BEFORE THE ARBITRATOR

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 421
No. 69467
MA-14615

(Grievance 2009-28; Marousek Grievance)

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 and June 30, 2010, in Oshkosh, Wisconsin. The hearing was transcribed. The parties submitted briefs on August 9, 2010. On August 10, 2010, the Examiner was notified that the parties would not be filing reply briefs, 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 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 compensated Deputy Charles Marousek in straight compensatory time off rather than overtime pay, for being required to work in excess of his regularly assigned workday on July 16, 2009? If so, what is the correct remedy?

The County framed the issue as follows:

> Did Winnebago County violate Article 8 of the collective bargaining agreement between Winnebago County and the Winnebago County Deputies Association by refusing to pay overtime wages to Deputy Charles Marousek for his attendance at a Wisconsin Department of Transportation meeting as a representative of the Winnebago County Sheriff's Office?

I have not adopted either side's proposed issue. 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 did not pay overtime to Deputy Marousek for staying three-fourths of an hour past the end of his normal workday on July 16, 2009? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

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

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.

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for certain Sheriff's Department employees, including Deputy Charles Marousek.

The record indicates that the Winnebago County Sheriff's Department now practices "community policing". According to that policing philosophy, law enforcement agencies partner with community-based organizations to share ideas and information to enhance their mutual functioning. These partnerships cover a wide range of community stakeholders. The theory is that by sharing insights, responses and experiences, all parties become better prepared to handle difficult issues as they occur. To effectuate the community policing philosophy, officers attend various types of meetings. These meetings are the vehicle by which communication occurs. When officers attend these meetings, they do so as representatives of the Sheriff's Department. Some of the meetings relate directly to law enforcement, such as fire investigations, SWAT teams and gang task force. Other meetings are indirectly related to law enforcement. For example, officers also attend meetings related to mental health issues, elder abuse, alcohol and tobacco cessation, community watch, neighborhood watch, transportation/construction issues and outreach to the business and Hispanic community. Many of these meetings are held off-site (meaning at locations other than the Sheriff's Department offices). The officers who attend these meetings are required to prepare a report afterwards summarizing the meeting. This report is then put on a shared computer so that other employees in the department have access to the information contained therein.

In the context of this case, what is important about the meetings just referenced is how the employees have been paid for attending these meetings while off duty. (NOTE: If they attended these meetings while on duty, they were paid their regular wage). The record indicates that when the employees attended these meetings while off duty, they have been paid with compensatory time at the straight time rate. Thus, they have not been paid overtime for attending meetings during their off-duty hours. In that regard, the Department's payroll records indicate the following. In 2006, the Department paid out about 183 hours of compensatory time to employees who attended meetings while off duty and no overtime. In 2007, the Department paid out about 113 hours of compensatory time to employees who attended meetings while off duty and a quarter hour of overtime. In 2008, the Department paid out about 71 hours of compensatory time to employees who attended meetings while off

duty and a quarter hour of overtime. In 2009, the Department paid out about 166 hours of compensatory time to employees who attended meetings while off duty and a quarter hour of overtime. All the compensatory time just referenced was paid at the straight time rate. The uncontradicted testimony at the hearing was that the quarter hour of overtime which was paid out in 2007, 2008 and 2009 was simply a payroll coding error which was not caught at the time. In other words, that overtime was paid by mistake.

Until this case arose, no grievance had been filed by either an employee or the Association challenging the method of payment referenced above (i.e. employees receiving compensatory time at the straight time rate for attending meetings while off duty).

The only instances referenced in the record where overtime was intentionally paid to an employee who attended a meeting while off duty was as follows. Deputy Jason Freeman testified that he was paid overtime for attending two meetings while off duty: one in 2001 and one in 2003 or 2004. On both occasions, Deputy Freeman was ordered in by his supervisor for what Freeman characterized as an "internal investigation." These meetings were single events, not part of a series of meetings. Freeman and his supervisor were the only persons in attendance at either one of these meetings. Following these two meetings, Deputy Freeman's supervisors ordered him to submit the time as overtime, which he did.

FACTS

As part of the Department's community policing philosophy, in the summer of 2009, Lt. Vendola-Messer assigned Deputy Marousek to attend several meetings as a representative of the Winnebago County Sheriff's Department. Marousek did as directed and attended those meetings.

This case involves his pay for attending one of those meetings.

