BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GREEN BAY BOARD OF EDUCATION (CLERICAL) EMPLOYEES UNION, LOCAL 3055B, AFSCME, AFL-CIO	Case 115 No. 41593 MA-5410
and	
GREEN BAY AREA SCHOOL DISTRICT	

Appearances:
Mr. James W. Miller, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.
Mr. J. D. McKay, Attorney at Law, appearing on behalf of the District.

ARBITRATION AWARD

Green Bay Board of Education (Clerical) Employees Union, Local 3055B, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Green Bay Area School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the District, that the Wisconsin Employment Relation Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Green Bay, Wisconsin on February 3, 1989. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on May 10, 1989.

BACKGROUND

The basic facts underlying this grievance are undisputed. The grievant is employed by the District as a computer operator whose normal work hours are from 2:00 p.m. to 10:00 p.m. with a 1/2 hour unpaid lunch or dinner period for a total of 7 1/2 hours. The grievant began her employment on July 23, 1988 when no present employe posted for the position of computer operator. The job posting stated under Hours of Work: "Up to 7.5 hours per day (Base day 2:00 p.m. to 10:00 p.m. May necessitate flexible hours and overtime hours as required by the job)." The job description also contained the following statement: "Flexible hours and overtime hours as required by the job."

On October 6, 1988, the grievant was called by her supervisor and asked to come into work early. The grievant reported to work at noon and was sent home at 8:00 p.m. The grievant filed a grievance contending she should have been allowed to work until 10:00 p.m.

ISSUE

The parties stipulated to the following:

> Was the grievant, a flexible hour employe, who was called in to work two (2) hours before the normal work day of 2:00 p.m. to 10:00 p.m. on October 6, 1988 and then sent home two (2) hours early, entitled to two (2) hours overtime along with her regular eight (8) hours of pay?

Pertinent Contractual Provisions

ARTICLE II

MANAGEMENT RIGHTS

> The Employer, on its own behalf, hereby retains and reserves unto itself, all powers, rights, authority, duties and responsibilities

conferred upon and vested in it by the laws and the constitutions of the State of Wisconsin and of the United States including rights:

1. To the executive management and administrative control of the school system and its properties and facilities;

2. To hire all employees and, subject to the provisions of law and this Agreement, to determine their qualifications and the conditions for their continued employment, or their dismissal or demotion, and to promote and transfer all such employees;

3. To determine hours of duty and assignment of work;

4. To establish new jobs and abolish or change existing jobs;

5. To manage the work force and determine the number of employees required.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement and Wisconsin Statues, Section 111.70, and then only to the extent such specific and express terms are in conformance with the constitution and laws of the State of Wisconsin and the constitution and laws of the United States.

. . .

ARTICLE X

PAY POLICY

. . .

Overtime: All work performed over seven and one-half (7 1/2) hours per work day and/or thirty-seven and one-half (37 1/2) hours per work week shall be compensated for at the rate of time and one-half the employee's rate of pay.

. . .

ARTICLE XI

CALL-IN PAY - STANDBY PAY

A minimum of three (3) hours' pay will be allowed each time an employee is called out from home for duty. The overtime provision shall apply to call-in time.

. . .

UNION'S POSITION

The Union contends that the District violated the agreement by not allowing the grievant to complete her regular shift. It notes that the posting states that the basic hours for the position are 2:00 p.m. to 10:00 p.m. and the position may necessitate flexible hours and overtime. It points out that the posting does not say flexible hours in lieu of overtime. It argues that the grievant is entitled to work her basic hours and, if she is called into work early, she cannot be sent home early to avoid the payment of overtime. The Union claims that the District is using call-in hours as part of the grievant's regular shift which would take away the meaning of overtime and call-in pay. It notes that the District failed to show any instance where call-in was used as part of the basic work day nor was there any showing that anyone was sent home early. It maintains that the shift is clearly spelled out and sending an employe home early renders call-in meaningless. It notes that the District asked the grievant to come in early and did not tell her she would be sent home early at that time. It asserts that the grievant should not be penalized for adhering to the District's request. It concludes that the District violated the agreement by not allowing the grievant to finish her regular shift and not paying her overtime and it asks that she be made whole.

