BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
IOWA COUNTY EMPLOYEES, LOCAL 1266, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 82 No. 52030 MA-8817
and	
IOWA COUNTY, WISCONSIN	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Iowa County Employees, Local 1266, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Howard Goldberg, Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law, 433 West Washington Avenue, P. O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of Iowa County, Wisconsin, referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Dennis McKernan, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 3 and 23, 1995, in Dodgeville, Wisconsin. The hearing was not transcribed. The parties filed briefs and waived the filing of reply briefs by June 6, 1995.

ISSUES

The parties stipulated the following issues for decision:

Did the Employer violate the collective bargaining

agreement in the manner in which it distributed overtime in the October 16, 1994 pay period?

If so, what is the appropriate remedy?

The County posed the following threshold procedural issue:

Was the grievance timely filed under Section 4.02?

RELEVANT CONTRACT PROVISIONS

ARTICLE III - MANAGEMENT RIGHTS

3.01 The County possesses the sole right to operate the County and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

A) To direct all operations of the County . . .

E) To maintain efficiency of County Operations . . .

K) To determine the methods, means and personnel by which County operations are to be conducted . . .

. . .

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 A grievance shall mean any dispute concerning the interpretation or application of a provision of this Contract, and shall be handled in the following manner:

4.02 STEP 1: The Union Committee and/or Union Representative, shall present the grievance in writing to the Highway Commissioner no later than seven (7) working days after the grievance occurred or the employee or the Union knew or should have known of such occurrence . . .

ARTICLE VIII - HOURS OF WORK

> 8.01 The hours of work for regular full-time employees shall be eight (8) hours per day . . . forty (40) hours per week, Monday through Friday . . .
>
> 8.02 It shall be the policy to keep overtime at a minimum and it is expected that overtime will be worked only in emergencies which are beyond the control of either party to this Agreement. All overtime shall be authorized by the Highway Commissioner or his/her representative. However, when it becomes necessary to work overtime, it shall be divided as equally as is reasonably possible among those employees qualified to perform the overtime work required and all employees shall be paid time and one-half (1 1/2) for all such overtime worked in excess of eight (8) hours per day and forty (40) hours per week. All time paid shall be considered time worked.

BACKGROUND

The grievance form, dated "10-21-94," states the "Date of the alleged infraction" thus: "10-16-94 pay period." The form states the factual background thus:

> Overtime was worked during this time amounting to 26 hours. No posting was made offering this overtime. The man given the overtime, Dan Ernzen, has more overtime than I do and has less seniority. This work amounted to sawing concrete for Green County and was not an emergency situation.

The form states the "Article or Section of contract which was violated if any" thus:

> I received no notice that overtime was being made available and therefore had no chance to work it. A violation of Article VIII -- hours of work, sections 8.01 and 8.02.

The remedy requested is stated thus:

> I want management to follow the contract and post overtime so that all employees have an equal chance to work it. I want to receive the overtime that was held from me amounting to 26 hours.

Roger Venden, the County's Patrol Superintendent, and Glenn L. Thronson, the County's Highway Commissioner, responded to the grievance in a letter dated October 26, 1994, 1/ which states:

> This letter is in answer to your grievance filed on October 25, 1994 . . .
>
> First of all, overtime is not governed by seniority. Secondly, overtime as the contract reads, shall be divided as equally as is reasonably possible among those employees qualified to perform the overtime work required ….
>
> Under Management Rights we determine the method, means and personnel by which county operations are to be conducted and maintain efficiency of county operations whenever possible. Therefore, grievance #0009 is hereby denied.

After this denial, the Grievant, through his grievance representative, Dan Ernzen, requested and was afforded the opportunity to discuss the grievance with the County Board. Sometime after this, James C. Murn, the Chairman of the County's Highway Committee, filed a written response to the grievance. His response, dated December 2, states: "The grievance was not timely, and we feel management acted well within their rights."

The overtime questioned by the grievance was traceable to a request from the Green County highway department for the use of the County's concrete saw. Green County did not have a concrete saw, and had leased one for work on a State highway in Green County. The work involved required more than one saw, however, thus prompting Green County's request for the use of the County's saw.

