

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE SAWYER COUNTY HIGHWAY EMPLOYEES	:	
LOCAL UNION #1213, AFSCME, AFL-CIO,	:	
	:	Case XIII
Complainant,	:	No. 19603 MP-511
	:	Decision No. 13978-A
vs.	:	
	:	
THE SAWYER COUNTY HIGHWAY DEPARTMENT,	:	
	:	
Respondent.	:	
	:	

Appearances:

- Mr. Charles C. Ackerman, Labor Consultant, appearing on behalf of the Municipal Employer.
- Mr. Richard C. Erickson, District Representative, Wisconsin Council of County and Municipal Employees, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Sawyer County Highway Employees Local Union #1213, AFSCME, AFL-CIO, having on September 22, 1975, filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Sawyer County Highway Department, Hayward, Wisconsin has committed a prohibited practice within the meaning of the Wisconsin Municipal Employment Relations Act by refusing to comply with an Arbitration Award; and the Commission having appointed Byron Yaffe, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sections 111.70(4) and 111.07 of the Wisconsin Statutes; and, pursuant to notice, a hearing having been scheduled at Hayward, Wisconsin on November 5, 1975 before the Examiner; and on said date the parties having waived their right to a transcript and hearing in said matter on the ground that the subject matter of the complaint involves no disputed facts, but instead involves a dispute over the method of computing backpay prescribed in a grievance arbitration award; and the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Sawyer County Highway Employees Local Union #1213, AFSCME, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization; and that Richard C. Erickson is the District Representative of the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO assigned to the Complainant and that his offices are at 1110 North 22nd Street, Superior, Wisconsin.
2. That the Sawyer County Highway Department, hereinafter referred to as the Respondent, is a municipal employer; and that Mr. Charles Ackerman is its representative and that his offices are at 515 West 5th Street North, Ladysmith, Wisconsin.
3. That the Complainant and Respondent were signators of a collective bargaining agreement which was in full force and effect at all material times and which contained the following material provisions:

ARTICLE VI GRIEVANCE PROCEDURE

Section 1 A grievance is a complaint, dispute or controversy in which it is claimed that the collective bargaining agreement has been violated, and which involves either a dispute to the facts involved or a question concerning the meaning, interpretation, scope or application of this Agreement or both.

Section 2 Should an employee feel that his rights and privileges under this Agreement have been violated, he shall consult with the Union Grievance Committee. The aggrieved employee and the Committee Chairman shall within 5 work days or less, of the date of the grievance present the facts to the employee's immediate supervisor who shall submit his answer to the Union Grievance Committee.

Section 3 Should the Union decide that the reply of the immediate supervisor is unsatisfactory, the Union Grievance Committee shall, within 5 work days or less, submit the facts of the grievance in writing to the Highway Commissioner. The Commissioner shall, within 5 work days, or less, reply to the Union in writing giving his decision.

Section 4 Should the Union decide that the reply of the Highway Commissioner is unsatisfactory, the Union shall, within 5 work days or less, submit the facts of the grievance in writing to the Highway Committee. The parties shall arrange for a meeting between the Union representatives and the Highway Committee within 5 work days or less for negotiation of the issue. If, after sincere and earnest effort in good faith, the issue remains unsettled, the dispute shall be submitted to the final step of this procedure.

Section 5 Arbitration. Any dispute not settled by the above procedure may be submitted to an Arbitration Panel. One member of the panel shall be chosen by the Employer; and one member shall be chosen by the Union; and the third member, who shall be the chairman shall be appointed by the Wisconsin Employment Relations Commission. The Panel shall conduct a hearing without delay and shall make known its findings in writing simultaneously to the Employer and the Union as soon after their final meeting as practical. Their decision shall be final and binding on both parties to this Agreement.

. . .

ARTICLE IX WORK DAY AND WORK WEEK

Section 1 The work day for hourly rated employees shall be nine (9) hours each day, Monday through Friday, from 7:00 a.m. to 12:00 noon and from 1:00 p.m. to 5:00 p.m. for a total of forty-five (45) hours a week. This section shall not be interpreted as a guaranteed work week.

Section 2 The work day for Office Personnel shall be eight (8) hours each day, Monday through Friday for forty (40) hours each week.

ARTICLE X OVERTIME

Section 1 Employees shall be paid overtime pay at the rate of one and one-half times the regular rate of pay for all hours worked in excess of the work day as spelled out in Section 1 and 2, Article IX and for all work performed on Saturdays, Sundays, and holidays. All holiday overtime pay shall be in addition to the employees regular holiday pay.

