referenced above had a contractual basis. However, it does not. When I previously reviewed the applicable contract language, it was noted that the second sentence in Article 8 contains four situations where the parties agreed overtime would not apply. A drug test and a TB test do not fit into any of the four situations noted in that sentence. That means that the practice that exists here - whereby employees are paid at straight time for attending drug tests and TB tests while off duty - does not have a contractual basis. Since there is no contractual basis for the existing practice, it further follows that there is no contractual basis for expanding the practice to include physical exams along with drug tests and TB tests.

Aside from that, even if I'm wrong about the scope of the current practice, and the current practice does already cover physical exams (as alleged by the Employer), that practice cannot be enforced here for the following reason. It is a well accepted principle of contract interpretation that contract language which is clear and unambiguous outweighs or trumps a past practice. Even a well-established and long-standing practice cannot be used to give meaning to, or countervail, a provision which is clear and unambiguous. When a conflict exists between the clear and unambiguous language of a contract and a long-standing practice, arbitrators usually follow the contract, and not the practice. In accordance with that generally-

accepted view, the undersigned holds likewise. Thus, the plain language of Article 8 controls, not a contrary practice.

Having rejected the Employer's contention that a past practice supports its denial of overtime, it is held that the Employer should have paid the employees overtime pursuant to the first sentence in Article 8. Since that did not happen, the Employer violated that provision.

I find that the remedy which the Employer owes in this case is as follows. First, Article 10 says that when an employee works overtime, they are guaranteed a minimum of two hours. Given that provision, the Employer is to pay the employees two hours of overtime pay. Second, the Employer is to pay this amount to all six of the employees named in the grievance.

In light of the above, it is my

**AWARD**

That the County violated Article 8 of the collective bargaining agreement when it paid six members of the bargaining unit with compensatory time at the straight time rate for attending a mandatory physical exam during their off-duty hours. They were contractually entitled to overtime for same. To remedy this contract violation, the County shall pay each of those employees two hours of overtime pay.

Dated at Madison, Wisconsin, this 28th day of September, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator