

**In Re Grievance Arbitration Between  
Goodhue County, Minnesota  
And  
Law Enforcement Labor Services, Inc., St. Paul, Minnesota**

**Decision and Award of Arbitrator**

**BMS Case Nos: 13-PA-0040 and 13-PA-0651  
(Injury on Duty)**

**Carol Berg O'Toole  
Arbitrator**

**May 28, 2013**

**Representatives for the Employer:**

**Susan K. Hansen, Attorney, MADDEN GALANTER HANSON, LLP  
Scott Arneson, County Administrator  
Lyle Lorenson, Chief Deputy**

**Witnesses for the Employer:**

**Melissa Cushing, Human Resources Director  
Kris Weiss, Administrative Assistant, Sheriff's Office**

**Representatives for the Union:**

**Isaac Kaufman, Law Enforcement Labor Services General Counsel  
Erik Mosvick, Law Enforcement Labor Services Research Assistant**

**Witnesses for the Union:**

**John Harris, Deputy Sheriff  
Misty Englund, Deputy Sheriff  
Mike Zimmerman, Detention Deputy  
Amy McKenzie, Detention Deputy  
Josh Stehr, Deputy Sheriff, Assistant Union Steward  
Glen Barringer, Investigator, Sheriff's Office  
Dennis Wempner, Detention Deputy  
Jay Kinseth, Deputy Sheriff**

## **Preliminary Statement**

The hearing was convened shortly after 10:0 AM at the Goodhue County Courthouse, 509 West Fifth Street, Red Wing, Minnesota on Tuesday, April 9, 2013. The parties involved are Goodhue County (Employer) and the Law Enforcement Labor Services, Inc., Locals #91 and 78 (Union), representing among others the County's Deputy Sheriffs and Detention Deputies. The parties presented opening arguments, oral testimony, oral argument and exhibits. Closing arguments were waived by both parties in favor of the filing of post hearing briefs. Post hearing briefs post marked May 10, 2013, were received by the arbitrator. The arbitrator closed the hearing with the receipt of the last brief by U.S. Mail on May 10, 2013.

## **Contractual and Statutory Jurisdiction**

The Union is the certified bargaining representative for the two grievants whose three grievances were consolidated for this hearing. The Employer and the Union are signatories to collective bargaining agreements (Agreements) covering the period from January 1, 2012 through December 31, 2013. Joint Exhibits 1 and 2. The grievances were each carried through steps one, two and three of the grievance procedure outlined in Article 7 of both contracts. The Union submitted the disputes to arbitration, requested a list of arbitrators from the Bureau of Mediation Services (BMS), and selected the undersigned arbitrator to hear the grievances and determine whether they should be sustained or denied. Prior to going on the record, both parties stipulated that there were no procedural issues present including timeliness of the grievances. The parties also stipulated to consolidating the grievances, four joint exhibits, and a protective order issued by the arbitrator allowing certain confidential medical data and/or personnel data

on employees to be introduced by both parties and the Grievants at the hearing and treated in a manner such that the privacy of the data is maintained.

## **Issue**

The parties did not agree on an issue so the arbitrator crafted the following:  
Did the Employer violate Article 11 of each Agreement when it allowed the Grievants to utilize accrued paid leave benefits to make up the difference between Workers Compensation benefits and the Grievants' regular rate of pay instead of paying outright the difference without diminishing the Grievants's paid leave accruals?

## **Positions of the Parties**

### **The Union**

Counsel for the Union gave his opening argument first and described how the two Grievants and three actual grievances, two by one of the Grievants, involved how they were paid after an injury on duty. The Employer, instead of making up the difference straight out, once it got the agreement of the Grievant, took the difference out of the Grievants' accrued paid leave, including sick leave, vacation accrual and compensatory time. This occurred after the first twenty-four hours of pay which the employer paid straight out. He stated that both Grievants, Misty Englund and Mike Zimmerman, exhausted their paid leave and went without full pay for a period of time.