DISTRICT'S POSITION

The District contends that the grievant is not entitled to overtime pay. It submits that overtime is all work in excess of 7 1/2 hours per day and the grievant did not work more than 7 1/2 hours on October 6, 1988, hence is not

entitled to overtime pay. It maintains that the grievant's job requires flexible hours and overtime as needed. It submits that nothing in the agreement specifies a 2:00 p.m. to 10:00 p.m. shift and, under the management rights provision, the District has the right to determine the hours of duty and assignment of work. It argues that the District has the flexibility of calling the grievant in on flexible hours and not paying overtime so long as the 7 1/2 hours are not exceeded. It takes the position that the grievant did not work over 7 1/2 hours, should not be paid any overtime and the grievance should be denied.

DISCUSSION

The instant dispute hinges on the term "flexible hours" as used in the job posting 1/ and job description. 2/ "Flexible hours" is not defined in the contract as overtime is. Overtime is work performed in excess of 7 1/2 hours per day or 37 1/2 hours per week. Inasmuch as the term "flexible hours" and overtime hours are used together in the posting and job description, they must have different meanings, otherwise if it was the intent of the parties that work outside the base day would be required, all that needed to be stated is overtime hours may be required because overtime would cover the situation without the need for the term, "flexible hours" being referenced. Therefore, the term "flexible hours" must mean something other than overtime hours or hours outside the base hours. Otherwise these terms would have the same meaning and the language would be redundant.

The plain meaning of flexible hours is that the assigned hours are not rigid or set but may be subject to change or alteration. Thus, though the grievant may normally work base hours, the reference to flexible hours in the job description and posting indicates that the base hours are subject to change. It would appear that under the management rights clause, the District retained the right to schedule hours of work. The right to schedule hours of work in a flexible manner means that the hours can be changed by the employer including starting times. 3/ Here, it appears that the District was exercising its rights to change the grievant's base schedule pursuant to its management rights. The District had put the grievant on notice in the job posting and the job description that flexible hours may be needed as required and no evidence was submitted that the grievant had been called in early in the past and was paid overtime. All that appears is that the grievant was assigned flexible hours in accordance with the management rights clause and the job description.

The Union's reference to call-in in Article XI is misplaced. That provision merely states that a call-in will guarantee three hours. Here, the grievant was called in for her regular 7 1/2 hours so she worked more than the guaranteed three hours. More importantly the work was due to a change in regular hours pursuant to the District's right to flex the schedule rather than to a call-in outside regular hours. Thus, the call-in provision has no applicability here for the same reason the District is not required to allow the grievant to work the normal shift. If the District were required to allow the grievant to work to the end of her shift, then she would be entitled to two hours of overtime but if the District had to allow the grievant to work her regular hours then the District's right to flexible schedule an employe would be meaningless because it would not exist. No overtime was involved here because the grievant never worked more than 7 1/2 hours on October 6, 1988. Although she worked early, she didn't work beyond the normal 7 1/2 hours and so the overtime provision does not apply. There is no express provision prohibiting the District from changing schedules to avoid the payment of overtime and inherent in the ability to have flexible schedules is that the District could schedule in a way that there would not be any overtime. Thus, it must be concluded that the District has the right to schedule the grievant in a flexible manner and because she did not work in excess of 7 1/2 hours on October 6, 1988, the grievant was not entitled to overtime.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The District did not violate the parties' collective bargaining agreement when it called the grievant in two hours before her normal work day on October 6, 1988 and then sent her home two hours early without paying her any overtime beyond her normal 7 1/2 hours of pay that day, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 30th day of May, 1989.

1/ Ex-6.

2/ Ex-7.

3/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 519-524.

By _____
Lionel L. Crowley, Arbitrator