The County's concrete saw is a large piece of equipment, roughly four feet tall by four and one-half feet wide. It is an expensive piece of equipment, using blades which can cost as much as $1,500.00. The County had, in the past, suffered damage to one of its blades when one of its operators improperly handled it.

1/ References to dates are to 1994, unless otherwise noted.

Green County's request for the use of the concrete saw was referred to Venden for the assignment of an operator. Venden was aware, at the time of this referral, that Daniel Ernzen, Rick James and Tom Ryan had experience operating the concrete saw. Venden assigned the work to Ryan, who had accumulated less overtime during that calendar year than Ernzen. Ryan, however, decided to take vacation for a hunting trip during the time Green County wanted the work done. Venden then reassigned the work to Ernzen. Ernzen performed the work, accumulating twenty-six hours of overtime on the job, due to the travel to and from the job site. Venden did not consider the Grievant for the overtime assignment. He was unaware, until Step 2 of the grievance procedure, that the Grievant had ever operated a concrete saw. He did not, however, consider the Grievant qualified to operate the County's saw.

Venden testified that he attempted to equalize overtime opportunities among full-time employes on road crews. He noted he did not consider overtime accumulations in assigning overtime on an emergency basis. Such overtime, he noted, is assigned to the employe closest to the work.

The Grievant has been employed by the County for about six years as a State Patrolman. Prior to that, he worked as a Welder for the County, and has worked for the County for roughly thirteen years. While in County employment, the Grievant has operated a variety of equipment, including mowers, sanders, different types of snowplows, tandem axle trucks, chain saws, sand blasters, weed trimmers, various types of cutting equipment and various types of welding equipment. He has not, however, operated the County's concrete saw. Prior to his hire with the County, he did operate a concrete saw.

The Grievant testified he was unsure when he learned of Ernzen's assignment, and may have learned of it as early as October 3. He noted, however, that he was not sure of a possible contract violation until after the issuance of paychecks for the payroll period which ended on October 16. He did note Ernzen was not in the Dodgeville shop during the time the Green County work was performed, but he was unaware of the overtime opportunity until other employes informed him of it. After learning Ernzen had received twenty-six hours of overtime for this job, the Grievant checked into overtime records. He discovered he had accumulated less overtime from April 1 through October than Ernzen had. In looking into these records, the Grievant compared himself, as a State Patrolman, to other employes who serve as a State Patrolman. He decided to file the grievance, and did so by handing it to Ernzen on October 21, who in turn filed it with Venden on October 25. He never informed the County of his prior experience with a concrete saw, but did unsuccessfully seek to be trained on the operation of the County's concrete saw.

Further facts will be noted in the DISCUSSION section below.

THE UNION'S POSITION

The Union addresses the threshold issue of timeliness by asserting that the grievance was timely filed. Noting that the disputed overtime was worked in a pay period ending October 16, the Union concludes that the grievance, filed on October 25, was filed within seven working days of the Grievant's knowledge of the violation. It follows, the Union concludes, that the grievance is timely within the meaning of Section 4.02. Any other conclusion, the Union contends, violates the "time-honored principle in grievance arbitration . . . that a grievance should be found to be arbitrable unless there is no reasonable interpretation of the facts which can support a finding of arbitrability."

A review of the evidence establishes, according to the Union, that the amount of overtime made available to unit employes varies widely. Beyond this general indication that the County has failed to equalize overtime, the Union notes that the Grievant's supervisor acknowledged that "he made no effort to find out if anyone else was qualified" to perform the pavement-cutting duties he assigned to Ernzen. With this as background, the Union concludes the County has violated Section 8.02.

The Union notes that the "proper interpretation of (Section 8.02) is that it requires reasonably equal distribution of overtime, but this principle may be superseded where there is evidence that to do so would be to give the particular work in question to an unqualified employee." That the County failed to determine whether employes other than Ernzen were qualified and failed to "make it known to the employees in advance that this work was going to be made available" establishes, the Union argues, that the County's "lack of effort was . . . violative of . . . the rights of employees under the agreement . . ." Section 8.02 imposes on the County a duty of diligence in equalizing overtime and, the Union concludes, the evidence establishes the County failed to meet this duty.

The Union concludes that the appropriate remedy is an order requiring the County to pay "to the grievant an amount equal to 26 hours pay at his time and one-half rate, and in addition, whatever additional payments that would have been made for him under the Wisconsin Retirement System." The Union asserts that any other remedy would, under arbitral authority, fail to establish any disincentive for future violations of the contract.

THE COUNTY'S POSITION

The County argues that "the Green County job was assigned in accordance with the terms of the contract." Initially, the County asserts that a review of overtime records establishes that, at the time of the assignment of the Green County job, the Grievant and Ernzen had been, on a calendar year basis, assigned roughly the same amount of overtime. Both employes had received above the average for the unit as a whole.

The County then contends that the Grievant was not qualified to perform the pavement cutting work. The Grievant had never operated this equipment in his thirteen years of County employment, and had no demonstrated experience with the type of saw used by the County. The County asserts that the contract does not require it to train the Grievant or to assign him to the work requested by Green County.

Even if the Grievant was qualified to run the pavement cutter, the County contends that the agreement authorized it to assign the work to Ernzen. The evidence demonstrates, according to the County, that Ryan had fewer overtime hours than the Grievant at the point of the assignment and that at "the time Ernzen started to work in Green County, Grievant and Ernzen had virtually the same number of overtime hours." The County concludes that "Venden had a reasonable basis to believe that he was assigning the overtime on an equal basis . . ."

A review of the Grievant's testimony establishes, the County argues, that his interpretation of Section 8.02 is unreasonable. The County argues that the Grievant's view of overtime assignment does little beyond furthering his own desire for more overtime. The view that overtime can be equalized daily on a unit-wide basis "would severely hinder the efficiency of county operations, and is not reasonable."

Nor can the grievance be considered timely, according to the County. Section 4.02 is pegged to the date the employe or the Union knew of the occurrence giving rise to the grievance. Noting that the Grievant "was deliberately vague as to the date of his own knowledge of the facts" and that the Grievant submitted the grievance to Ernzen, who was his grievance representative, the County concludes that the Union knew of the assignment giving rise to the grievance well before the pay period in which the work occurred.

Even if a contract violation could be found, the County asserts that the sole appropriate remedy would be "for the Arbitrator to state the basis for his ruling, and direct that overtime be assigned a different way in the future."

DISCUSSION

The parties did not stipulate the timeliness issue, but the Union has acknowledged the need to address it as a threshold matter. Section 4.02 governs this matter, and requires that a grievance "shall" be presented "no later than seven (7) working days after the grievance occurred or the employee or the Union knew or should have known of such occurrence."

The evidence does not establish when the Green County work was assigned Ryan or to Ernzen. There is, then, no way to determine, under Section 4.02, the date "the grievance occurred." The Grievant's testimony on when he first learned of the grievance is less than definitive, but there is no solid basis to conclude he "knew or should have known" of the Green

County work prior to the issuance of checks for the payroll period covering the Green County work.

The Section 4.02 timelines must, then, be dated from the time "the Union knew or should have known of such occurrence" if the grievance is to be found untimely. A review of the evidence does establish that the Union knew of the grievance well before seven working days preceding October 25. Ernzen started the work in Green County no later than October 3. Although the date of his assignment to the work cannot be determined, it would appear he and Ryan were aware of the assignment well before October 3. Even if Ernzen's assignment to the work is taken to be October 3, and even if the filing of the grievance is treated as October 21, the grievance did not comply with the seven working day time limit of Section 4.02.

Ernzen's knowledge of the overtime assignment must be treated as "Union" knowledge of the assignment under Section 4.02. He serves as the Union's elected grievance representative. His assignment to the job arguably created a conflict between his personal and his representative interests. This affords, however, no basis to alter the conclusion stated above. The initial assignment was to Ryan, not to Ernzen. Thus, the conflict which arose on the reassignment of the work has no bearing on whether the initial assignment was a grievable offense. Nor is there any reason to conclude the assignment was less than common knowledge within the shop. Discussion of the assignment may have taken some time to reach the Grievant. The deadline of Section 4.02 is not, however, restricted to the knowledge of the grieving employe. In the terms of Section 4.02, there is no reason to doubt the "Union" was aware of the assignment no later than October 3. The grievance was, then, untimely.

The Union forcefully argues that arbitral precedent cautions against averting a decision on the merits due to procedural problems. Presumably, a decision on the merits can address a festering problem which might otherwise continue to fester. Beyond this, it can be noted that finding a grievance untimely based on the Union's knowledge of the grievance may serve as an inducement for the Union to grieve matters it otherwise might not.

These concerns cannot be dismissed lightly. The fact remains, however, that Section 4.02 makes the knowledge of "the Union" a determinative point. To ignore that reference on the facts posed here would render it meaningless. Beyond this, it must be noted that grievance timelines serve a purpose. Prompt processing of grievances avoids the presentation of disputes on stale evidence. This consideration plays no role here. Beyond this, however, grievance timelines encourage disputes to be promptly brought or abandoned. This may produce something less than a decision on the merits, but does permit bargaining parties the time to move beyond a particular dispute. If enforced, the time limit of Section 4.02 assures each party that no dispute should fester more than seven working days.

More significantly, this grievance poses a type of dispute which should not be allowed to linger. The dispute was open and involved a unit-wide issue. Whatever is said of the unit's

politics, Ernzen is an elected representative accountable to the unit as a whole. The issue of the overtime assignment had a considerable time to breed intra-unit dissension. This is the type of dispute which should be brought to a head to avoid the lingering impact of a divisive issue.

It can be noted that the timeliness issue was not raised until Step 2, and that from the Step 1 response the parties have taken some effort to address its merits. With this as background, it appears appropriate to comment on the merits of the grievance. That comment is dicta, which can be taken for whatever it may be worth. At a minimum, it assures that the laborious path through this litigation will not have failed to produce any view on the merits.

At most, the evidence would establish a technical violation of Section 8.02. I cannot see how the evidence could support the remedy the grievance seeks. As preface to examining this point, it should be noted that the County's assertion that Section 8.02 affords the Grievant neither the seniority nor the posting right he asserts is persuasive.

The strength of the Union's case is its contention that Section 8.02 imposes a duty on the County to exercise diligence in determining who is qualified to perform non-emergency overtime. The evidence fails, however, to afford this contention the factual base upon which a remedy can be erected. Initially, it must be noted that Venden considered each of the applicants whose qualifications were known to him. Even if he would have broadened his search, the evidence fails to show any other employe qualified to perform the work. The Grievant's use of a cement cutter, not shown to be like the County's, more than thirteen years ago is less than a persuasive showing of qualification to perform the Green County work.

Beyond this, the evidence fails to support a finding that Venden failed to divide overtime "as equally as is reasonably possible . . ." Venden sought to assign the work to Ryan, who had accumulated less overtime than Ernzen. Events beyond his control made this impossible. The Grievant's assertion that Venden could have spread the Green County work among a number of employes ignores both the qualifications issue as well as the issue of the County's authority under Article III.

The fundamental weakness of the evidence supporting the grievance is that it attempts to resolve an issue of unit-wide significance by asserting one employe's entitlement. Neither the Union's nor the County's calculation of unit-wide overtime accumulation points to a clear entitlement on the Grievant's part to the Green County work. Venden tracks such accumulations on a calendar year basis. At the point of assignment, Ernzen's and the Grievant's accumulations were close, and above average for the unit. Venden's approach appears to reflect tradition and at least tracks the contract. The Union tracked such accumulations on a non-calendar year basis, running from April 1, 1993 to the following April. Here too, Ernzen's and the Grievant's total accumulations are close. The Union's April through October totals put Ernzen well ahead of the Grievant, but it is not clear why this period should have any independent significance. The ambiguity over what period of time governs the equalization highlights the fundamental problem posed by the grievance. While the April to October time frame favors the Grievant, what distinguishes that time period from any other time period which might favor another unit member? If the equalization required by Section 8.02 can be dated from any period of time selected by any unit member for no reason beyond immediate self interest, it is not apparent how the section can

be administered.

In sum, the grievance is not timely under Section 4.02. Even if treated as timely, the grievance could not yield the remedy the Union seeks. At most, the Union has demonstrated that the County may not have sought qualified employes for the Green County work as diligently as Section 8.02 may require. On the evidence posed, however, there are no employes qualified for the Green County work other than those considered by Venden. Nothing in Venden's assignment of the work has been shown to otherwise violate Section 8.02.

AWARD

The grievance was not timely filed under Section 4.02.

Dated at Madison, Wisconsin, this 25th day of August, 1995.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator