BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ST. CROIX COUNTY

and

ST. CROIX COUNTY LAW ENFORCEMENT ASSOCIATION, LOCAL 108

Case 227
No. 69592
MA-14662

Appearances:

Stephen L. Weld, Attorney at Law, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Post Office Box 1030, Eau Claire, Wisconsin, 54702-1030, appearing on behalf of St. Croix County.

Benjamin M. Barth, Labor Consultant, The Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin, 53022, appearing on behalf of the St. Croix County Law Enforcement Association, Local 108.

ARBITRATION AWARD

St. Croix County ("County") and the St. Croix County Law Enforcement Association, Local 108 ("Association") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On February 18, 2010, the City and the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a dispute regarding compensation for the Grievant, Richard Koenig ("Grievant"). The filing jointly requested that the undersigned be appointed to serve as arbitrator in this matter, and the Commission did so. A hearing was held on April 21, 2010, in Hudson, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. No transcript of the proceeding was made. Each party filed a post-hearing brief, the last of which was received on June 22, 2010, whereupon the record was closed.

ISSUE

The parties entered into a stipulation allowing the arbitrator to frame the statement(s) of the issue to be decided. The County proposed the following statement of the issue:

> Did the County violate Article 6, Section 3, when it failed to pay overtime for an off-duty medical appointment which did not have prior County authorization? If so, what is the appropriate remedy?

The Association proposed the following:

> Is the County violating the expressed or implied terms and conditions of the collective bargaining agreement and/or past practice when it denied Deputy Richard Koenig's request to be compensated at the appropriate overtime rate for attending physicians appointments while off-duty related to a duty incurred injury? If so, what is the correct remedy?

Based on the proposed statements of the parties, as well as the record and arguments before me, I have framed the statement of the issue as follows:

> Did the County violate the Agreement when it failed to pay overtime to the Grievant to attend an off-duty medical appointment for an injury sustained in the line of duty? If so, what is the appropriate remedy?

RELEVANT PROVISIONS

ARTICLE 6 – WORK WEEK – CALL-IN PAY – OVERTIME

. . .

Section 3 – Overtime:

1. In the event an employee is called in to work for a court appearance or for other duties not immediately after a regularly scheduled work shift, he/she shall receive one and one-half (1½) his/her regular hourly rate of pay for all time worked except that he/she shall be guaranteed a minimum of two (2) hours pay at said premium rate.

2. All employees shall be compensated at the rate of time and one-half (1-1/2) for all time worked in excess of their regular work day or regular work week/cycle. …

. . .

BACKGROUND

The Grievant, a deputy sheriff employed by the County, was seriously injured on November 22, 2006, in the line of duty. Because of his injuries, the Grievant did not return to his position with the County Sheriff's Department until September of 2007.

Even after the Grievant returned to work at the Sheriff's Department, he required medical attention. On October 1, October 7, and December 18, 2007, the Grievant attended medical appointments related to his injuries during his scheduled shift. There is no dispute that the Grievant had authorization to attend these three appointments while on duty, and he was not required to take leave time or suffer a reduction in pay. The County Sheriff testified at hearing that it has been his practice during his eleven-year tenure to allow employees to attend medical appointments in this manner, while on duty, to follow-up on work-related injuries.

On August 27, 2008, the Grievant attended a medical appointment related to his injuries outside the hours of his regularly scheduled shift. The car accident that caused the Grievant's injuries had resulted in a criminal case, and the court presiding over that case ordered the Grievant to undergo an independent medical examination (IME). In response to the court order, the Sheriff directed the Grievant to attend the IME. Subsequent to that appointment, the Grievant submitted a timecard on which he requested overtime pay for the time spent at the medical appointment of August 27, and he received that pay.

On August 29 and May 1, 2009, the Grievant also attended medical appointments. Although the appointments did not relate to any court-ordered IME, they were follow-up appointments related to the Grievant's work-related injuries. These appointments also occurred during hours on which the Grievant was not working. The Grievant submitted timecards requesting overtime for the hours he spent at these two appointments, which he was paid.

On May 7, 2009, the Grievant attended another medical appointment related to his injuries, again not during work hours. On his timecard, the Grievant requested overtime pay for the 2.5 hours he spent at that appointment. This time, the Grievant's request for overtime pay was denied. It is this denial that is the subject of this grievance.

DISCUSSION

The Association's contention that the Grievant was entitled to overtime pay for the hours spent at the May 7 appointment is based on two theories: first, that the Grievant is entitled to the pay under the express terms of the Agreement and, alternatively, that paying the Grievant overtime in this situation is consistent with the parties' past practice.

