

*WORK VACATION*

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In the Matter of the Arbitration

between

POLICE BENEVOLENT ASSOCIATION

and

COUNTY OF NASSAU  
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AWARD

The undersigned arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The grievance is granted. The County must comply with its obligations under Section 12.2 of the Agreement.

*Carol Wittenberg*  
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Carol Wittenberg

STATE OF NEW YORK

SS.:

COUNTY OF WESTCHESTER

I, CAROL WITTENBERG, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

*3/1/93*  
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(Dated)

*Carol Wittenberg*  
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(Signature)

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In the Matter of the Arbitration

between

OPINION AND AWARD

POLICE BENEVOLENT ASSOCIATION

and

COUNTY OF NASSAU

-----\*  
Before: Carol Wittenberg

The undersigned, having been designated by the parties pursuant to the collective bargaining agreement, was selected to serve as arbitrator of the dispute described below. A hearing was held on February 10, 1993 at the offices of the County of Nassau in Mineola, New York. The Union was represented Harry Greenberg, Esquire. The County was represented by Daniel Wahl, Esquire.

The parties had a full opportunity to examine and cross-examine witnesses, to submit documentation and to make oral argument in support of their respective positions. The hearing was declared closed on February 10, 1993.

The issues before the Arbitrator, as agreed upon by the parties, are as follows:

Is the dispute arbitrable? If so, did the County violate the collective bargaining agreement as alleged by the PBA in Joint #2? If so, what shall the appropriate remedy be?

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RELEVANT CONTRACT LANGUAGE

Section 5.0 Grievance Procedures.

5.1 Every employee shall have the right to present his/her grievances solely in accordance with the procedures described herein with or without a representative of the Association, free from interference, coercion, restraint, discrimination or reprisal.

Step 1. An employee who feels that he/she has been aggrieved may orally present his/her grievance to his/her Commanding Officer within 30 days after the employee received actual notice of the action, omission or other circumstances claimed to give rise to the grievance. Vacation time, sick leave and military leave shall not be included with the 30 days time limitation. Commanding Officer shall carefully consider the matter and within three (3) days thereafter, make a determination and advise the employee of the decision.

Section 8.11-8

At the discretion of the Commissioner, employees, who so desire, may volunteer to work for a period of five (5) consecutive days during their annual vacation. Such work will be compensated at straight time, unless an employee works in excess of eight (8) hours or unless an employee works where at least one-half (1/2) the tour is between the hours of 1530 and 0730, in which case the applicable overtime compensation and night differential pay will be given. Such volunteers may be assigned to perform duties as designated.

Section 12.2

If any provision of the agreement shall be found to be illegal, the County and the Association shall mutually agree to replace that provision with another one which is substantially equal in monetary value.

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BACKGROUND

The facts in this case are not in dispute. For approximately 15 years, police officers were able to volunteer, at the discretion of the Police Commissioner, to work for a period of five consecutive days during their annual vacation for which they were paid at a straight time rate. Upon retirement, money earned while working on vacation was included in an officer's final salary for pension calculation purposes.

In 1988, the State Comptroller, as Administrator of the New York State Policeman's and Fireman's Retirement System, determined that money earned during a police officer's vacation could not be considered pensionable. Under the Comptroller's ruling, such pension money received as a result of being calculated into the officer's final salary had to be paid back to the State Pension System.

The Union brought an Article 78 proceeding against the Comptroller for his refusal to credit vacation earnings toward a police officer's final salary. In a decision by Daniel H. Prior, Jr., Justice of the Supreme Court, County of Albany dated August

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28, 1992, the court dismissed the Union's petition. The Order of the court was signed and dated September 28, 1992.

On October 14, 1992 PBA Second Vice-President Allen Unterweiser wrote to Police Commissioner Donald Kane notifying him of the court decision and stating as follows:

A recent court decision has found Section 8.11-8 to be illegal, therefore, Section 12.2 of the Collective Bargaining Agreement states "If any provision of the agreement shall be found to be illegal, the County and the Association shall mutually agree to replace that provision with another one which is substantially equal in monetary value."

These retired members should be paid overtime rates for those days they worked, and that money should be recalculated in their pension allotments.

When the County refused to make the requested adjustments, the Union grieved and appealed the case to arbitration.

The evidence establishes that the rights under Section 8.11-8 of the Agreement have been in existence since at least 1973. According to Unterweiser, he participated in discussions concerning the clause during negotiations for the last two contracts. Unterweiser testified further that the clause had two purposes, to save the County money by paying straight time instead of overtime and to make the money earned pensionable.

