

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 716
No. 69602
MA-14670

(Grievance No. 51476 – New Uniforms)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Timothy Schoewe, Acting Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the grievance referenced above. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on July 15, 2010. The hearing was not transcribed. The parties filed briefs whereupon the record was closed October 12, 2010. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided herein. The Association frames the issue as follows:

When the Sheriff requires a change to the uniform requirements for Deputies, is the cost of purchasing the new uniform requirements included in the contractual uniform allowance, or are the new uniforms to be purchased at the expense of Milwaukee County separate from the uniform allowance?

The County frames the issue as follows:

Did Milwaukee County violate Section 3.06 of the Memorandum of Agreement when it did not furnish an entirely new set of uniforms to all deputies at County expense? If so, what is the remedy?

Although there is little substantive difference between the issues referenced above, I have adopted the County's proposed wording of the issue because it specifically references the collective bargaining agreement (while the Association's wording of the issue did not). Thus, the County's wording of the issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 2007-2008 collective bargaining agreement contained the following pertinent provisions:

3.06 UNIFORM ALLOWANCE

(1) Uniform allowance shall be paid by separate check to all employees in the bargaining unit as follows:

(a) Uniformed employees shall be furnished with a full uniform at time of hire or as soon thereafter as practicable. The uniformed items furnished shall be in accordance with the regulations of the Sheriff's Department setting forth prescribed minimum equipment for each employee. Any employee whose employment is terminated within two (2) years from the date of hire shall return all uniform items furnished by the County to the Sheriff's Department within seven (7) days of termination.

(b) The annual allowance for all employees shall be four hundred twenty five dollars (\$425.00).

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs.

This case involves the contractual uniform allowance.

When new deputies are hired, the County provides them with a uniform. The Employer pays for the uniform. After getting the uniform, the deputy is responsible for maintaining it at their own expense.

The collective bargaining agreement has a provision that gives employees a uniform allowance. This provision has been in the collective bargaining agreement since the 1970s. The dollar amount of the uniform allowance has increased over time. The current dollar figure for the allowance is \$425 per year. Taxes are taken out of that amount. That amount is to be used by the employees to launder, repair and replace their uniforms. Most of the employees get their uniform dry cleaned and pressed.

Sometimes, if a uniform is damaged, the Employer will give the affected employee a new uniform.

...

The remainder of this section deals with those instances where the Employer changed the uniform in some way, shape or form.

Prior to 1971, deputies wore green uniforms. In the late 1960s, the Department announced substantial changes to the uniform requirements of deputies on a Department-wide basis, a change which was permanently implemented in 1971. At that time, the uniforms were changed from green to brown and beige. When this changeover to the brown and beige uniforms occurred, the Department provided the new brown and beige uniforms to deputies at County expense. For the next 37 years, from 1971 to 2008, the Department's duty uniforms were brown and beige.

...

In 1987, the County required that a new identification patch be part of the uniform. A grievance arose concerning the cost of replacing that patch. At the arbitration hearing on that grievance, Arbitrator Coleen Burns gave an oral bench award, which she subsequently reduced to writing. MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), Case 236, No. 38099, MA-4432 (Burns, 1987). Therein, she wrote:

As set forth in the stipulation of facts, on prior occasions when there has been a change in the uniform, the County has provided the uniform modification items and has not deducted the expense of the items from the contractual uniform allowance. . .

(page 2).

She then addressed the record evidence which dealt with the replacement of patches on uniforms. After doing so, she held as follows:

. . .Applying the past practice herein, the undersigned is persuaded that the cost of installing new stripes and patches is a cost which is reimbursed in the contractual uniform allowance.

AWARD

When the Sheriff requires a change in the identification patch, thereby necessitating the removal of the old patch and sewing on of the new patch, the cost of the removal and sewing on is included in the contractual uniform allowance.

. . .

In 1992, Sheriff Richard Artison changed the uniform for sergeants. The memo implementing this change provided in pertinent part:

. . .all sergeants shall also attain the following uniform items, all of which will be paid for by the Sheriffs Department. . .

Thus, the Department provided the new uniforms at no expense to the sergeants.