Section 2 The employer agrees that there will be no lay off in any particular work week to avoid the payment of overtime pay.

. . .

ARTICLE XX WAGE RATES

Section 1 The wage rates shall be bargained for annually and shall automatically become a part of this working Agreement, see addendum. The jobs of employees and the prevailing wage shall be listed. Where no data can be obtained that could be applied as a prevailing rate, the parties shall negotiate such a rate.

ARTICLE XXI TOOL AND CLOTHING ALLOWANCE

Section 1 The Employer agrees to pay Twenty-Five Dollars (\$25.00) per year tool allowance to mechanics. Said tool allowance to be paid in January of each year.

Section 2 The Employer shall furnish coveralls and launder same, for six Mechanics, crusher operator, oil heater operators and haulers.

Section 3 Rubber gloves will be furnished by the employer for all personnel working with oil. In order to receive a second pair of gloves, the first pair issued must be turned in."

4. That prior to May 2, 1973, Mr. Nicholas Dorazio was employed by the Respondent as a Mechanic I; and that on May 2, 1973 that position was discontinued by the Respondent and Mr. Dorazio was transferred to a lower paying job at which he worked from May 2, 1973 until approximately March 31, 1975.

5. That a grievance was filed in 1973 by Complainant which alleged that the Respondent by the actions described in paragraph four and other actions had violated certain provisions of the collective bargaining agreement; that, pursuant to the agreement, the parties submitted the dispute to Arbitrator Marvin L. Schurke for a final and binding decision, waiving the requirement of a three-member board; that the Arbitrator conducted a hearing in the matter on April 24, 1974, where the parties were present and given full opportunity to present oral and written evidence and to make such arguments as were pertinent to the issues; that on March 21, 1975, Arbitrator Schurke issued his award and that the material part reads as follows:

- "1. Sawyer County violated the 1973 collective bargaining agreement between Sawyer County and Highway Employees Local #1213, WCCME, AFSCME, AFL-CIO, by transferring employes so as to reduce the work force in the Sawyer County Highway Department Shop to less than six Mechanical personnel including the Shop Foreman and by refilling such Mechanical positions without regard to the seniority rights of the employes so transferred. To remedy said violations of the collective bargaining agreement, Sawyer County is ordered to re-create positions, fill positions and make employes whole as follows:

. . .

- (b) Sawyer County shall re-create at least one position in the classification of Mechanic I, at least one position in the classification of Mechanic II and at least one position in the classification of Mechanic Helper, as such positions existed on May 1, 1973. Sawyer County shall re-create at least two additional positions among the classifications of Mechanic I, Mechanic II and Mechanic Helper, as suited to the type of work to be assigned to the occupants of such positions and as such positions existed on May 1, 1973. Sawyer County shall first offer said positions to the employes who held the classifications of Mechanic I, Mechanic II and Mechanic Helper as of May 1, 1973, in the order of their seniority. If any such employe declines the offer of said position(s) he shall lose all rights with respect thereto and the positions(s) remaining unfilled, if any, shall be posted and filled in the manner provided in the 1973 collective bargaining agreement between the parties. Each of the employes awarded positions under this paragraph shall receive back pay in the amount of the difference between the rate for the position obtained as specified in the 1973 and subsequent collective bargaining agreements, and the rates he actually received between May 2, 1973 and the date of the transfer or reinstatement made pursuant to this Award."

6. That following the issuance of the Arbitrator's Award and pursuant to the above Section of the Award, the Respondent recreated at least one position in the classification of Mechanic I and offered same to Mr. Dorazio who accepted the position, effective April 1, 1975; and that Respondent, on June 10, 1975, paid Mr. Dorazio the gross sum of \$165.74 which amounted to the difference between the straight time pay rate for the recreated position from May 2, 1973 to April 1, 1975 and the total straight and overtime pay actually received by Mr. Dorazio during that period.

7. That Mr. Dorazio may have worked some overtime hours had he worked as a Mechanic I from May 2, 1973 to April 1, 1975; that since said position was not in existence nor filled by a single individual during said period, and since the Respondent's payroll records for the period in question do not accurately reflect the amount of time other employes performed Mechanic I work during said period, the number of overtime hours Mr. Dorazio would have worked based upon a review of the Respondent's payroll records during said period would be difficult, if not impossible, to ascertain; and that the amount of overtime pay Mr. Dorazio would have earned during said period was not factored into the amount of backpay due him by the Respondent pursuant to the aforementioned arbitration award.