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ARBITRABILITY

The County raised a threshold issue of procedural arbitrability. The County contends that under Section 5.1 of the Agreement, the Union has 30 working days in which to file a grievance. The County claims that the Union failed to file the instant grievance within 30 working days of Justice Prior's decision dated August 28, 1992.

Counsel for the Union testified that he was not served with a copy of the Court's Order until after September 28, 1992. Therefore, the October 14, 1992 grievance was well within the 30 working day requirement of the contract.

The Arbitrator finds the Union's grievance to be arbitrable under Section 5.1 of the Agreement. She is persuaded that the Union filed well within thirty working days of its actual notice of the Court's Order. The grievance is timely and, arbitrable.

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THE MERITS

CONTENTIONS OF THE PARTIES

The Union contends that the practice of calculating money earned under Section 8.11-8 as part of a police officer's final salary is now illegal. The 1988 Comptroller's decision was upheld by a court of competent jurisdiction in September, 1992. The Union argues that, as a result, Section 12.2 of the Agreement triggered a requirement that the parties agree to replace the provision with one of equal value.

The Union contends that if Section 8.11-8 is found to be ambiguous, the bargaining history of the section is relevant. Specifically, the Union asserts that the parties' intent was to exchange the payment of straight time for vacation work for pensionability.

The County contends that Section 8.11-8 was not rendered illegal by Justice Prior's decision. In the County's view, the benefit under Section 8.11-8 continues to exist. It argues, therefore, that Section 12.2 is inapplicable under these facts.

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The County maintains that police officers continue to work during their vacations at a straight time rate, at the discretion of the Police Commissioner, pursuant to Section 8.11-8.

The County points out that Section 8.11-8 is silent with regard to eligibility for pension credit. It argues that the Union is trying to obtain a benefit in arbitration which it was unable to obtain from a court, and to which it is not entitled.

#### OPINION

The crux of the issue before the Arbitrator is whether the past practice of including money earned under Section 8.11-8 as pensionable constitutes a "provision of the agreement" under Section 12.2, requiring the parties to replace the provision with one of equal value. The Arbitrator finds that there was a binding past practice of a benefit which is regarded as a distinct condition of employment and which, when declared illegal, triggered Section 12.2. My reasons follow.

Section 8.11-8 is silent with regard to pensionability. The parties' bargaining history and 15 years of practice clarify the



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intent of this section of the contract. The bargaining history favors the Union. It establishes that the County received a cost savings in reduced overtime expenditures by paying police officers who work five consecutive days of vacation at a straight time rate. The straight time payment was, therefore, a quid pro quo for the savings generated for the County.

The Union's interpretation of Section 8.11-8 is also supported by the parties' practice of 15 years standing. Moreover, the practice was clear, consistent, lengthy, repeated, accepted and mutual. In short, the past practice was a product of the joint understanding of the parties as the accepted way of calculating monies earned during a police officer's vacation for the purpose of calculating an officer's pension. The practice constitutes a binding practice which, like a written provision of the contract, becomes an enforceable part of the collective bargaining agreement.

The practice in this case concerns the provision of a monetary benefit which is generally regarded as a distinct and binding condition of employment. Moreover, a reading of Section 12.2 indicates that the parties contemplated this type of situation in providing for mutual agreement to replace the illegal provision with "another one which is substantially equal in monetary value."

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Therefore, when Justice Prior confirmed the Comptroller's decision not to consider money earned under Section 8.11-8 pensionable, a "provision" of this section of the contract was declared illegal, triggering Section 12.2. The Arbitrator notes that the parties used four different terms in Section 12. of the contract in discussing what occurs when something is declared invalid or illegal.

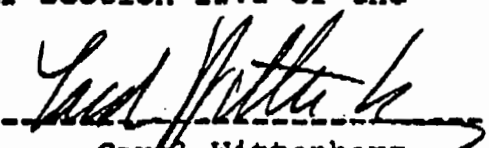
Section 12.1 refers to what occurs when "any article, section or portion of this agreement is contrary to the law or found to be invalid." Section 12.2 refers to a "provision" of the agreement being found to be illegal. Since the parties did not define a "provision," and since the definition of a provision can refer either to an entire clause or part thereof, the Arbitrator reads the word "provision" to be inclusive.

Therefore, on the basis of the record before her, the Arbitrator makes the following award:

AWARD

The grievance is granted. The County must comply with its obligations under Section 12.2 of the Agreement.

Dated: March 10, 1993

  
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Carol Wittenberg  
Arbitrator