

There are about 15 cases a year where employees have been relieved from duty and paid for all scheduled hours.

The Grievant, Dennis Duggan, is a certified nursing assistant. He was working on Unit 7 of the facility on July 10, 1992. 1/ He started his shift that Friday afternoon at 3 p.m., but did not complete it because he was taken off duty due to charges of client abuse. One patient claimed that another patient had been physically abused by the Grievant, and the P.M. Nursing Supervisor, Edith Riegert, served him with a notice of investigation. He was interviewed on the following Monday morning and notified later that afternoon that he was cleared of all charges.

While on duty on Friday, July 10, he asked Riegert to put him down for any overtime that night and also told her that he was available that weekend to work overtime. It was a regular procedure in the facility at that time for employees to ask for available overtime, and if there were some available, the employees would get it according to their seniority and requests. Employees become aware of overtime opportunities for the next shift while they are working their regular shifts.

Riegert could not recall whether she talked with the Grievant about working overtime for that particular weekend. Her general practice was to jot down the names of staff who told her they were available for overtime. Employees might be paged for overtime assignments, but sometimes they were out of the building on walks with patients and could not hear the page. Riegert would get in touch with those who did not answer the page but had told her they would work overtime. She only kept track of those who offered to work overtime for the next shift.

The Grievant was scheduled to work eight hour shifts on Saturday and Sunday, July 11 and 12. He did not work those shifts, since he was off due to the investigation into charges against him, and he was paid for both of those shifts at straight time. He was not scheduled to work Monday, July 13.

There were four shifts on Sunday, July 12th, that were eventually covered by on-call employees. The Grievant would have been offered one of them had he not been on suspension, and would have received one by virtue of seniority, because he is a regular employee with seniority over on-call employees. Those shifts were not mandatory overtime, and the Grievant would have to agree to work them before being actually assigned.

The Grievant refused to work a day shift for Friday, July 10. He worked the 2nd and 3rd shifts the previous evening on Thursday, July 9th. He volunteered to work the 3rd shift by

1/ All dates are for the year 1992 unless otherwise stated.

accepting a page, after he had refused the day shift for the 10th.

He refused to work the a.m. shift for the 10th because he wanted to work the p.m. shifts (2nd shifts), then the night shifts (3rd shifts) and have a shift off in between. This schedule worked better for him with his schedule of p.m.s for the weekend. If he had accepted the a.m. shift for the 10th, he would have lost out on overtime shifts because he would not have been allowed to work the 3rd shift on the 9th (as he did) or the 3rd shift on the 10th (as he hoped to before his suspension). The facility does not allow employees to work more than two shifts in 16 hours except in emergency cases.

The Union grieved for the overtime the Grievant would have worked had he still been working at the facility, namely, eight hours on Sunday, July 12th.

THE PARTIES' POSITIONS:

The Union argues that the Grievant should have been completely made whole and compensated for overtime hours he would have accepted during the time he was serving a suspension. Duggan was available for overtime on either of the weekend days as well as on the Friday that he was suspended, and he informed P.M. Nursing Supervisor Riegert of his interest in working such overtime. He would have had seniority to work but for his suspension, and the overtime was worked by employees who had less seniority.

The Union contends that this grievance poses a basic question of equity. If an employee is completely cleared of an allegation, why should he suffer any financial loss due to those false charges? Since the institution has a policy of paying for any scheduled hours including scheduled overtime, why should the employee wrongly accused be denied overtime for which he has indicated he would work? If Duggan had been working, he would have accepted overtime for a shift on Sunday, the 12th, which was worked by a less senior employee. At least four employees with less seniority worked that day.

While the County has found occasions where Duggan did not accept overtime when asked, the Union asserts that it is not a question of whether he ever turned down any overtime assignment but whether he would have been available and would have accepted the overtime during the weekend that he was suspended. Duggan indicated his availability to his supervisor, there was no evidence to the contrary, and he would have been asked to work in the normal course of following seniority. Therefore, in order for the financial effect of the suspension to be eliminated, the Grievant should be made whole for eight hours of overtime that he could have worked on July 12th when he was on paid suspension.