. . .

In 2006, the Department changed the required badge for sworn members of the Department from a 7-pointed star to a 5-pointed star. This change was implemented on a Department-wide basis, and the County provided every sworn member of the Department with a new 5-pointed star badge at no cost to the individual.

. . .

The Department has various special units. Some of these units are the OWI task force, the motorcycle unit, the bicycle unit, doghandlers, horse patrol, GRIP, and TEU. The officers assigned to these units wear uniforms which are different from the regular uniforms. During the tenure of the current Sheriff (i.e. Sheriff David Clarke), changes have been made to the uniforms worn by the officers in the previously-mentioned units. Each time changes were made to the uniform of these special units, the County purchased the new uniforms for the members of those units. Thus, the officers did not pay for the new uniforms out of their own pocket.

. . .

In addition to the background noted above, the parties stipulated to the following:

1. Sometime in the 1990s, then Sheriff Artison directed that Sergeants wear white shirts. The white shirts were provided at County expense. Two Sheriffs later, Sheriff Baldwin directed Sergeants to wear brown shirts rather than white. When that happened, the County did not issue new brown shirts to Sergeants. The brown shirts were the same as worn before the white shirt transition, and were the same worn by Deputy Sheriff I's.
2. When the County changed the initial issue for new employees from a leather jacket to a brown gore-tex type jackets, the County did not provide these new gore-tex type jackets at County expense to those employees already issued a leather jacket, nor did the County require replacement of the leather jacket unless the garment failed to meet uniform standards.

...

The leather jackets referenced in Stipulation #2 above were issued to the deputies in the motorcycle division. Over time, the Department changed jacket styles and transitioned from leather to gore-tex jackets. The Employer paid for the new gore-tex jackets, but as noted in Stipulation #2 above, it did not provide gore-tex jackets to those deputies who already had a leather jacket.

FACTS

In August, 2008, Milwaukee County Sheriff David Clarke announced that he was comprehensively changing the required duty uniforms for all members of the Milwaukee County Sheriff's Department. As noted above, at the time, all uniformed members of the Department were required to wear brown pants and beige shirts. In a memo sent by Deputy Inspector Edward Bailey on August 7, 2008 to all sworn staff, he announced that the Department would begin the changeover to grey and black uniforms the week of August 11, 2008. He further announced that the process of changing over to the new duty uniforms would conclude on February 11, 2011, at which time the brown and beige uniforms would be "disallowed for wear". This August, 2008 announced changeover from brown pants and beige shirt to black pants and a grey shirt marked the first time the Department's uniform had been substantially changed on a Department-wide basis since 1971.

While this memo did not say so explicitly, it was implicit from the memo that employees would have to purchase the new uniforms themselves. In other words, the Employer would not be providing the new uniform to employees.

After the changeover to the new duty uniforms was announced, the Association filed a grievance on August 19, 2008. The grievance sought to have the Employer pay for the new uniforms.

In early 2010, the Employer's Step 3 grievance response denied the grievance and averred as follows:

Management has given the grievants three (3) years to replace their uniforms with the new style. Section 3.06 of the MOA provides \$425 each year for replacement of the uniforms. It is not unreasonable to require the grievants to replace their uniforms. There is no violation of the MOA.

The grievance was subsequently appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that the County violated Section 3.06 of the collective bargaining agreement when it did not provide the initial issue of the new uniforms to the deputies. According to the Association, it should have done so per a long-standing past practice. It's the Association's position that by requiring the deputies to pay for the new uniforms themselves, the Employer violated that practice which, in turn, violated the collective bargaining agreement.

The Association asserts at the outset that Section 3.06 does not say who pays for the new uniforms when a Sheriff changes the uniform requirements for members of the Department. That being so, it's the Association's view that the language is silent on that point. Building on that premise, the Association sees this case as a past practice case wherein the arbitrator has to review the parties' past practice to discern the parties' intent relative to paying for new uniforms.