The Union argued that there is clear and unambiguous language in the Agreements and that, because of that, past practice does not apply. Counsel stated that if past practice applies, the Employer has the burden of showing that the practice is fixed, established, and accepted by both parties. The Union stated that the issue had been grieved two other times and that other employees were unaware of the Agreements'

language on the issue. The Union closed by requesting that all three grievances be sustained.

### **Union's Witnesses**

John Harris, a Deputy Sheriff was the first Union witness to testify. He stated he had been a licensed deputy since October, 2003. Harris identified Union Exhibit 13 and described his injury to his left leg which he originally thought was a tear but turned out to be a large bruise. Harris described the approval by Workers Compensation and the subsequent loss of sick time when it was used to supplement the two-thirds pay through Workers' Compensation. Harris testified that he was not familiar with the Agreement's provision, Article 11 Injury on Duty, and that when he called Human Resources to request 100% of his pay, they "didn't mention anything about a contract provision". He himself did not check the Agreement and didn't talk to anyone about the pay discrepancy. Harris stated that he wasn't aware of the issue until a few weeks ago. He understands now that you don't have to use the accruals. He testified that Englund told him that in preparation for the hearing. On cross examination, Harris was asked about the signatures on Union Exhibit 13, his payroll records showing the use of his accrued paid leave. He identified his signatures under the statement, "I verify entries above are correct." He stated that he knew he could go to Kris Weiss who works in the Sheriff's office about pay issues but that he never went to her with a question. He testified that he didn't contact the Union either. On recross examination when he was asked if he was familiar with the Agreement he stated, "I don't think that's my job." When asked if that was a Union responsibility, he said "Yes".

Amy McKenzie was called as the second Union witness. She is a Detention

Deputy and has been for nine years. McKenzie testified that in 2008 she pulled a muscle during “Use of Force” training” and applied for Workers Compensation. She identified Union Exhibit 14 and stated that she lost some accrued sick leave during the incident. She testified that although she was familiar with the Agreement she didn’t go through it to check to see how her leave balances were affected. McKenzie testified that she “didn’t know I’d lost four hours”. When asked if there was a discrepancy between the Agreement and practice, she responded, “Yes, I guess so.” On cross examination McKenzie stated she considered filing a grievance but didn’t.

Mike Zimmerman testified third. He said he had been a Detention Deputy for five and one-half years. Zimmerman described the tear he felt on duty and identified Union Exhibit 12, showing the use of his paid leave accrual to supplement the two-thirds pay from Workers Compensation. He identified Employer Exhibit 1 and said that his initial Workers Compensation claim was denied. When asked if the Employer returned his sick leave, Zimmerman testified, “No, they didn’t.” Zimmerman said he was made aware of the discrepancy by several Detention Deputies. On cross examination Zimmerman indicated he was told to file the grievance. He identified Employer Exhibit 1 and said that initially Workers Compensation was denied him. Zimmerman also was asked if Article 11 says that the Employer will pay regular wages, he stated “No”. He was asked about Article 11. He said, “I don’t know it’s confusing.” He was also asked if there was “any county employee who has received regular wages during a Workers Compensation leave?” He said “No”. Zimmerman maintained that, “I’m not trying to change anything.”

Josh Stehr was the next Union witness. He testified that he was a Detention Deputy for two years and now is a Deputy Sheriff. He has been a Union Steward for ten

years. Stehr said that the Injury on Duty provision had been the same “throughout”. When asked if he participated in negotiations he replied, “I believe so -- maybe not in 2003”. He indicated that he had no knowledge of past practice and that “nothing had been brought to my attention”. Similarly, he responded to a question of whether there had been prior instances that he knew of none. On cross examination, Stehr was asked about grievances occurring between the Union and the Employer. He agreed that they were rare. He answered that he had access to the Employer policies, that negotiation process involved input from members and that the bargaining team makes proposals if the bargaining unit wants them. He indicated that time sheets were submitted to Weiss and that that process had been the same as long as he could recall. Under both cross examination and re-direct examination Stehr testified that he was not clear as to what the contract language “excluding year and holiday pay” meant. He knew what “holiday pay” meant but not what “year” meant. Stehr said he thought the language, “the first twenty-four (24) hours of an injury” being charged to the employee’s sick leave account was clear to him.

