

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WISCONSIN PROFESSIONAL POLICE  
ASSOCIATION/LAW ENFORCEMENT  
EMPLOYEE RELATIONS DIVISION

and

CALUMET COUNTY (SHERIFF'S  
DEPARTMENT)

Case 92  
No. 51493  
MA-8629

Appearances:

Mr. Richard J. Daley, Business Agent, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, 3301 South Clay Street, Green Bay, Wisconsin 54301-1548, appearing on behalf of the Association.  
Carlson Associates, Inc., by Mr. Charles E. Carlson, 6666 Odana Road, Box 246, Madison, Wisconsin 53719, appearing on behalf of the County.

ARBITRATION AWARD

Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereafter the Association, and Calumet County (Sheriff's Department), hereafter the County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. Hearing was held on March 23, 1995, in Chilton, Wisconsin. The hearing was not transcribed and post-hearing briefs were received by May 2, 1995.

ISSUE:

The parties have stipulated to the following statement of the issue:

Did the Employer violate the terms and conditions of the Agreement by refusing to credit the grievants with an additional day of vacation when Easter Sunday fell during their scheduled vacation?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

**ARTICLE X - PREMIUM PAY**

. . .

10.03 Holiday Pay - Employees working on one of the specific holidays set forth in Article X (sic) will receive holiday pay plus compensation at the rate of one and one-half (1-1/2) the regular rate of pay for the hours actually worked.

**ARTICLE XI - HOLIDAYS**

11.01 All employees shall be entitled to eight (8) specific holidays and two (2) floating holidays with full pay. The specific holidays are as follows: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, day before Christmas, Christmas Day and day before New Year's Day. The floating holidays shall be taken at the mutual convenience of the County and the employee.

11.02 Easter Sunday shall be observed as an additional holiday for those employees scheduled to work.

11.03 If the holiday falls during an employee's vacation, the employee shall receive an additional day of vacation.

. . .

**BACKGROUND:**

The grievants, Steven Baer and Gary Hemauer, are employees of the Calumet County Sheriff's Department. April 3, 1994 was Easter Sunday. The grievants' regular work schedule required the grievants to work on April 3, 1994. Each requested and received Easter Sunday off. In each case, Easter Sunday was paid as a vacation day. The vacation day paid was deducted from each of the grievant's vacation balance.

Thereafter, the grievants and the Association filed a grievance requesting the Employer to credit each of the grievants with an extra day of vacation because a holiday (Easter) had occurred during their scheduled vacation. The grievance was denied and, thereafter, submitted to arbitration.

## POSITIONS OF THE PARTIES:

### Association

Section 11.02 provides that "Easter Sunday shall be observed as an additional holiday for those employees scheduled to work." It does not state that Easter Sunday shall be observed as an additional holiday for those employees who "actually" work. Section 11.03 states: "If the holiday falls during an employee's vacation, the employee shall receive an additional day of vacation."

In the present case, the grievants were scheduled to work. Management allowed the grievants to take a vacation day on Easter. Neither grievant was granted an additional vacation day when the holiday fell on the vacation day scheduled by management. The failure to allow the grievants the additional vacation day violates the clear and unambiguous language of Section 11.02 and 11.03.

Arbitrators have generally held that, if a contract specifically provides for an additional holiday day, as does Section 11.03 of this agreement, then when the holiday occurs during an employee's vacation period, additional vacation pay must be allowed.

On two prior occasions, employees were granted the holiday off with pay without being required to "burn" a vacation day. The Employer's argument that these two incidents were mistakes is unsupported by the testimony and Association exhibits.

In bargaining, the Employer proposed, but did not obtain, language which would produce the result desired by the Employer. A fundamental principal of arbitration is that the arbitrator must not grant a party that which it could not obtain in bargaining.

The Employer argues that the Association did not prevail in the 1993 grievance filed by grievant Baer and, therefore, the grievance must be denied. While the grievance may have died on the vine, the Association did not accept the Employer's interpretation of the collective bargaining agreement.

Each grievant indicated that they are aware of the "past practice" when they requested Easter Sunday off. No notification was given by management that the employees were going to be charged "two for the price of one." The grievants are not aware of any requirement that they discuss leave requests, or the ramification of leave requests, with the Employer's Administrative Coordinator.

The Employer's argument that the application of the holiday and vacation provisions is consistent with other bargaining units is irrelevant. The language and clauses in the other contracts are not the same as the language in the Association's collective bargaining agreement.

The Association asks that the Arbitrator find that the District has violated the collective bargaining agreement. The Association further asks that the two grievants, Baer and Hemauer, each be made whole with the credit of an additional vacation day.