8. That the Respondent did not reimburse Mr. Dorazio for the tool and clothing allowance he would have received as a Mechanic I during the period in question.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That the Respondent, by failing to reimburse Mr. Dorazio for the clothing and tool allowance he would have received as a

Mechanic I during the period May 2, 1973 to April 1, 1975 did not violate the March 31, 1975 arbitration award of Arbitrator Schurke, and therefore said action does not constitute a prohibited practice within the meaning of Section 111.70(3)(a)(5) of the Wisconsin Municipal Employment Relations Act.

2. That the Respondent, by failing to factor into the backpay computation due Mr. Dorazio pursuant to said award the overtime pay Mr. Dorazio would have earned as a Mechanic I during the period between May 2, 1973 and the date he was subsequently awarded the Mechanic I position, (April 1, 1975), did violate Arbitrator Schurke's award and thereby committed a prohibited practice within the meaning of Section 111.70(3)(a)(5) of the Wisconsin Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and files the following

ORDER

IT IS ORDERED that the Sawyer County Highway Department, its officers and agents shall immediately:

1. Cease and desist from failing to comply with the Arbitration Award issued by Arbitrator Marvin L. Schurke on March 31, 1975.
2. Take the following affirmative action which will effectuate the policies of the Municipal Employment Relations Act:
 - (a) Factor into the computation of backpay due Mr. Dorazio pursuant to Arbitrator Schurke's award the amount of overtime pay Mr. Dorazio would have earned as a Mechanic I between May 2, 1973 and the date he was subsequently awarded said position (April 1, 1975). The determination of said overtime pay should be computed as follows:

The total number of overtime hours worked by Mr. Dorazio from April 1, 1975 through December 31, 1975 should be computed. Thereafter, the average number of overtime hours worked by Mr. Dorazio per month should be computed by dividing the total number of overtime hours he worked by the number of months he was assigned to the Mechanic I position prior to December 31, 1975 (9 months); said monthly average should then be utilized as a reasonable approximation of the number of overtime hours Mr. Dorazio would have worked per month during the period the Arbitrator found him to be entitled to back pay; accordingly, the Respondent should thereafter pay Mr. Dorazio the difference between the total straight and overtime 1/ earnings he would have received as a Mechanic I between the period May 2, 1973 and April 1, 1975 and the total straight and overtime earnings he actually received during said period.

- (b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison Wisconsin this 30th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Byron Yaffe, Examiner

1/ Using the aforementioned formula to compute average monthly overtime hours worked by Mr. Dorazio.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The issue in this complaint case involves the question whether or not the Respondent has failed to comply with an arbitration award requiring the payment of backpay to Mr. Nicholas Dorazio "in the amount of the difference between the rate for the position he obtained as specified in the 1973 and subsequent collective bargaining agreements, and the rates he actually received between May 2, 1973 and the date" Mr. Dorazio was awarded the Mechanic I position pursuant to said arbitration award.

The Complainant contends that the Respondent has failed to comply with the Award because it has not paid Mr. Dorazio the proper sum of backpay. The Respondent computed the amount of backpay due Mr. Dorazio as follows: the straight-time pay Mr. Dorazio would have received in the Mechanic I position from May 2, 1973 to April 1, 1975 (the date he was awarded the Mechanic I position) less the total straight-time plus overtime pay he actually received during said period.

The Complainant argues that the amount of backpay due Mr. Dorazio should be computed as follows: the straight-time pay Mr. Dorazio would have received as a Mechanic I between May 2, 1973 and April 1, 1975 minus the straight-time pay he actually received during said period, plus the tool and clothing allowance he would have been entitled to as a Mechanic I during the period in question.

The arbitration award defines backpay in terms of the difference between the rates of pay which Mr. Dorazio was entitled to and the rates of pay which he actually received. Because of the specificity of the award in this regard, the Examiner concludes that the Arbitrator clearly did not contemplate in his backpay award reimbursement for lost allowances for tools and clothing. Therefore, the Respondent has not violated said award by failing to reimburse Mr. Dorazio for said allowances.

The more difficult issue in this proceeding is whether or not Mr. Dorazio's earned overtime and expected overtime in the Mechanic I position should have been considered in computing the backpay due him pursuant to Arbitrator Schurke's award.

The Arbitrator stated in his award that its purpose was "to put those improperly transferred or displaced back into the position they would have been, at least financially, had their seniority rights not been violated."