Glen Barringer was the fifth witness to testify for the Union. He is an Investigator with the Sheriff’s Office and first started working in that capacity in 1999. He testified that he is in the same bargaining unit as the sworn deputies and has been the Union Steward for ten to eleven years. In that role he participated, among other things, in negotiations for the collective bargaining agreements from 2003 to the present Agreement. He testified that the Injury on Duty provision had remained the same the whole time and that there was no discussion of changing, amending or clarifying it. He said “No one brought it up.” On May 8, 2012 he became aware of it when Englund called and he told her to get

in contact with the Business Agent. Barringer testified that he had no knowledge of past practice and was not aware of anyone who hadn't been paid. On cross examination he agreed that the term "regular compensation" isn't included in the Injury on Duty language of the Agreement, Joint Exhibit 1. In addition, he agreed that the term "wages" wasn't included in the Agreement, Joint Exhibit 1. He stated that they had "never had an issue with it" and he had no member approach him with concerns.

Dennis Wempner, a Detention Deputy since 2003, was the sixth person to testify. He is the Steward for Local 78. Wempner said that the Injury on Duty provision of the Agreement was not a subject of bargaining. Wempner testified that the language in that section, "year and holiday pay", should really be "year-end holiday pay"

Englund, a Deputy Sheriff was the seventh person to testify. She, too, got her injury in Use of Force Training. She was on leave for an injury during two separate periods of time: from March 2012, to May 2012; and, from December 2012 to March 25, 2013, when she returned to work. Union Exhibits 10 and 11. Englund stated that she exhausted her sick leave, compensatory time and vacation time. She testified that because she had no more paid time off she had to have a graduation and going away to boot camp party for her daughter on a Monday night, had to forgo a motorcycle trip, and missed Easter celebrations and multiple birthday celebrations. On cross examination she was asked about other employees donating paid leave. She said it was not allowed when an employee was on Workers Compensation. She also indicated that the Workers Compensation was not taxable so no tax withholding was taken out of her check for those payments. Englund indicated that on May 17, 2012, she got information from another employee through her husband who was told "make sure she sees this", meaning the

Injury on Duty language of the Agreement. She testified that “No one else has ever filed a grievance [on this issue].” She indicated that it was similar to Zimmerman’s grievance. She said that in the 2006 and 2009 collective bargaining agreements the Union did raise the issue. She stated that McKenzie’s injury in 2008 didn’t generate a grievance because she didn’t know anything was wrong. Englund testified that “No one had an issue because no one knew about it.” At the end of the hearing Englund was brought back by the Union to testify as a rebuttal witness. She testified that she was never given the option of deciding what accumulated paid leave she wanted to use. On cross examination she modified her testimony to say she didn’t “recall” or it “didn’t happen”

Jay Kingseth testified that he pulled a hamstring on duty and was docked his sick leave to augment his Workers Compensation. He was familiar with the Injury on Duty language. He went through his pay stub and talked to the Union Steward and the BA. He believed there was a discrepancy when he looked at it the day before this arbitration. He believes he has a basis for a grievance. He was asked if he had an opportunity to review the payroll record that showed the use of the accumulated paid leave and he replied, “yes”.

### **The Employer**

In the Employer’s opening argument Counsel stated that the facts in evidence are those from 1989 to the present. Over that long period of time the Employer has administered the Workers Compensation’s benefit by using employees’ sick, vacation and compensatory accruals to make up the difference between the two-thirds payment from Workers Compensation and the employees’ regular wages. All licensed and unlicensed employees are treated the same. The Union has not made a contract

proposal to change the section of the Agreement dealing with this, Injury on Duty.

“Employee after Employee had injuries on duty.” That knowledge can be imputed to the Union. The Employer argued that the Union is attempting to gain through grievance arbitration what they perceive they cannot get in negotiations. The Employer stated that the personnel policy is the same for Teamsters and AFSCME members who work for the county. The Employer argued that the Injury on Duty provision is confusing and pointed to the language “excluding the year and holiday pay”, Joint Exhibits 1 and 2. The Employer said the likely language meant to be is “year- end holiday pay”. The Employer said that the Injury on Duty language is not the same as other provisions in the Agreements including the court duty provision where paid leave accruals are not used to pay the county employee. The Employer concluded that the Section 11, Injury on Duty language is ambiguous and that an arbitrator is bound to look at past practice.