According to the Association, the practice is this: when the Sheriff directs employees to wear a new uniform, the Employer provides the new uniform to employees at no expense to the employee. In other words, the Employer pays for the first issue of the new uniform, not the employee. It cites the following to support that contention. First, it notes that in 1971, when the Department changed from green duty uniforms to brown and beige, the County provided the new uniforms to members of the Department at County expense. Second, it notes that in the 1980's, when the Sheriff required a new patch to be placed on the uniform and that matter was grieved, the parties stipulated at the subsequent arbitration hearing "that on prior occasions where there has been a change in the uniform requirements for Deputies, the County has provided the uniform modification items at no expense to the members of the Department." Third, the Association notes that in 1992, Sheriff Artison ordered that all sergeants in the Department wear new uniforms, and the County provided the new uniforms to the sergeants at

County expense. Fourth, the Association notes that in 2006, Sheriff Clarke changed the required badge style. When that happened, the County provided members of the Department with the new badge at no cost to the individual. Fifth, the Association notes that under Sheriff Clarke, changes have been made to the uniforms worn by the officers in the OWI task force, the motorcycle unit, the bicycle unit, doghandlers, horse patrol, GRIP and TEU. Each time changes were made to the uniform of these special units, the County purchased the new uniforms for the members of those units. Thus, the officers did not pay for the new uniforms out of their own pocket. In the Association's view, the foregoing evidence establishes that whenever the Sheriff has changed the uniform requirements for members of the Department – either in whole or in part – “the County has provided the items meeting the new uniform requirements at no expense to the members of the Department.”

The Association maintains that the County's attempt to distinguish the instant case based on the Department's issuance of the brown gore-tex jacket does not carry water. Here's why. The Association acknowledges that when the County changed the jacket styles for the deputies in the motorcycle division from a leather jacket to a gore-tex type jacket, the County did not provide these new gore-tex type jackets at County expense to those employees already issued a leather jacket. The Association emphasizes that the Department does not require officers in the motorcycle division to wear the gore-tex jacket. It was, and still is, their choice whether they wear the leather jacket versus the gore-tex jacket. Thus, the Department did not require members to stop wearing their leather jackets unless the garment failed to meet uniform standards.

The Association argues that the past practice referenced above has been long-standing, repeated and consistent over time. Each time a change was made to the uniform – whether it was a major or minor change – “the County provided the initial issue of uniforms meeting the new uniform requirements at no expense to the individual members of the Department.” The Association maintains that the County violated this practice when it required employees to pay for the new uniform. According to the Association, the County should have provided the initial issue of the new uniforms at no cost to the employees.

Finally, the Association points out that the contractual uniform allowance has never previously been interpreted to require employees to purchase an entirely new duty uniform to comply with a comprehensive change to the departmental uniform. The Association contends that “if the members of the Department are forced to use three years of their contractual uniform allowance to purchase the new uniform requirements, then they will be left with no money to keep up and/or replace their worn uniforms.” It asserts that “following this line of logic would allow a Sheriff to change the required duty uniforms of the Department as often as he liked, with no impact whatsoever on the County, as long as the Sheriff gave members of the Department enough time to use multiple years of the uniform allowance during the changeover.”

The Association asks that the arbitrator sustain the grievance. As a remedy, the Association seeks an award requiring the County to purchase one full set of duty uniforms pursuant to Department specifications for minimum requirement for each member of the Association at no expense to the individual members.

County

The County contends that it did not violate Section 3.06 of the collective bargaining agreement by not providing employees with a new set of uniforms. It elaborates on this contention as follows.

As the County sees it, the contract language – or in this case, the lack thereof – should be controlling herein. It notes in this regard that the Association is not hanging its proverbial hat on any particular portion of Section 3.06 to prove a contract violation. It submits that the reason for that is because the contract language in Section 3.06 is silent on the matter involved here (i.e. who pays for new uniforms when the Sheriff changes the uniform requirements). According to the County, since the contract is silent on that topic, that means that the County did not violate any specific portion of Section 3.06. As the County put it in their brief, once the arbitrator reviews that contract provision and finds that it is silent on the topic involved here, “the case should end there.” The County maintains that if the arbitrator somehow finds that Section 3.06 requires the County to pay for new uniforms when the Sheriff changes the uniform requirements, he will be doing two things. First, he will be rewriting the contract to require a payment by the County that does not currently exist. Second, he will be giving the Association something in grievance arbitration that should be obtained in collective bargaining.