The Association's position that the Grievant is entitled to the requested overtime pay under the express terms of the Agreement is based on Article 6 of the Agreement, which mandates that an employee is to receive one-and-one-half of his or her regular hourly rate for

time worked in excess of the regular work day or work week/cycle. The Association contends that this clear and unambiguous provision entitles the Grievant to time-and-one-half for the hours he spent at his May 7 medical appointment, because the Grievant was directed by the employer to attend follow-up medical appointments for his work-related injury and, therefore, should be considered to have been working and eligible for overtime pay for the time he spent at the May 7 appointment.

It does not appear from the record that the Grievant was specifically told to attend the May 7 appointment or that he had prior approval to receive overtime for hours spent at that particular medical appointment. Nor is there any evidence suggesting that the Grievant specifically was told that he would be paid overtime for the off-duty, injury-related appointments he attended. Rather, the Association's position rests primarily on the Grievant's testimony that he was told by the four supervisors in the Sheriff's Department that he should complete all follow-up doctor visits. The Association contends that it should be inferred from this "standing order" that the Grievant was eligible to receive overtime pay for any injury-related appointments that occurred outside of his regularly scheduled shift.

I am not willing to draw such an inference. The Grievant's rather vague testimony that he received "general authorization" from the supervisors at the Sheriff's Department to take care of medical matters is simply not enough to persuade me that the County committed itself to paying overtime for the Grievant's medical appointments for a period that was, by the time the Grievant attended his May 7 appointment, approaching two years. It's not that I disbelieve the Grievant's assertion that he was told to take care of medical matters. But to conclude that such a statement is tantamount to an order and, beyond that, a commitment to pay overtime for hours spent at medical appointments, the evidence would simply have to be more concrete. This is particularly true where, as the record indicates, such a benefit had not been extended to any other employee in the past. The Sheriff testified that, although there had been many work-related injuries during the course of his eleven-year tenure, he was not aware of any officer who had claimed or received overtime pay for attending off-duty medical appointments.

Thus, going back to the basic question of whether the Grievant was entitled to overtime pay under the Agreement, I find that he was not. Article 6 allows for overtime for "all time worked". The Agreement also indicates that this can include situations where an employee is called in to work "for a court appearance or for *other duties* not immediately after a regularly scheduled work shift" (emphasis added). If this dispute focused on the court-ordered IME the Sheriff specifically instructed the Grievant to attend, it's likely that the appointment would be considered an "other duty" and, therefore, time "worked" under this provision. In this case, however, because I am not willing to infer that the Grievant was operating under an order such that his attendance at follow-up medical appointments should be considered time worked, I do not find that the Grievant was entitled to the claimed overtime pay under the express terms of the Agreement.

The alternative question is whether there is a past practice that requires this grievance to be sustained. Until the Grievant's May 7 overtime request was denied, he had been paid overtime to attend medical appointments on three occasions: August 27, 2008, August 29, 2008, and May 1, 2009. The Association's position is that these instances reflect a mutual understanding between the parties that overtime would be paid for hours spent at off-duty medical appointments. There is evidence on the record related to each of these instances, however, which prevents me from drawing such a conclusion. First, the August 27 IME cannot fairly be considered evidence of a general intention to pay overtime for medical appointments, because the Grievant specifically was directed by the Sheriff to attend that appointment, in conjunction with a court order. Further, there is evidence indicating that the August 29 and May 1 overtime payments were made in error. The Sheriff persuasively testified that a management meeting occurred between May 1 and May 7, 2009, in which he happened to learn in the course of a conversation with Sheriff's Department supervisors that overtime had been approved for the Grievant's off-duty medical appointments – the supervisors were discussing the question of whether it was appropriate to pay overtime under that circumstance – and the Sheriff immediately directed them not to authorize such overtime requests in the future. This reaction on the Sheriff's part suggests a definite lack of mutual understanding. Finally, there apparently has been no other instance in which a deputy has requested overtime for attending a medical appointment, even though other deputies have had work-related injuries and, it is safe to assume, occasion to attend follow-up appointments while not on duty. All of this evidence is inconsistent with the assertion that there was a mutual understanding between the parties that overtime would be paid for off-duty medical appointments. Thus, I cannot find that there is a past practice that supports the Association's contention that the Grievant is entitled to overtime pay.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 9th day of December, 2010.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

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