### **Employer’s Witnesses**

The first witness for the Employer was Weiss, the Administrative Assistant to the Goodhue County Sheriff. She has worked for the Goodhue County since 1989. She currently reconciles time cards and reviews and corrects time sheets. She makes a copy for herself and sends one to Payroll. She testified that the regular work shift was a ten hour shift, but now is an eleven and one-half hour shift. She testified about Deputy Sheriff Anderson’s injury on duty in 2000 and how he was not paid regular wages but two-thirds Workers Compensation and one-third from his accrued sick leave. She indicated that she signs each of the pages, the Employee signs each of the pages and the Employee receives a copy. It includes the First Report of Injury and the actual calculation for each pay period, consisting of four pages. Employer Exhibit 3. Weiss

identified Employer Exhibit 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 covering years starting in 1993 as essentially the procedure she used for everyone that suffered an injury on duty. Weiss testified that the practice has been the same for twenty-five years. She indicated that she testified to this in the Whipple grievance arbitration. On cross examination she testified that the arbitrator determined in the Whipple arbitration that it was not timely filed. The arbitrator “dismissed” the grievance on that basis.

Weiss was called back as a rebuttal witness at the end of the hearing by the Employer. She testified that when she had a conversation with Englund about supplementing the Workers Compensation payment. Englund discussed her sick leave accrual and Weiss referred her to Human Resources. On cross examination, Weiss testified that she recalled specifically that Englund told her, “I need to cover that one-third somehow.”

Melissa Cushing testified second for the Employer. She has been the Human Resources Director since 2002. In addition to participating at the bargaining table for six bargaining units, she deals with, among other things, wellness, safety, and Workers’ Compensation. She testified that the Injury on Duty provision in both Agreements at issue has been the same since she has been involved in negotiations. She testified that Article 11, Injury on Duty, reads “year and holiday pay” it should be “end”. In other words holiday pay can’t supplement Workers Compensation. She explained that in the first three shifts of an eight hour shift Workers Compensation doesn’t pay and an employee’s sick leave accrual is charged. The employee can use sick leave, compensatory time and vacation time to supplement the Workers’ Compensation payment. Cushing stated, “If it

was clear language we wouldn't have a disagreement on it."

Cushing testified about Article 15.4 in Joint Exhibit 1, which reads "Accumulated paid sick leave may be approved for paid employee absences for the following reasons: Because of employee illness or injury which prevents the employee from performing job duties and responsibilities." In addition, she pointed to Article 22.2, Court Duty which reads, "An employee called and selected for Jury Duty, shall receive regular compensation and other benefits for such duty." Cushing testified that no language like that exists in the Injury on Duty section of the Agreement. Cushing said the Injury on Duty language is administered uniformly and that uniform administration involved thirteen other members of the Grievants' bargaining units. Cushing testified that the Mike Mazurka settlement was agreed by all parties to be non-precedential. The employee had resigned and it was settle for "pennies on the dollar", less than \$100.

Cushing testified regarding Goodhue County's policies which were applicable to all bargaining units except when in conflict. She pointed out two provisions on page 3 and 79 of Employer Exhibit 32. She described the policies as consistent with the practice and was asked if any employee had been paid regular wages without deduction from accrued leave. She said, "No". When asked about the implication of the present grievances being sustained she said it would change an extremely long past practice, would affect both union and no-union employees and that the Grievants are asking for something outside the scope of negotiations. On cross examination she was asked about the other bargaining units and said AFSCME has no Injury on Duty provision and the Teamsters' one is different. She said an employee has the option to use accrued leave or not and can designate which kind they want to use to supplement the Workers'

Compensation. She testified that Englund used all of her accrued sick leave. On redirect, Cushing testified that she had engaged in negotiating four successor agreements and there had been no proposal to modify the Injury on Duty provision. She said the policy language on Injury on Duty was the same from 1999 to 2011.