The pertinent facts are as follows. On July 16, 2009, Deputy Marousek was on duty as a Winnebago County Deputy Sheriff. He was scheduled to work from 6:00 a.m. to 2:10 p.m. that day. Starting at noon that day, he attended a meeting in Oshkosh conducted by the Wisconsin Department of Transportation (DOT). That meeting had to do with plans for the expansion of the Highway 41 corridor which runs through Winnebago County. About 80 people were at the meeting. Deputy Marousek was the only representative of the Winnebago County Sheriff's Department present at the meeting. The reason Deputy Marousek was at the meeting was to determine how the construction would impact the Sheriff's Department's law enforcement functions on the freeway. Marousek attended the meeting in uniform, as a representative of the Winnebago County Sheriff's Department. The meeting ended about 2:00 p.m., whereupon Marousek left and drove his squad car back to the Sheriff's Department, a distance of about 10 miles. After emptying his squad of personal gear, Deputy Marousek clocked out at 2:45 p.m.

Afterwards, Marousek sought three-fourths of an hour of overtime for the time between the end of his normal shift and 2:45 p.m. when he clocked out. He first submitted a signed "MPF slip" claiming entitlement to three-fourths of an hour of overtime, coded as 907 for "meeting". Captain Christopherson denied the request for overtime, and wrote "Please submit for comp time" on the MPF form. Deputy Marousek then signed and submitted another MPF form, requesting overtime, coded as 600 for "late call". A "late call" occurs when a deputy is on a call for service, such as a traffic stop or a domestic abuse call, and his/her duties unexpectedly extend beyond his/her scheduled end of shift. Captain Christopherson denied Deputy Marousek's request, saying "Please submit for comp time. Meeting Attendance #907". Deputy Marousek then submitted a third form, coded 907, requesting compensatory time at the straight time rate. He received compensation in that form.

The Association grieved the denial of overtime pay for Marousek for the matter referenced above. The grievance was processed through the contractual grievance procedure. When it was appealed to the third step, the Employer's Human Resource Director averred that "It is a long standing past practice that when an officer attends a meeting as a representative of the Sheriff's Office any time spent at the meeting outside of their normal working hours has been credited to the affected individual's comp time account." The grievance was ultimately appealed to arbitration.

. . .

While it is not referenced on the above-captioned grievance, the record indicates that per Lt. Vendola-Messer's directive, Deputy Marousek also attended five TRIAD meetings off duty in late 2009 and early 2010. Each time, he was paid compensatory time at the straight time rate for the meeting he attended while off duty. After each meeting, he submitted an overtime request. All five of his overtime requests were denied.

POSITIONS OF THE PARTIES

Association

The Association contends the Employer violated the collective bargaining agreement when it compensated Deputy Marousek in compensatory time off rather than overtime pay for being required to work in excess of his regularly assigned workday on July 16, 2009. 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 the meeting involved here (i.e. a DOT meeting) does 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.

The Association argues that the Employer has "overreached" in its interpretation of the word "departmental". To support that premise, the Association notes that when the Employer made its opening statement, it said that "any meeting" attended on behalf of the department qualifies as a "departmental meeting". According to the Association, that assertion is "too expansive, self-serving and clearly wrong." Here's why. First, the Association points out that no bargaining history evidence was presented at the hearing to define the term "departmental". Second, since there is no bargaining history evidence to rely on, the Association cites the definition of "department" in *Black's Law Dictionary* as "a principal branch or division of government." The Association concedes that any meeting held by the Sheriff's Department concerning an internal matter would be a "departmental" meeting, per the dictionary definition. However, the Association opines that a meeting held by an outside agency – as happened here – could not be a "departmental" meeting. Third, the Association believes that even more significant than the dictionary definition is its placement next to the phrase "shift meetings". The Association argues that if the parties had intended "all meetings" to be covered by the overtime exclusion, they would have simply used the term "meetings" in lieu of the terms "departmental" and "shift meetings". As the Association sees it, it is illogical to place a specific term (i.e. the term "shift meeting") after the term "departmental", if the intent of "departmental" is to include any and all meetings. Doing so here would render the term "shift" void if "departmental" was intended to be all-inclusive.

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 acknowledges that while several deputies have been paid straight time for attending various meetings, the Association points out that Deputy Freeman twice received overtime for attending internal investigation meetings – once about 2001 and once in 2003. It also avers that "many employees simply do not challenge the position of their Employer even if it involves a violation of the collective bargaining agreement." It also points out that after Deputy Marousek filed the instant grievance, other employees have filed similar grievances seeking overtime for attending meetings. Building on the foregoing, it's the

Association's view that the Employer did not prove the existence of a practice that employees are paid at straight time for attending meetings.

