

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DOUGLAS COUNTY DEPUTY SHERIFFS'
ASSOCIATION, LOCAL 41, LAW
ENFORCEMENT EMPLOYEES DIVISION,
WISCONSIN PROFESSIONAL POLICE
ASSOCIATION

and

DOUGLAS COUNTY (SHERIFF'S DEPARTMENT)

Case 213
No. 52110
MA-8841

Appearances:

Mr. Gerald W. Gravesen, Bargaining Consultant, LEER Division, Wisconsin Professional Police Association, on behalf of the Douglas County Deputy Sheriff's Association.
Mr. Frederic P. Felker, Corporation Counsel, on behalf of Douglas County.

ARBITRATION AWARD

Douglas County Deputy Sheriff's Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Douglas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 23, 1995, in Superior, Wisconsin. No stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by July 3, 1995. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there are no procedural issues and stipulated to the following substantive issue:

Did the County violate the Labor Agreement when it denied the Grievant overtime compensation for hours worked commencing at 11:00 p.m. on September 6th and ending at 7:00 a.m. on September 7th, 1994, a shift which was adjacent to his regularly scheduled shift of 7:00 a.m. to 3:00 p.m. on September 7, 1994? If so, what is

the appropriate remedy? 1/

CONTRACT PROVISIONS

ARTICLE 5

VESTED RIGHT OF MANAGEMENT. The right to employ, promote, to transfer, discipline and discharge employees and the management of the property and equipment of the Law Enforcement Department is reserved by and shall be vested exclusively in the Douglas County Board of Supervisors through its duly appointed Committees. The Department Head, through authority vested in him, by either the Douglas County Board or the State Statutes, shall have the right to determine how many men there will be employed or retained together with the right to exercise full control and discipline in the proper conduct of the Law Enforcement Department operation.

The County Board through its Committees and the Law Enforcement Department shall have the sole right to contract for any work it chooses, direct employees to perform such work wherever located in its jurisdiction. The County shall have the exclusive right to determine the hour [sic] of employment and the length of the work week and to make changes in the detail of the employment of the various employees from time to time as it deems necessary for the efficient operation of the Law Enforcement Department, and the Union and its members agree to cooperate with the Board and/or its representatives in all respects to promote its efficient operation of the Law Enforcement Department.

The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this

1/ The statement of the issue is taken from the Arbitrator's notes and, while it is substantively identical, the wording differs from the submissions in the parties' respective briefs. The parties stipulated that this Award will apply to the November 10, 1994, instance involving these same parties, and requested that the undersigned retain jurisdiction in that regard.

Agreement.

...

ARTICLE 9

CONDITIONS OF EMPLOYMENT: The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, vacations and other benefits shall be maintained at not less than the highest minimum standard in effect at the time of signing this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvements are made elsewhere in this Agreement.

...

ARTICLE 27

WEEKLY HOURS AND OVERTIME RATES: Section 1. The Employer agrees to guarantee five (5) standard consecutive days of work and each standard day shall be eight (8) hours per day and each standard work week shall not be less than forty (40) hours per week or pay in lieu thereof.

Section 2- Overtime pay at the rate of one and one-half (1 1/2) times the regular rate of pay shall be paid as follows:

- (a) Hours worked over eight (8) hours per day;
- (b) Hours worked in excess of forty (40) hours in any one (1) week, Sunday through Saturday.

...

Section 3. All overtime work will be paid for at one and one-half (1 1/2) times the regular rate of pay. Time absent from work (e.g. sick leave, vacations, personal leave days, funeral leave, compensatory time) will not be considered hours worked for overtime purposes.

...

BACKGROUND

The Grievant, John Parenteau, has been employed in the Douglas County Sheriff's Department since April 21, 1991. From his starting date until October 30, 1994, the Grievant was employed as a Jailer, and since October 30, 1994, to present as a Patrol Deputy in that Department.

The Grievant took a personal leave day on September 4, 1994, and did not work on September 5, 1994, as it was his scheduled day off. On September 6 the Grievant worked the 11 p.m. to 7 a.m. shift ending on September 7, and then worked his regular 7 a.m. to 3 p.m. shift on September 7. The Grievant did not work in excess of forty hours in that week. On his time card, the Grievant indicated the hours from 11 p.m. on September 6 until 7 a.m. on September 7 as overtime hours, however, he did not receive overtime pay for those hours worked. The Grievant grieved the County's refusal to pay him overtime for said hours. The grievance was processed through the grievance procedure, and ultimately was appealed to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the language of Article 27, Section 2 of the parties' Agreement is clear and unambiguous that overtime will be compensable at time and one-half for hours worked over eight hours per day or for hours worked in excess of 40 hours in any one week, Sunday through Saturday. While the Agreement is silent as to defining a "day", during negotiations for the 1993 agreement the parties clearly defined both the definition of overtime and when overtime pay is triggered, as well as the work week being Sunday through Saturday. The County's definition of a "day" is unilateral and self-serving, and is predicated upon the County's desire not to pay overtime pay for contiguous hours worked contiguous to the employe's regularly-scheduled shift.