Next, the County argues that notwithstanding the Association’s contention to the contrary, this case should not be controlled by an alleged past practice. Here’s why. First, it notes that this is the first time in many, many years that there has been a significant change in the Department’s uniforms. The County sees that as significant. Second, it acknowledges that over the years, it has provided some “minor accoutrements” and uniform items to employees at the County’s expense. However, the County maintains it has not always paid for all uniform changes. To support that contention, it specifically notes that when the Department switched from leather jackets to gore-tex jackets, it did not provide gore-tex jackets to those deputies who already had a leather jacket. As the County sees it, the foregoing shows that the Association did not prove what has come to be the standard arbitral principle 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). Building on the foregoing, the County contends that the arbitrator should not base his decision here on an alleged past practice.

In sum then, it’s the County’s position that it did not violate the collective bargaining agreement by not paying for the new uniforms. It therefore asks the arbitrator to deny the grievance.

DISCUSSION

The Department instituted a uniform changeover which takes effect in February, 2011. At issue here is who has to pay for the new uniforms. The Employer contends that employees have to pay for the new uniforms out of their existing clothing allowance. The Association disagrees and contends the Employer has to pay for the new uniforms separate from the contractual uniform allowance. Based on the rationale which follows, I find that the Employer has to pay for the new uniforms separate from the contractual uniform allowance.

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 found in Section 3.06. Subparagraph (1)(a) says that "uniformed employees shall be furnished with a full uniform at the time of hire. . ." (NOTE: The remainder of that paragraph is not relevant to this case so it need not be referenced). This sentence says that when new employees are hired, they are provided with a full uniform by the Employer. This case does not involve newly-hired employees getting their first uniform. Instead, it involves existing employees getting a replacement uniform when the Employer changes uniform requirements. Nothing in that sentence, or elsewhere in that paragraph, addresses the topic of who pays for replacement uniforms when the Employer changes uniform styles. Subparagraph (1)(b) then goes on to say "The annual allowance for all employees shall be four hundred twenty five dollars (\$425.00)." The "allowance" referenced in this sentence, of course, is the uniform allowance. This sentence allots a yearly uniform allowance of \$425.00 to all employees. The employees can use this money to launder, repair and replace their existing uniform. However, this case does not involve the employee's existing uniform. Instead, as just noted, it involves a replacement uniform which was necessitated by the Employer's decision to change uniforms. That decision raises the following question: When the Employer changes uniforms, who pays for it? Simply put, does the Employer pay for it, or do employees have to pay for the new uniforms out of their contractual uniform allowance of \$425.00? Subparagraph (1)(b) does not say. It's silent

on that point. Since neither subparagraphs (1)(a) or (1)(b) says anything about who pays for replacement uniforms when the Employer changes uniform requirements, the Employer asks me to find – based on that contractual silence – that no contract violation has been shown. I decline to do that. Instead, what I’m going to do is this: For the purpose of discussion, I’m finding that Section 3.06 is ambiguous concerning who pays for replacement uniforms when the Employer changes uniform requirements. This finding (that the contract provision is ambiguous on that point) enables me to review the record evidence to determine if there is an applicable past practice.

When contract language is found to be ambiguous, arbitrators look beyond the contract language itself for guidance in determining its meaning. Oftentimes, they consider the parties’ past practice. Past practice is a form of evidence commonly used to clarify and 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 contract. Said another way, the actual practice under an agreement can yield reliable evidence of what a particular provision means.

The focus now turns to whether the record establishes the existence of a practice. It is generally accepted by arbitrators that in order for a practice to be considered binding, the conduct must be clear and consistent, of long duration and mutually accepted by both sides. Said another way, the practice must be shown to be the understood and accepted way of doing something over an extended period of time.