In order to place Mr. Dorazio in the same financial position, at least with respect to lost earnings, it seems clear that all of his wages, including those actually earned and those which he reasonably could have anticipated as a Mechanic I, must be factored into the backpay computation. To do otherwise would contradict the Arbitrator's above stated purpose, as well as the established practice of arbitrators and administrative agencies to include the difference between anticipated overtime earnings and actual overtime earnings in the computation of backpay designed to make employes financially whole for wrongful Employer conduct resulting in a loss of earnings. 2/

2/ Darby Printing Co. 49 LA 828; for similar NLRB precedent see: Controlled Alloy, Inc. 85 LRRM 1495 (NLRB 1974); Marcus Trucking Co. 137 NLRB 1378 (1962); Stover Bedding Co. 15 NLRB 635, 5 LRRM 158 (1939); modified and enforced 114 F.2d 513, 7 LRRM 609 (10th Cir. 1940).

Having thus concluded that overtime earnings, both actual and potential, should have been factored into the backpay computation which is the subject matter of this proceeding, the next and most difficult task is the development of a fair and relatively accurate method of computing the overtime hours Mr. Dorazio would have worked as a Mechanic I during the period said position was abolished.

Because the Mechanic I position did not exist during said period and because the payroll records of other employes who performed the work of the Mechanic I position on a part-time basis during said period do not reflect the amount of time spent in the performance of said work, utilization of the Respondent's payroll records for said period to ascertain the amount of overtime Mr. Dorazio would have worked does not appear to be viable.

Reliance on Mr. Dorazio's earned overtime before his position was abolished would be possible; however, because of the Respondent's purchase of new equipment during the period in question to be worked upon by the Mechanic I, it seems more reasonable to utilize the average number of hours worked by Mr. Dorazio since he was awarded the Mechanic I position as being representative of the number of overtime hours he would have worked during the backpay period. This is so because his current work is more like that which he would have been assigned during the backpay period (he is now working on the new equipment) than was the work he performed during the period immediately prior to the introduction of the new equipment, before the Mechanic I position was abolished by the Respondent.

The Examiner concedes that utilization of the post award period to determine potential overtime earnings during the backpay period probably would have not been utilized by Arbitrator Schurke in fashioning his arbitration award; however, at this time, the above approach seems to the undersigned to be the fairest and most accurate means to achieve the Arbitrator's expressed desire, namely, to put Mr. Dorazio back into the position he would have been in, at least financially, had his seniority rights not been violated.

Thus, although the actual number of overtime hours Mr. Dorazio would have worked during the backpay period does not appear to be accurately computable, a fair approximation of his overtime earnings during said period does appear to be computable by utilizing the monthly average overtime hours worked by Mr. Dorazio as a Mechanic I since he has been awarded said position pursuant to Arbitrator Schurke's award. Because such overtime earnings are computable, and because it is necessary to consider them in order to make Mr. Dorazio financially whole, the Respondent, by failing to incorporate such potential earnings in its computation of the backpay due Mr. Dorazio, has failed to comply with the intent of Arbitrator Schurke's backpay award and has thereby violated Section 111.70(3)(a)(5) Wisconsin Statutes.

Accordingly, the Respondent shall be required in this order to factor into its computation of the backpay due Mr. Dorazio a reasonable estimate of the overtime hours Mr. Dorazio would have worked during the backpay period as Mechanic I had his seniority rights not been violated. The specific method of computing and applying the overtime estimate is set forth in the Order.

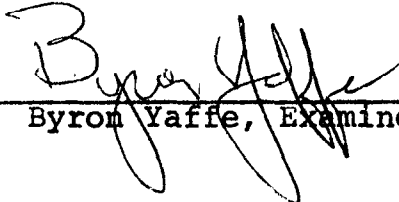
Although the Complainant has requested interest on the backpay which was improperly withheld from Mr. Dorazio by the Respondent, the Examiner does not believe the payment of such interest should be required of the Respondent in this instance since the Arbitrator's backpay award allows for legitimate differing interpretations which in fact are reflected in the

parties' positions in this proceeding. Since this dispute arose over legitimate differences of opinion as to the meaning and intent of Arbitrator Schurke's backpay award, and since there is no evidence that the Respondent willfully intended not to comply with said award, an interest penalty on the Respondent does not appear to be appropriate.

Dated at Madison, Wisconsin this 30th day of January, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Byron Yaffe, Examiner