As to the County's reliance upon an alleged past practice of defining a "day" for Jailers as starting and ending at 7 a.m., and not paying overtime pay in a situation such as the instant one, the Association's past president Gary Gulbrandson, an employe in the unit for over 20 years, testified that to his knowledge, hours worked in excess of the regular-scheduled hours have always been compensated at the rate of time and one-half, and that the definition of a "day" had never been broached by the County until negotiations commenced for the successor to the 1993 Agreement. The County's assertion of a past practice is not supported by evidence of a mutual agreement as to the definition of a "day". The payroll time sheet of Sgt. Johnson for the period May 29 to June 11, 1994 is the only example the County found in examining its payroll sheets for the past 10 years where an employe did not apply for overtime pay when they worked under

similar circumstances. A single instance does not stand either the test of mutuality or of time. Further, the failure to grieve past violations of a clear contract rule does not bar that party, after giving notice to the violator, from insisting upon compliance with the contract. The Chief Deputy also testified that there was not any notice posted explaining the County's definition of a "day" and that the practice had not been negotiated. That testimony, along with that of Sgt. Gulbrandson, makes it reasonable to assume there was no communication to the Association relative to the County's defining a "day" for Jailers as 7 a.m. to the next 7 a.m., or for Patrol Deputies, from 8 a.m. to the following 8 a.m. To be enforceable, a practice must be mutually understood by the parties and they must have agreed to the practice and abided by it over a long period of time and the practice must have been consistently and evenly applied. The County has not demonstrated either the longevity or the repetitive nature of the practice, or that there was mutuality as to the existence of such a practice.

A practice is used to clarify ambiguous contract language, however, the language of Article 27, Section 2, is clear and easily understood when it states, in relevant part: "Overtime is paid for all hours worked in excess of eight (8) hours per day." As to the definition of a "day", since the parties' do not have a mutual understanding of when a work "day" ends or begins, as it relates to hours worked in any 24 hour period, the term "day" must be given a reasonable definition. The Association cites Black's Law Dictionary, (5th Edition, 1979), as defining a "day" as "the space of time which elapses between two successive midnights;" or as "the whole or any period of 24 hours from midnight to midnight." That volume also states that the potential variations of the definition of a day as being "the period of time, within the limits of a natural day, set apart either by law or by common usage for the transaction of particular business or the performance of labor, as in banking, in laws regulating the hours of labor, in contracts for so many 'day's work', and the like, the word 'day' may signify six, eight, ten, or any number of hours." The 1993 Agreement does not spell out the legal definition of a "day", nor does it state that the parties mutually agree to define a "day" as that for which the County contends. The Association asserts that the reasonable definition is that a "day" begins and ends at midnight.

As a remedy, the Association asserts that the Grievant should be made whole, and compensated at the overtime rate for the hours worked outside of his regular schedule, from 11 p.m. September 6 until 7 a.m. on September 7, as should any other affected member of the bargaining unit who performed work under similar circumstances for a period of 10 calendar days prior to the date of the filing of the grievance, up to the date of the decision, and that the County should be ordered to cease and desist from further action of this nature, now or in the future, unless the parties mutually agree to amend the terms of the parties' Agreement.

County

The County notes that Article 27, Section 2 (a) provides that overtime shall be paid for "hours worked over eight (8) hours per day". The issue in the instant grievance is what constitutes a "day" for purposes of computing whether hours worked have exceeded eight. The contract is

silent in that regard, and thus, is ambiguous as to what constitutes a "day" for purposes of computing overtime. The County notes that custom and past practice may be used to interpret ambiguous contract language and that to be binding, the practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Citing, Elkouri and Elkouri, How Arbitration Works, (Third Edition). Mutual acceptance may be tacit, i.e., inferred from the circumstances. The County also asserts that while another factor may be whether the activity was instituted by bilateral action or by unilateral action of one party, the fact of unilateral establishment should not necessarily be given controlling weight. Citing, Elkouri and Elkouri, at pages 391-392.

While the Grievant made an attempt to show a past practice justifying payment of eight hours at the overtime rate for consecutive shifts worked, he could not cite an example of when overtime had been paid for consecutive shifts on separate work days, with the exception of one instance involving himself. In that one instance, however, the Grievant could not recall whether the overtime involved a week in which he had worked in excess of 40 hours, in which case he would have been paid at the overtime rate irrespective of the consecutive nature of the work shifts. Conversely, the County provided substantial evidence as to the long-standing nature of its payroll policies and the formula it has utilized for many years to determine overtime on a daily basis. The County asserts it has consistently considered its work day to begin at either 7 a.m. or 8 a.m. and continue for 24 hours until the next day, encompassing three eight-hour shifts.