Here’s what the record evidence shows regarding changes to uniform requirements over the years. First, in 1971, the Department changed from green uniforms to brown and beige uniforms. When that happened, the County provided the new uniforms to members of the Department at County expense. Second, in 1987, the Sheriff required a new patch to be placed on the uniform and that matter was grieved. At the subsequent arbitration hearing, the parties stipulated “that on prior occasions when there has been a change in the uniform requirements for Deputies, the County has provided the uniform modification items at no expense to the members of the Department.” Third, in 1992, Sheriff Artison directed that sergeants wear white shirts. The white shirts were provided to the sergeants at County expense. Fourth, in 2006, Sheriff Clarke changed the required badge style. When that happened, the County provided members of the Department with the new badge at no cost to the individual. Fifth, under Sheriff Clarke, changes have been made to the uniforms worn by officers in the OWI task force, the motorcycle unit, the bicycle unit, doghandlers, horse patrol, GRIP and TEU. Each time changes were made to the uniform of these special units, the County purchased the new uniforms for the members of those units. Thus, the officers did not pay for the new uniforms out of their contractual clothing allowance.

The County essentially ignores all the instances noted above and instead focuses on the gore-tex jacket matter. What happened there was that when the County changed the jacket style for officers in the motorcycle division from a leather jacket to a brown gore-tex type jacket, the County paid for the new gore-tex jackets, but did not provide them to those deputies

who already had a leather jacket. The County sees that as significantly undercutting the Association's past practice contention. I don't see it that way. Here's why. All of the uniform items referenced above involved matters that were a uniform requirement. By that, I mean that employees didn't have a choice whether or not to wear the item(s) involved. In contrast, the brown gore-tex jacket is not a uniform requirement. Thus, members of the Department don't have to wear gore-tex jackets. Some members of the Department still wear leather jackets. The members of the Department therefore have a choice regarding their jacket style: they can wear either the gore-tex jacket or the leather jacket. That's not the case though with the new uniforms. Members of the Department must wear the new black and grey uniforms beginning in February, 2011, and must stop wearing their existing brown and beige uniforms at that time. Thus, they don't have a choice regarding what uniform to wear.

The evidence referenced above persuades me that a practice exists concerning who pays for replacement/new uniform items when the Employer changes uniform requirements. The practice is this: when the Sheriff has previously made a uniform modification, the County has provided the new/replacement uniform items at no expense to members of the Department. Said another way, the Employer paid for the new/replacement uniforms – not the employees. First, that has been the case whether the Sheriff made significant changes to the uniform requirements or just slight changes such as patches and badges. Either way, the Employer paid for the changes (meaning the Employer provided the items meeting the new uniform requirement at no charge or expense to the members of the Department). Second, in these prior instances, the Employer's payment for the uniform item was not something that just fell through the proverbial cracks; instead, the Employer made a conscious decision each time to pay for the uniform item. Third, these instances occurred over an extended period of time and occurred under different sheriffs. Fourth, 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. This practice establishes how Section 3.06 has come to be mutually interpreted concerning who pays for new/replacement uniform items when the Employer changes uniform requirements (namely, that when that happens, the County has provided the new/replacement uniform requirements to employees at no charge or expense to the employees).

Application of that practice here means that when the Employer set the uniform requirements at issue here, it should have paid for the new uniforms. That did not happen. Instead, the Employer required the employees to pay for the new uniforms out of their existing contractual clothing allowance. That action violated Section 3.06 (as it has come to be interpreted by the parties themselves via their past practice).

In order to remedy this contractual breach, the County shall provide one new complete uniform set to each deputy at no expense to the individual employee. If any employee has already purchased a new uniform, the County shall reimburse them for the money expended on same.

In light of the above, it is my

AWARD

That Milwaukee County violated Section 3.06 of the collective bargaining agreement when it did not furnish an entirely new set of uniforms to all deputies at County expense. In order to remedy this contractual violation, the County shall provide one new complete uniform set to each deputy at no expense to the individual employee. If any employee has already purchased a new uniform, the County shall reimburse them for the money expended on same.

Dated at Madison, Wisconsin, this 6th day of December, 2010.

Raleigh Jones /s/

Raleigh Jones, Arbitrator