### Employer

The contractual provision for granting an additional day off if a holiday falls during a scheduled vacation is intended to ensure that an employee would receive the eight holidays granted in Section 11.01. If Easter were like any other holiday, then why set Easter off as a separate holiday in 11.02? Moreover, why would the Association, in 1992, make a bargaining proposal to change the holiday language in 11.01 by adding a ninth holiday, i.e., Easter?

According to the Employer's negotiator, the intent of the language and the Employer's administrative practice was to pay employees who worked the Easter holiday. The Association presented no evidence to contradict this testimony.

The Employer mistakenly granted a compensatory day in 1992. The Employer correctly applied the contract language in 1993. While the Association grieved the 1993 application of the language, the grievance was dropped.

With the exception of the grievants, employees have avoided scheduling Easter as a vacation day. If the Association's interpretation of the agreement were correct, such avoidance would be extraordinary since Easter is a popular time to take vacation. The Employer submits that employees are aware that they get paid extra for working Easter, but do not receive compensation if they take a vacation day on Easter.

Grievants Hemauer and Baer were not scheduled to work in Easter 1994. Rather, at their request, the grievants were scheduled for vacation. They are not entitled to Easter holiday compensation of any kind.

Assuming arguendo, that the Arbitrator were to conclude that the agreement requires a day off if the employee is on vacation on Easter, the two grievants are not entitled to any further compensation because they made no attempt to clarify whether a compensatory day would be granted.

The Association is attempting to gain through arbitration that which it dropped as a demand in 1992 and as a grievance in 1993. There is no basis for the grievance and it must be denied.

## DISCUSSION:

April 3, 1994, Easter Sunday, was a work day under each of the grievant's regular work schedule. The grievants did not work on Easter Sunday because they had requested and received a day of vacation.

The Association argues that Section 11.03 requires the Employer to provide each of the grievants with an additional vacation day. The Employer argues that Section 11.03 is not applicable because the Easter Sunday holiday provided in Section 11.02 is only available to employees who work on Easter Sunday.

Section 11.02 states that "Easter Sunday shall be observed as an additional holiday for those employees scheduled to work." While the use of the phrase "scheduled to work" is not without ambiguity, within the context of a law enforcement unit, the most reasonable construction of the plain language of Section 11.03 is that Easter Sunday is not limited to employees who work Easter Sunday, but rather, is available to employees who have a regular work schedule which requires the employee to work Easter Sunday.

In Section 10.03, the parties have provided a premium for "employees working" and for "hours actually worked" on a holiday. One may reasonably conclude, therefore, that, if the parties had intended the Section 11.02 holiday benefit to be limited to employees who work Easter Sunday, as argued by the Employer, then the parties would have expressly stated such a condition, as they did in Section 10.03. The absence of such an expressed condition in Section 11.02 supports the conclusion that the Easter Sunday holiday benefit is not limited to employees who work Easter Sunday.

The grievants did not work Easter Sunday because each requested and received a vacation day. Had they not been "scheduled to work" on Easter Sunday, there would have been no need to request a vacation day. Despite the Employer's argument to the contrary, the conversion of Easter Sunday from a work day to a vacation day does not alter the fact that the grievants were "scheduled to work" on Easter Sunday.

Section 11.03 states that "If the holiday falls during an employee's vacation, the employee shall receive an additional day of vacation." Section 11.03 does not limit the additional day of vacation to the holidays listed in Section 11.01. Accordingly, the plain language of Section 11.03 does not provide any basis for distinguishing the Easter Sunday holiday provided in Section 11.02 from the holidays provided in Section 11.01.

In summary, the grievants were scheduled to work on Easter Sunday. Giving effect to the plain language of Section 11.02, Easter Sunday was an additional holiday for the grievants. The grievants requested and received a vacation day on the Easter Sunday holiday. Thus, the Easter Sunday holiday fell during each of the grievant's vacation. Giving effect to the plain language of

Section 11.03, the grievants are entitled to receive an additional day of vacation.

The language of Sections 11.02 and 11.03 has been in existence since 1973, when the parties bargained their initial collective bargaining agreement. According to Employer Representative Carlson, the Employer always understood that the sole purpose of Section 11.02 was to pay a bonus for working on Easter Sunday. However, Carlson was not present when the parties bargained the initial contract and, thus, was not privy to the discussions which lead to the adoption of Section 11.02 and Section 11.03. Neither Carlson's testimony, nor any other evidence, demonstrates that, at the time that the parties negotiated the language of Section 11.02 and Section 11.03, the parties mutually intended the language of Section 11.02 and Section 11.03 to be given any meaning other than that which is reflected in the plain language of the contract.