The County submitted six possible scenarios outlining when overtime would or would not be paid for more than one shift worked within a 24 hour time frame based upon the County's definition of a "day", along with copies of actual time sheets submitted as examples of each scenario. Under two of those possible scenarios where shifts were worked consecutively, overtime would be paid if the shifts occurred within the particular work day, as the County has defined it. The only scenario where overtime would not be paid for a consecutive shift occurs when a second shift begins on the following work day, as in this case. The County notes that under its definition of a work day, a person who worked a non-consecutive shift, i.e., 11 p.m. to 7 a.m. after working 7 a.m. to 3 p.m. on the same work day, would also receive pay for the second shift at the overtime rate. It asserts that, therefore, its definition of a work day is consistent. The County also asserts that the examples it submitted as to the work schedules in the Sheriff's Department demonstrates that each schedule is broken into consecutive days with most shifts commencing on any given day at 7 a.m. or 8 a.m., or at eight hour intervals thereafter. Shifts that commence at midnight are included within the work day that commences the previous calendar day. Both the Department's Business Manager, Mary Drobot, and the Chief Deputy testified that that manner of scheduling for each work day has occurred for many years. The County asserts that it has therefore established an unequivocal past practice of defining a work day within the Sheriff's Department as commencing at 7 a.m. in the morning until 7 a.m. the following day, excepting those shifts which commence at 8 a.m., 4 p.m., and midnight, and that employees have been paid overtime on that basis for many years. Drobot also testified that it was difficult to find an example of past situations like the instant case, since the situation occurs so seldom.

DISCUSSION

Both parties note that the term "day", as it is used in Article 27, Section 2(a) of their Agreement, is not defined in the Agreement. Both parties resort to past practice to support their respective positions on how "day" is to be defined. Each party cites one specific prior instance to support its position.

While the County was able to establish that it has scheduled Jailers' shifts on the basis of a twenty-four hour period commencing at 7:00 a.m. and running to the next 7:00 a.m., it cited only one specific case where an employe did not claim overtime for working consecutive shifts in a situation as in this case. There may be cases where one prior instance is sufficient to establish a practice, e.g., where the situation so rarely occurs and the parties were both aware of how it was handled in that one instance. Although the situation in this instance does not occur frequently, it does not appear likely that it occurs so rarely that one instance is sufficient to establish a binding practice. 2/ Thus, neither party has established that there is a consistent and mutually understood and accepted past practice as to whether or not an employe is entitled to be paid at the overtime rate on the basis of working in excess of eight hours in a "day" in situations as in the instant case.

In the absence of evidence to indicate that a term is intended to be used in a different sense, arbitrators give words their "ordinary and popularly-accepted meaning" and will often rely on the ordinary definition of the word in a reliable dictionary. 3/

Webster's New World Dictionary (2nd College Edition), defines the term "day" as used in the context of Article 27, Section 2(a), as follows:

the time (24 hours) that it takes the earth to revolve once on its axis:
the civil or legal day is from midnight to midnight. . .

Applying the above definition of "day" to the instant situation, the Grievant worked fifteen hours on September 7th, i.e., from 12:00 a.m. to 3:00 p.m. on that "day", and was therefore entitled to seven hours of pay at the overtime rate under Article 27, Section 2(a) of the Agreement. Thus, to the extent it failed to compensate the Grievant at the overtime rate for the seven hours he worked on September 7th prior to working his regular 7:00 a.m. to 3:00 p.m. shift on that date, the County violated the parties' Agreement. The Arbitrator notes that defining a "day" as the

2/ The prior instance cited by the Association involved this same Grievant and he could not recall whether he worked over forty hours in that week, which would also have entitled him to overtime pay.

3/ Elkouri and Elkouri, How Arbitration Works, (3rd Ed.), at pp. 305-307.

period from midnight to midnight, as opposed to 7:00 a.m. to 7:00 a.m., only changes the shifts affected and does not preclude a similar situation arising where the employe would only be entitled to the overtime rate for one hour, based on working in excess of eight hours in a day, where working consecutive shifts, i.e., an employe who works 3:00 p.m. to 11:00 p.m., and then works 11:00 p.m. to 7:00 a.m.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained to the extent the Grievant worked over eight (8) hours on September 7, 1994, commencing at 12:00 a.m. on that day. Douglas County is therefore directed to immediately pay the Grievant the difference between what he was paid for the seven (7) hours he worked on September 7, 1994 in excess of eight hours, and the overtime rate for those seven (7) hours. Pursuant to the parties' request, the undersigned will retain jurisdiction in this case as it applies to the November 10, 1994, instance involving these same parties. In that regard, the undersigned will relinquish his jurisdiction forty-five (45) days from the date of this Award, unless he is notified by the parties prior to that time that there is a dispute.

Dated at Madison, Wisconsin, this 5th day of December, 1995.

By David E. Shaw /s/
David E. Shaw, Arbitrator