The Association therefore asks the arbitrator to sustain the grievance and find a contract violation. As a remedy, the Association seeks three-fourths of an hour overtime pay for the grievant.

County

The County contends it did not violate the collective bargaining agreement when it paid Deputy Marousek compensatory time at the straight time rate for his attendance at a Wisconsin Department of Transportation (DOT) meeting during off duty hours. As the County sees it, overtime was not owed for two main reasons. First, the applicable contract language lists "departmental meetings" as an overtime exception, and it's the County's view that the meeting which the grievant attended was a "departmental meeting". Second, the County argues that there is a past practice applicable to this matter, and that practice supports the County's interpretation of the contract language. It elaborates on these contentions as follows.

The County notes at the outset that Article 8 says that overtime does not apply to four situations, to wit: "in-service training, schooling, departmental and shift meetings." According to the County, the meeting involved here (namely, a DOT meeting) fits into the third category (i.e. a "departmental" meeting). Here's why.

The County initially notes that the term "departmental meeting" is not defined in the contract. Building on that premise, the County notes that at the hearing, several definitions were offered. First, Deputy Marousek offered his view that a "departmental meeting" is when the entire department – including all shifts and all functions – are called together at once. According to Marousek, such a meeting had occurred only once in his 18 years of service. The County characterizes that definition as too constrictive because it would rarely be used. Second, Deputy Freeman offered his view that a "departmental meeting" is a meeting "run by the department". Freeman felt that if someone unrelated to the Sheriff's Department set up the meeting, it would no longer qualify as a "departmental meeting". Finally, Captain Christopherson offered his view that a "departmental meeting" covers all meetings that officers attend in their official capacity.

The County maintains that the last view of a "departmental meeting" (i.e. Christopherson's view, referenced above) should be applied here because this definition "aligns more consistently with the other exceptions listed in Article 8 [in-service training, schooling, and shift meetings] because each of those events occurs on a repetitive, not isolated, basis." It notes in this regard that deputies regularly attend schooling and training. According to the County, this repetitive feature distinguishes the four situations referenced in Article 8 from the internal investigation meetings which were cited by Deputy Freeman. Thus, it's the County's view that when the contract language is given its plain meaning, a "departmental meeting" is any meeting that officers attend in their official capacity.

If the arbitrator finds that the meaning of "departmental meeting" is ambiguous, and is in need of clarification, then the County maintains there is an applicable past practice. According to the County, the practice is this: when employees attend any meeting in their official capacity, they are paid with compensatory time at straight time rather than overtime. It relies on the following to support that contention. First, the County points to the numerous witnesses who testified at the hearing that they were paid with compensatory time at the straight time rate (rather than overtime) for attending meetings outside the department in their official capacity. Second, the County points out that until this grievance was filed, those employees who attended meetings outside the department in their official capacity did not challenge their method of payment (namely, that they were paid at straight time rather than overtime for attending those meetings). The County submits that their failure to grieve that payment means that the Association has acquiesced to the "practice" of defining a "departmental meeting" as all meetings that officers attend in their official capacity. Putting both of the foregoing points together, the County maintains that it has shown a clear and unequivocal past practice that when officers attend a meeting in their official capacity, that qualifies as a "departmental meeting" within the meaning of Article 8.

In sum then, it's the County's position that it did not violate the collective bargaining agreement by denying overtime to Marousek. It asks that the grievance be denied.

DISCUSSION

At issue here is the type of payment due Deputy Marousek for staying three-fourths of an hour past the end of his normal workday on July 16, 2009. The County paid him 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 not 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.

Since this is a contract interpretation case, I've decided to begin with the following introductory comments about how I go about interpreting contract language. In a contract interpretation case, my interpretive task is to determine if the meaning of the contract language is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then apply that meaning to the facts. Attention is now turned to making that call.

The contract language relevant to this 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.

This case involves the third category referenced in the last sentence of the preceding paragraph (i.e. "departmental" meetings). The relatively simple question to be answered here is whether the meeting which Deputy Marousek attended on July 16, 2009 qualified as a "departmental" meeting. If it did, then overtime was not owed because the Employer does not have to pay overtime when employees attend "departmental" meetings. However, if the meeting in question did not qualify as a "departmental" meeting, then that overtime exception does not apply and overtime was owed.

