BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WOOD COUNTY NURSES COUNCIL, LOCAL 5037, AFT, AFL-CIO	Case 113 No. 48253 MA-7555
and	
WOOD COUNTY	

Appearances:
Ms. Carol Beckerleg, Field Representative, on behalf of the Union.
Mr. Douglass F. Maurer, Personnel Director, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein the Union and County, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Wisconsin Rapids, Wisconsin, on March 9, 1993. The hearing was not transcribed and the parties filed briefs which were received by April 9, 1993.

Based upon the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Is the County violating Article 6 of the contract by not including paid time off in determining for overtime purposes whether employes work more than 38 3/4 hours and, if so, what is the appropriate remedy?

DISCUSSION

The genesis of this dispute dates back to the 1981-1982 contract between the parties which provided at Article VI, Section "A", that:

> A. Hours. The normal work week for full-time employees shall be 38 3/4 hours. Due to the nature of the work with this agency, these hours may fall outside of normal courthouse hours, and this section shall not be construed as, and is not a guarantee of, any number of hours of work per day or per week.
>
> Each employee shall be allowed a fifteen minute break during each morning and afternoon without loss of pay.
>
> B. Overtime. Employees who are required to work outside of the normal schedule of hours during the week shall receive compensatory time off at time and one-half rate for the actual hours worked or pay at time and one-half hourly rate of the employee. Employees who are required to work on any weekend shall receive compensatory time off at time and one-half rate for the

> actual hours worked or pay at time and one-half hourly rate of the employee. Time off or pay shall be as agreed between the employee and the supervisor.
>
> . . .

Similar language was contained in all subsequent contracts up to 1992.

Throughout almost all of that time, the County paid employes at straight time if their combined hours exceeded 38 3/4 rather than time and a half, even though the plain language of the contract expressly provided for time and a half. Furthermore, the County always included paid time off - such as sick leave, holidays, and vacations - in determining whether employes were entitled to overtime for exceeding the 38 3/4 hours' requirement.

In 1990, Home Health Nurses filed a grievance over not being paid time and a half for such overtime purposes. The County subsequently settled the grievance by agreeing to pay the time and a half rate and by including paid time off in calculating whether employes worked beyond 38 3/4 hours in a week. Such settlement was made retroactive to January 1, 1989.

In 1991, the Public Health Nurses filed a similar grievance and the County entered into a similar settlement "on a no-fault basis", with retroactivity dating back to January, 1990.

In negotiations for the present 1992-1994 contract, Personnel Director Douglass F. Maurer informed the Union by letter dated November 20, 1991, that effective December 31, 1991, the County was repudiating any past practices relating to:

> "Any pay practices not specifically prescribed in the labor agreement, will not be continued."

By letter dated December 5, 1991, Field Representative Carol Beckerleg informed Maurer, inter alia:

> "I also want to remind you that there are two types of past practices. Those practices relating to specific contract clauses that may be ambiguous, cannot be changed without changing the contract language. Only those practices not relating to specific contract language may be changed by a mere letter of repudiation." (Emphasis added).

In those negotiations, the County unsuccessfully proposed language providing that only hours worked would be counted in determining for overtime purposes whether employes worked more than 38 3/4 hours in a week. But it did succeed in those negotiations in obtaining new language set forth in Article 18.1 of the present contract which provides, inter alia:

> "Any actual or alleged practices not incorporated into the specific terms of this Agreement are of no binding force or effect whatsoever."

The County therefore has repudiated the terms of the two grievance settlements by no longer counting vacation, holidays, sick leave, etc. in determining whether employes are entitled to overtime, as it grants compensatory time or pay at time and one half only when hours "actually worked" exceeds 38 3/4 in a work week without regard to hours paid. That has led to the present grievance.

In support thereof, the Union primarily argues that Article 6 is ambiguous on this issue; that the past practice herein establishes that this language has been interpreted by the parties to include paid time off; and that the County under well-established arbitral case law cannot unilaterally abolish such a past practice. As a remedy, the Union requests that all affected employes be made whole retroactive to January 1, 1992.

The County, in turn, claims that the contract is clear and unambiguous in providing that the normal work week is 38 3/4 hours and that time and one half only "will apply to hours 'actually worked' exceeding 38.75 in a work week." It further argues that there is no binding past practice to the contrary because the only exceptions thereto related to grievance settlements which were "time certain".

The issue herein is somewhat unusual because both parties are now advancing positions which are partly inconsistent with how Article 6 was applied prior to the above-mentioned grievance settlements and how they themselves viewed this language over the years. For while the contract since 1981 has clearly and unambiguously stated that overtime for over 38 3/4 hours must be paid at time and one-half, it is undisputed that the County did not do so and that no grievance was filed on that issue until 1990. Furthermore, the County throughout that time did include paid time in determining whether the 38 3/4 hour threshold was met, contrary to its position here.

The County's position therefore boils down to the claim that while employes under Article 6 now can receive time and one half for exceeding the 38 3/4 hour requirement, and that while in the past they received full credit for all time paid in computing weekly overtime, they are not entitled to receive both at the present time.

The problem with this claim is that it runs counter to the grievance settlements on this very issue and the County's own practice of including hours paid for overtime purposes between 1980 and 1991. The penultimate question herein therefore turns on whether the County's attempted repudiation under Article 18 of the present contract is sufficient to overcome these factors.

I conclude that it is not. For while the County under Article 18 can do away with certain past practices which are not related to how contract language has been interpreted and applied, it does not have the right to undo the two grievance settlements herein which provide that paid hours are to be used in determining whether the 38 3/4 hour requirement has been met. Those settlements, after all, show how the parties themselves came to view and apply Article 6 in the prior contract, thereby bringing into play the well-established arbitral principle that "mutual settlements often constitute binding precedent for the parties." See, How Arbitration Works, pp. 361-362 (Elkouri and Elkouri, Fourth Edition, 1985.)

That being so, it was incumbent on the County in the last round of contract negotiations to obtain different contract language providing that employes would not be given credit for paid hours. And indeed, that is exactly what the County tried to do - but without success. Having therefore failed in that endeavor, the County is precluded from obtaining in arbitration what it could not obtain at the bargaining table, which is exactly what would happen here if its position were to be sustained.

The Union therefore correctly points out that arbitral law provides that past practices which give meaning to ambiguous contract language cannot be unilaterally abolished. 1/ Here, such ambiguity exists because Article 6 on

1/ See for example Douglas County Federation of Nurses and Health Professionals, Local 5034, AFT, AFL-CIO, and Dane County, (unpublished), Arbitrator James W. Engmann (August, 1991) appended to the Union's brief,

its face does not expressly address this issue and because the phrase, "outside of the normal schedule of hours during the week" therein appears to conflict with the phrase, "shall receive compensatory time off at time and one-half rate for the actual hours worked. . ." In such circumstances, it is appropriate to see how the parties themselves have interpreted this language --- something that can best be done here by looking at the two grievance settlements which support the Union's position.

In light of the foregoing, it therefore is my

AWARD

1. That the County has violated Article 6 of the contract by not including paid time off in determining for overtime purposes whether employes exceed the 38 3/4 hours' requirement.

2. That as a remedy, the County shall make whole all affected employes by crediting and paying them at the time and one-half rate for all such time since January 1, 1992, to the present.

3. That to resolve any disputes which may arise over application of this Award, I shall maintain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 30th day of June, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

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and How Arbitration Works, p. 449.