It is not evident that the language of Sections 11.02 and 11.03 was at issue in any contract negotiation from 1973 to 1992. In 1992 and again in 1994, each of the parties unsuccessfully proposed changes to Section Eleven of the contract. 1/ Neither the language of the proposals, nor any other evidence, establishes that either party offered the proposals because the party understood that the existing contract language did not provide the party with the contractual right advocated herein. 2/ Thus, contrary to the argument of each party, the evidence of the 1992 and 1994 bargain does not establish that either party is attempting to gain through arbitration that which it did not obtain through bargaining in 1992 or 1994. 3/ Nor does the evidence of these negotiations demonstrate that the parties reached any mutual understanding with respect to the interpretation of Section 11.02 and Section 11.03 other than that which is reflected in the plain language of the contract.

To be sure, the Employer's proposal to "clarify" Section 11.02 placed the Association on notice that the Employer did not interpret Section 11.02 in the same manner as the Association. However, where as here, the Employer's unilateral understanding of a contract provision conflicts

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1/ In 1992 and in 1994, the Association proposed the elimination of Section 11.02 and the inclusion of Easter Sunday in Section 11.01. In 1992, the Employer proposed that Section 11.03 be modified to state "If an employee takes vacation on a holiday, the holiday will be paid." The Employer made a similar proposal in 1994. In 1994, the Employer proposed that Section 11.02 be modified to state "Easter Sunday shall be observed as an additional holiday for those employees who work." This proposal expressly stated that the modification to Section 11.02 was for "clarification purposes."

2/ Indeed, the proposals of the parties would have implications beyond the issue in dispute. The Association's proposal would have provided the Easter Sunday holiday to all bargaining unit employees. The Employer's proposals would have eliminated the additional vacation day for all holidays.

3/ Rather, the Employer is attempting to gain through arbitration that which it did not gain in bargaining in 1973.

with the plain language of the provision, it is the language of the provision which is controlling.

Since 1973, there have been no more than four requests for vacation on Easter Sunday. The Employer argues that the lack of requests demonstrates that the Association and its bargaining unit members are aware that the Easter Sunday holiday is only available to employees who work the Easter Sunday holiday. Since the other bargaining unit members did not testify as to why they have not sought vacation on Easter Sunday, the undersigned considers the Employer's argument to be speculative and, thus, not persuasive.

On at least one occasion, in 1992, the Employer granted vacation on Easter Sunday and provided an additional vacation day. 4/ The Employer argues that this was a "mistake." It is not evident that Baer or the Association had any knowledge that the Employer considered the payments to be a "mistake" until 1993, when the two grievants were granted vacation on Easter Sunday, but were denied the additional vacation day. Given the infrequent and inconsistent application of Sections 11.02 and 11.03, the evidence does not establish any binding past practice with respect to the issue in dispute.

A grievance was filed on the 1993 denial of the additional vacation day. While it is evident that the Association failed to pursue the grievance, it is not evident that this failure was due to any factor other than the Association's failure to process the grievance in a timely manner. Absent evidence that the Association acknowledged that the grievance was without merit, the Association's failure to pursue the 1993 grievance does not demonstrate that the Association has accepted the Employer's interpretation of Section 11.02 and Section 11.03. 5/

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- 4/ The 1992 incident involved Baer. According to Carlson, there may have been one other incident in which an employee was granted the additional vacation day, but he was not clear on the facts.
- 5/ Contract language may provide that the failure to pursue a grievance binds the union to the contract interpretation advocated by the employer, or waives the union's right to pursue another grievance on the same issue. The Employer does not argue, and the record does not demonstrate, that the parties' contract contains such language.

At the time that the grievants requested and received a vacation day for Easter Sunday, the grievants and their respective supervisor did not discuss whether or not the grievants were entitled to an additional vacation day under Section 11.03. Nor did the grievants seek a clarification of the Easter Sunday holiday benefit from any other management representative. However, as the Association argues, the contract does not require employees to discuss the ramifications of leave requests prior to using the leave. Contrary to the argument of the Employer, the failure of the grievants to seek clarification of the Easter Sunday holiday benefit does not waive the grievants' right to pursue this grievance and receive the appropriate remedy.

The Personnel and General Administrative Policies and the labor contracts of bargaining units not represented by the Association do not contain the language of Section 11.02. Thus, as the Association argues, the Employer's administration of these policies and contracts is irrelevant to the determination of the instant dispute.

### CONCLUSION

The most reasonable construction of the plain language of Section 11.02 and Section 11.03 is that the grievants are entitled to receive an additional day of vacation. The record does not establish that the parties had any mutual understanding with respect to Section 11.02 and Section 11.03 other than that which is reflected in the plain language of Section 11.02 and Section 11.03.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

### AWARD

1. The Employer violated the terms and conditions of the Agreement by refusing to credit the grievants with an additional day of vacation when Easter Sunday fell during their scheduled vacations.
2. In remedy of this contract violation, the Employer shall immediately credit each of the grievants with an additional day of vacation.

Dated at Madison, Wisconsin, this 15th day of June, 1995.

By Coleen A. Burns /s/  
Coleen A. Burns, Arbitrator