## **Discussion**

Both the Union and the Employer in their Post Hearing Briefs maintained that any consideration of past practice must first be preceded by a finding of unclear or ambiguous contract language. The Employer argues further, that an arbitrator can ignore clear contract language and still find past practice binding. There is no need in this arbitration to go that far. I find that the language of the Agreements is unclear, ambiguous and uncertain. The members of the bargaining units and the Employer find it so, the Agreements, each as a whole, suggest it, and a literal reading of Section 11, Injury on Duty, confirms it.

The testimony of Union and Employer witnesses indicated confusion and uncertainty about the language of Article 11, Injury on Duty in the Agreements. Testimony of Zimmerman, Stehr, and Cushing. It is well settled that conduct of the parties may be used to affix a meaning to words and phrases of uncertain meaning. Union's Post Hearing Brief.

The language of Article 11, Injury on Duty when viewed in the context of the Agreements governing the parties, is uncertain. In Article 15.4, it states that "Accumulated paid sick leave may be approved for paid employee absences for the following reasons: 15.4.1 Because of employee illness or injury which prevents the employee from performing job duties and responsibilities." Joint Exhibit 2. In Article

22.2, Court Duty, it states, “An employee called and selected for Jury Duty, shall receive regular compensation...” Joint Exhibit 2. The language of both Agreements under which these grievances arise is nearly identical. It has also been unchanged for years. Article 11 doesn’t say anything about the employee receiving regular compensation.

Furthermore, a literal reading of the sentence in Injury on Duty doesn’t make sense. The Employer argues that the “and” should be “end”. One of the Union witnesses testified that he agreed with that interpretation and others found the language confusing without specifying what it meant. Testimony of Wempfer. Finally, the testimony of Englund stating that no deductions are made from Workers Compensation payments (as are deductions from regular compensation) would result in an employee receiving more in total pay while injured on duty than when working actively. That may be an additional benefit the employees think is proper considering an injury, but the Agreements do not say that, nor has that been the practice.

The language of the Agreements is unclear and ambiguous. Consultation of the parties’ past practice is “the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the parties’ intent is most often manifested in their actions.” Elkouri & Elkouri, *How Arbitration Works* (6<sup>th</sup> Ed. BNA) at 623.

The past practice was accepted. Testimony of Stehr and Barringer. The bargaining unit members and the Union’s inaction in grieving what they now find a violation of the contract, are telling. It is undisputed that the employees’ signatures on payroll records are authentic. The precise delineation on those records of the use of each kind of leave and the dollars it took to supplement the Workers Compensation

payments couldn't be more clear. Employees considered such accruals their property and agreed to the use of it by their signature and lack of complaint. Seldom are such business records so consistent. Employer Exhibit 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 22, and 23. These were. Only two employees did not sign, one because the Union and he grieved it and settled it in a non-precedential settlement indicating the knowledge of the practice as the Employer correctly points out in its Post Hearing Brief, and one, presumably in an oversight. Because of this evidence, I find that there was knowledge of and acquiescence in the practice of supplementing Workers Compensation pay with an employee's accrued leave. Englund's own testimony, "No one else has ever filed a grievance", says it all. She, buoyed by advice from others, was forging ahead with this new interpretation of the Agreement's language. It is practice the employees and Union knew about and acquiesced in.

In order to establish a binding past practice, "the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future". *PPG Indus.*, 110 LA 968, 969 (Felice 1998) as cited in Elkouri at 625. The practice, besides being known and acquiesced to by signatures on the payroll document was a quarter of a century old. Testimony of Weiss. After the first twenty-four hours the accrued sick, vacation or compensatory time was used to supplement the two-thirds pay Workers Compensation insurance provides. To disturb that long term practice the Agreements language would have to be clarified by the Union and Employer bargaining teams at the negotiations table.

### **Award**

The grievances are denied.

Dated the 28<sup>th</sup> of May, 2013

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Carol Berg O'Toole, Arbitrator