The focus now turns to making that call. It is noted at the outset that the contract does not say what qualifies as a "departmental" meeting. That term is not defined. Given that contractual silence on its meaning, some witnesses offered their own definitions at the hearing. For example, Deputy Marousek felt that a "departmental" meeting is when the entire department (i.e. all shifts and call functions) are called together for a meeting. The record indicates that such a meeting has only occurred once in the last 18 years. While that definition is certainly a constricted meaning of the word "departmental", it is still a plausible interpretation/meaning. Next, Deputy Freeman felt that "departmental" meetings are those meetings run by the department (as opposed to someone outside the department). In my view, that's also a plausible interpretation/meaning. Finally, Captain Christopherson felt that a "departmental" meeting covers those meetings that officers attend in their official capacity (as representatives of the Department). I think that's also a plausible interpretation/meaning. While I could pick one of the meanings just proffered as being the one which – as the Employer put it in their brief – "aligns more consistently with the other exceptions listed in Article 8 [in-service training, school and shift meetings]", I've decided not to do that. Instead, I've decided to find that the word "departmental" is ambiguous because it is susceptible to more than one plausible interpretation/meaning concerning what qualifies as a "departmental" meeting.

Having just found that the word "departmental" is ambiguous, my interpretive task is now to determine whether the meeting which Deputy Marousek attended on July 16, 2009 qualified as a "departmental" meeting.

In litigating their case, the Employer relied on an alleged past practice to buttress their position that the meeting in question qualified as a "departmental" meeting.

Past practice is a form of evidence which is commonly used to help interpret ambiguous contract language. 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 language. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means.

I will first address whether a past practice is applicable here. It is generally accepted by arbitrators that for a practice to be considered indicative of the parties mutual intent and be binding, the conduct must be clear and consistent, of long duration and accepted by both sides. The County asserts that the record evidence meets all of these criteria and, thus, is entitled to be given effect herein.

The following facts pertain to the alleged past practice. Since at least 2006, when employees attend meetings while off duty, they have been paid with compensatory time at the straight time rate. In other words, employees have not been paid overtime for attending meetings during their off duty hours. The record indicates that in the four-year period between 2006 and 2009, the Employer paid out, on average, about 133 hours of compensatory time per year for attendance at meetings. Assuming that the average meeting lasted several hours, it can be surmised that officers attended dozens of meetings each year. Until this grievance arose, no grievance had been filed by either an employee or the Association challenging that method of payment (i.e employees receiving compensatory time at the straight time rate for attending meetings during their off duty hours). The only instances referenced in the record where an employee intentionally received overtime for attending a meeting while off duty were the two instances involving Deputy Freeman. Those two meetings can be distinguished on the grounds that they involved an internal investigation. An internal investigation is purely an in-house matter and, as such, differs from the other meetings referenced in this case. All the other meetings referenced in this case relate to the Employer's "community policing" efforts. A meeting relating to an internal investigation has no relationship to "community policing" and therefore is distinguishable.

Based on the foregoing, I find that the Employer established that a practice exists concerning what meetings qualify as "departmental" meetings within the meaning of the second sentence of Article 8. The practice is this: when employees attend a meeting in their official capacity (as a representative of the Sheriff's Department), that's a "departmental" meeting. That practice, which coincides with the definition of "departmental" proffered by Captain Christopherson at the hearing, establishes how the word "departmental" has historically been interpreted by the parties themselves. Specifically, it shows that a

"departmental" meeting refers to those meetings which employees attend in their official capacity (as a representative of the Department). It would be one thing if this practice conflicted with the contract language. However, it does not. Thus, this is not a situation where the practice is inconsistent with the contract language.

Application of that practice to the record facts yields the following results. As previously noted, the Department sends officers to various meetings as part of its community policing efforts. Pursuant thereto, Marousek was directed to attend a meeting which was arranged and conducted by the Wisconsin DOT concerning the Highway 41 expansion project. As such, Marousek attended that meeting in his official capacity (as a representative of the Sheriff's Department). Pursuant to the parties' past practice, that meeting qualified as a "departmental" meeting even though it was arranged and conducted by the Wisconsin DOT. Per the second sentence in Article 8, the Employer does not have to pay overtime to employees when they attend "departmental" meetings. Since that was what Marousek was doing when he stayed three-fourths of an hour past the end of his normal workday on July 16, 2009, the Employer did not have to pay him overtime for that time period.

In light of the above, it is my

AWARD

That the County did not violate Article 8 of the collective bargaining agreement when it did not pay overtime to Deputy Marousek for staying three-fourths of an hour past the end of his normal workday on July 16, 2009. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 27th day of October, 2010.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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