The County contends that there was no lost overtime and that the Grievant was paid according to a clearly established past practice of over eight years of paying only for wages for scheduled shifts. The labor agreement is silent as to payment for employees on investigative suspensions, and the past practice of the parties controls this issue. Article 11 provides for overtime for all time worked outside the employee's regular shift, and the Grievant did not actually work overtime on July 11 or 12. The past practice of the parties has been to pay employees only for scheduled hours -- both regular and overtime -- during the period of suspension. The County acted reasonably in suspending the Grievant and paying him only for scheduled shifts during the investigation, and there was no violation of any contractual right.

The County notes that the Grievant refused an offer of overtime on July 10th. Both before and after the scheduling period in question, the Grievant refused numerous offers of overtime hours. The County asserts that the Grievant had a predominant pattern of not responding when paged or refusing available overtime when compared to the times he actually accepted offers to work overtime.

The County argues that in order to be paid lost wages, the Grievant would have to show that he was actually scheduled to work the hours claimed. The County calls the Grievant's testimony regarding his availability to work overtime self-serving and speculative, and Riegert did not recall his offer to work overtime.

The County has established its clear past practice of making wage payments to suspended employees for scheduled shifts only. In the 100 or so investigative suspensions in the past eight years, the Union has never grieved a claim of lost wage payments for non-scheduled hours. The practice in this case is binding upon the parties.

Although the parties agreed at the hearing to waive reply briefs, both filed them. The Union notes that it filed this grievance over non-scheduled overtime that could have been worked during the suspension, and nothing in the past practice precludes such a payment. The County's policy to pay for scheduled hours recognizes the need for a suspension before the County has any way of knowing whether allegations are valid or not. Because this suspension is not disciplinary in nature, the employee should suffer no loss of pay.

The Union contends that it is not relevant that the Grievant turned down other overtime shifts, including the shift prior to the one he was working when suspended. The only overtime relevant is that which was available during the suspension. The Grievant explained his reason for accepting a different overtime shift than one for the morning of July 10th.

The County replied that the Union cites no pertinent contractual provision that it alleged to have been violated. The Union is asking that an entirely new term be added to the contract. Moreover, the Union cannot now challenge the past practice it has known and acquiesced to for at least eight years.

The County submits that the Grievant cannot establish a financial loss as the Union claims. There is a factual distinction between scheduled work hours and the potential availability of extra shifts. While the Union asks for equity, fairness dictates that a suspended employee be paid only for actual scheduled hours which were actually lost during the investigative suspension.

DISCUSSION:

While the Union asks for a little equity here, the County correctly notes that the past practice controls because the contract language does not specifically address the payment of wages to employees on investigatory suspensions. The Union would have the past practice stretched by claiming lost overtime which had not been promised nor scheduled. The past practice has been to pay employees for any scheduled overtime while they are on investigatory suspensions.

It is common in this facility for employees to call in sick or absent on the shift prior to the one they are scheduled to work. Therefore, there is little notice and the facility needs to quickly replace those employees. While the County follows the contract for seniority, a system developed whereby employees let their supervisors know that they would accept a double shift or fill in someone's absence on the shift following their regular shift.

The real issue here is whether the Grievant's advance notice to Riegert constituted an overtime opportunity with enough certainty to amount to a pre-scheduling of overtime which would warrant payment despite the suspension, in line with the practice of paying overtime while on investigatory suspensions as long as that overtime was scheduled.

At the time the Grievant was suspended, he had only notified Riegert that he would accept overtime for that night and the

weekend if there were some available. Riegert had not offered it to him, he had not accepted it. She had no certain knowledge that any overtime would be available. There is no evidence that the facility would have asked the Grievant to work a double shift either on the Friday night when he was suspended, or the next night, Saturday. The evidence only shows that there were overtime opportunities by Sunday, which would have been offered to the Grievant had he not been on investigatory suspension.

The Grievant's notice of his availability to work overtime is not tantamount to the scheduling of overtime in order to invoke the past practice. It might be a different story if Riegert had actually offered him overtime, he accepted it, and then he was suspended, given the short notice which makes it impossible for the facility to actually schedule the overtime in a more formal manner. However, the Grievant's desire to work overtime does not amount to the loss of overtime in a manner sufficient to fulfill the past practice. Accordingly, the Grievant is not due the eight hours of overtime for July 12, 1992.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this ____ day of _____,
1993.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator