

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ONEIDA COUNTY (HIGHWAY DEPARTMENT)

and

ONEIDA COUNTY HIGHWAY EMPLOYEES,
LOCAL UNION NO. 79, AFSCME, AFL-CIO

Case 105
No. 51833
MA-8752

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, on behalf of Local 79.

Mr. John L. O'Brien, Drager, O'Brien, Anderson, Burgy and Garbowicz, Arbutus Court, Box 639, Eagle River, Wisconsin 54521, on behalf of the County.

SUPPLEMENTAL AWARD

Pursuant to a joint request by the County and Local Union No. 79, the Undersigned has been asked to clarify her July 14, 1995 Award in the captioned case, sustaining the grievance filed by Grievant David McCarty (pursuant to the 1993-1995 collective bargaining agreement), holding that the County violated the parties' working agreement when it failed to offer overtime for snow plowing to David McCarty on February 12, 1995. The joint request for clarification arose due to the parties' disagreement regarding the proper construction for the following sentence in the Undersigned's July 14, 1995 Award:

The grievance is therefore sustained and the County is hereby ordered to make McCarty whole for the overtime opportunity he lost on February 12, 1994.

The parties filed their written positions regarding the proper interpretation of the above-quoted sentence by September 15, 1995. The parties agreed not to file reply briefs.

Positions of the Parties:

Union:

The Union urged that the undersigned should order Grievant McCarty made whole by the payment of five hours of overtime pay at time and one-half plus two hours of call pay at straight time for the overtime he had been available for and was passed over for on February 12, 1995. The Union noted that the County had failed to argue at any time that such a make-whole remedy, including backpay, was inappropriate. Indeed, the Union asserted that it had consistently sought overtime pay as well as call pay for Grievant McCarty from the beginning of the grievance process all the way through to its final arguments on the merits in this case.

The Union contended that where overtime is allotted by seniority an award of compensation is the preferred remedy rather than granting an aggrieved employe the opportunity to perform work and be paid therefor on a different date. The Union asserted that if no contractual language exists to indicate what the remedy should be, an award of backpay at overtime rates is appropriate where overtime is normally assigned and performed according to seniority. The Union argued that the Grievant was entitled to work the hours that were available on February 12th, that management was well aware that Grievant McCarty was available to work those hours and had informed them of such, and that the snow plowing work that was available on February 12th is, of its very nature, the type of work which cannot be rescheduled or recovered. In these circumstances, the Union asserted that Grievant McCarty clearly suffered damage when he was not assigned by seniority to plow snow on February 12, 1995 and that, therefore, McCarty should be paid out for the overtime opportunity he lost.

County:

In its supplemental brief in this case, the County argued that it properly offered McCarty the opportunity to work another five hours of overtime rather than paying him at the overtime rate for five hours plus two hours of call pay at straight time. The County urged that the Undersigned has latitude in terms of fashioning an appropriate remedy in arbitration cases and that absent an established past practice or showing that the Grievant actually suffered damages, no order requiring backpay should be issued in this case. The County asserted that McCarty suffered no damage by his not being called in on February 12, 1995 and that an order requiring the County to pay him overtime pay, rather than allowing him an opportunity in the future to work five hours of overtime, would be punitive. The County contended therefore that an Order requiring the County to offer McCarty five hours of overtime work in the future would put the parties "exactly where they would have been if the County had followed the contract correctly and had called McCarty in when he should have been called in" (County Reply Brief). Thus, the County urged that the offer it had made to pay McCarty two hours at straight time of call pay and to offer him five hours of overtime at time and one-half at some future date should be affirmed by the Undersigned.

Supplemental Facts:

After receiving the Award in this case dated July 14, 1995, the County offered the Grievant overtime work on a date in the future ("within the next thirty days"), as a remedy for its failure to call McCarty and offer him overtime work on February 12, 1995. The County also offered McCarty two hours of call pay at straight time as a part of the remedy in this case. The Union objected to the County's offer of a remedy in this case by its letter dated July 26, 1995 and it urged the County to make McCarty whole by paying him not only two hours call pay at straight time but also by paying him five hours overtime pay at time and one-half as a full remedy in the case.

The parties thereafter agreed to mutually request that the Undersigned reassert her jurisdiction in this case to interpret the initial Award and decide how the Award should be applied to the remedy in this case. The parties also agreed that no additional hearing was necessary and that they would submit briefs regarding the remedy issue. The undersigned received the parties' briefs by September 15, 1995. The undersigned thereafter exchanged the briefs for the parties and the record herein was closed.

Discussion:

The parties do not dispute the need to pay McCarty two hours call pay in this case. 1/ Therefore the County shall be ordered to pay McCarty two hours call pay at straight time (if the County has not already done so) as a part of the appropriate remedy in this case. Therefore, the County will be ordered to pay McCarty two hours call pay at straight time.

However, the County and the Union disagree as to the remainder of the appropriate remedy in this case -- whether McCarty should be paid overtime pay for five hours or whether he should be offered five hours of overtime work at a date in the future. 2/

The Union is correct in its assertion that where, as here, the contractual overtime system is

1/ Article VII - Call-Time, Section A requires the County to pay "two (2) hours call pay, at the rate of straight time in addition to the actual number of hours worked, when said employes are called to report for work outside the regular specified hours. . . ." Thus the parties are in agreement that McCarty is due two hours call pay at straight time.

2/ Article VII - Call-time, Section B, states that "overtime work shall be called for or assigned to employes who, in the judgment of the Highway Commissioner or direct supervisor, are well qualified to perform the available overtime work and who are not working on a regularly scheduled job. . . ."

driven by seniority principles, the normal remedy for wrongly assigning overtime is to pay backpay at the appropriate overtime rate to the employe who was wrongly passed over. In this case, I note that the record showed and I concluded in the initial Award, that McCarty was available for work on February 12, 1995 and that McCarty notified County managers of his availability for work on that date. It was only after McCarty was told by a County Supervisor that he would not be called in to work overtime on February 12th, that McCarty stated that in that case, he would go ice fishing that day.

Based upon the facts in this case, it is clear that an order requiring the County to pay McCarty five hours of overtime pay for the opportunity he missed on February 12, 1995 to perform overtime work is the appropriate remedy in this case. 3/ I note that overtime under the contract is assigned by seniority and that by its nature, the snow plowing work available on February 12, 1995 is not the kind of work that can be made up or recovered at a later date. In addition, McCarty's assignment out of order at a later date would only serve to exacerbate the County's original error in passing over McCarty on February 12th.

In all of the circumstances of this case, given the fact that Grievant McCarty has suffered damage by his being passed over for overtime work on February 12, 1995 and given the silence of the labor agreement regarding the exact remedy to be applied in such a case, I issue the following

SUPPLEMENTAL AWARD

The County shall immediately pay Grievant McCarty five hours of overtime pay at the time and one-half rate and two hours of call pay at the straight time rate for the County's violation of Mr. McCarty's contractual right to work overtime on February 12, 1995.

Dated at Madison, Wisconsin this 6th day of October, 1995.

By Sharon A. Gallagher /s/

3/ The County has argued that because McCarty went fishing after he contacted the Employer and was told he would not be called in, that McCarty would receive a windfall if the Arbitrator ordered the payment of five hours of overtime pay to McCarty rather than ordering him to be offered the opportunity to work five hours of overtime work. I find this argument entirely unpersuasive in the circumstances of this case. Had the County followed the contract, they would have called Grievant McCarty into work on February 12, 1995 and they would therefore have had to pay not only call pay but also five hours of overtime pay. Thus, McCarty has suffered damage by the fact that the County failed to follow the contract on February 12, 1995.

Sharon A. Gallagher, Arbitrator