BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION, LOCAL 1903, AFSCME, AFL-CIO and WINNEBAGO COUNTY	Case 257 No. 52959 MA-9170

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John Bodnar, Winnebago County Corporation Counsel, Winnebago County Courthouse, P. O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing on behalf of Winnebago County, referred to below as the County.

ARBITRATION AWARD

The Union and the County 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 Robert Kinderman, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 18, 1995, in Oshkosh, Wisconsin. The hearing was not transcribed, and the parties chose to make closing statements rather than filing written briefs.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the County violate the contract by its call-in practices on February 26, 1995?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
MANAGEMENT RIGHTS

1. The management of the Winnebago County Highway (including the Landfill), Solid Waste, Airport, and Parks Departments and the direction of the employees in the bargaining unit, including, but not limited to . . .

the right to assign overtime work . . .

shall be vested exclusively in the County.

. . .

ARTICLE 6
SENIORITY

The County recognizes seniority. Seniority is defined as the length of County service as it is measured from the last date the employee was hired by the County and continuing until he quits or is discharged . . . Eligibility for benefits shall be determined in accordance with the above . . .

BACKGROUND

The grievance concerns the County's assignment of overtime on Sunday, February 26, 1995. Early that morning, Bob Lohry, the County's Assistant Parks Director, woke to find a winter storm dropping a considerable amount of snow. He looked for his call-in list to determine who was the assigned duty man for that weekend. Overtime is offered first to the assigned duty man. He discovered he had left his list at the shop, but believed he remembered Chris Christensen was the assigned duty man. He phoned Christensen, and asked him to come in to plow snow. Christensen agreed to do so. Lohry also called in Melvin Tebo.

When Lohry reviewed the time cards for February 26, he discovered that Paul Miller, Bob Kinderman and Bob Vaughan each claimed six and one-half hours of work for that date. Lohry brought the matter to the attention of the Parks Director, Jeffrey Christensen, who then discussed the matter with Miller. Miller informed Christensen that there had been an error in the call-in, and that the three employes were seeking pay for that error.

Jeffrey Christensen responded to this request in writing in a memo dated March 16, 1995, which states:

> I have had the opportunity to review your request for overtime you feel is due to you from February 26, 1995. An error was made by Mr. Lohry in that he called in the wrong person to perform snow plowing. Certainly a mistake was made and management will endeavor to follow the call-in procedure in the future. There is no basis for payment of the overtime and it is accordingly disallowed.

This memo prompted the filing of a written grievance the following day.

The grievance challenges a County failure "to follow proper call in procedure pertaining to overtime, which affected Robert L. Kinderman, Paul Miller, & Bob Vaughan." It cites Article 6 and a Parks Department Memorandum as the source of the violation. The grievance form seeks that the County "Make employees whole . . . Restore lost wages."

The County denied the grievance at each step of the grievance procedure. The third step answer was authored by the County's Personnel Director, William Wagner, who stated:

. . .

> I have no evidence to indicate that the Union or any of the affected employees made any effort at the time of the call-in to alert Management to the error in order to insure that the appropriate person was called to perform the work.
>
> Insofar as the requested additional remedy is concerned--that of paying one or more employees who should have been called under the policy ahead of the called employee for work that they did not perform, I find no contractual basis for such payment and therefore deny payment.

The call-in policy is based in the settlement of a grievance. Jeffrey Christensen thus described the policy in a letter to Miller dated March 5, 1993:

> Should management require someone to work, a call would be

> placed to the assigned duty man first, than (sic) to the most senior employee and on down the line as needed until someone is found that can work. Management would not be obligated to make more than one contact per individual. If the person doesn't answer, the next employee is called, and so on.

The parties stipulated that the Grievant was the assigned duty man for the week including February 26, 1995. The parties also stipulated that Chris Christensen worked six and one-half hours at time and one-half on February 26, 1995. The Parks Department seniority list, ranked from the most to the least senior can be stated thus:

> Melvin Tebo
> Bob Kinderman
> Paul Miller
> Greg Rasske
> Bob Vaughan
> Chris Christensen

The parties stipulated that an assigned duty man, during winter months, is not necessarily required to work a call-in.

Christensen testified that at the time he received Lohry's call, he was not sure if he was the assigned duty man for the weekend. He did not ask Lohry if he was the assigned duty man, nor did he ask if Lohry had called in any other employe.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union states the issue for decision thus:

> What is the remedy for the Employer violating the call-in procedure at the Parks Department on February 26, 1995?

The Union contends that the issue posed solely involves remedy. From the Union's perspective, the allocation of overtime is governed not by the labor agreement, but by a mutually

understood past practice in the Parks Department. That practice dictates both that the remedy at issue here has no impact outside of the Parks Department and that the Grievant should be made whole for six and one-half hours of overtime wrongfully assigned to a less senior employe.

The Union acknowledges that the County made an error in the assignment of overtime, but argues that the source of the violation has no impact on the appropriate remedy. Arbitral authority requires, according to the Union, that the Grievant be made whole monetarily for the error and that the error not be remedied by the provision of overtime to the Grievant at an indefinite point in the future. To conclude otherwise, the Union warns, risks affording the Grievant no remedy since the rotation system makes future overtime opportunities speculative at best. A failure to grant a monetary remedy would also, the Union contends, permit the County too broad an ability to unilaterally alter the distribution of overtime.

THE COUNTY'S POSITION

The County contends that no violation of the contract has been proven. Article 1 vests the right to assign work exclusively in the County. The County adds that the absence of any written side letter of agreement makes the rotation system no more than the resolution of a particular grievance.

In the event that a contract violation is found, the County urges that the only equitable remedy is an order that the County award six and one-half hours of overtime to the Grievant which Christensen otherwise would have worked. This is equitable, the County adds, since Lohry made a good faith mistake and because arbitral authority recognizes the equity of equalizing mistakenly assigned overtime opportunities. Any other conclusion would, the County argues, afford the Grievant a windfall. The County adds that any inconvenience in how the overtime is scheduled can be remedied by making the scheduling of the overtime a matter of mutual agreement between departmental managers and the Grievant.

DISCUSSION

The issues are not stipulated. I have adopted the County's statement of the issues as that appropriate to this record. The County is unwilling to stipulate that a violation of the contract has occurred, and it is thus impossible to adopt the Union's statement of the issues, which presumes a contract violation.

The County persuasively notes that it has, under Article 1, the right to assign overtime work. This right, although broadly stated, cannot be considered unlimited. Under Article 6, for example, the County "recognizes seniority" and determines "(e)ligibility for benefits" in accordance with it. The relationship of these two broadly stated provisions cannot be considered clear and unambiguous.

Past practice and bargaining history are the most persuasive guides for the resolution of contractual ambiguity since each focuses on the conduct of the bargaining parties whose intent is the source and the goal of contract interpretation. In this case, there is no evidence regarding bargaining history. The evidence does, however, establish a past practice regarding the call-in procedure used within the Parks Department.

The criteria defining what makes a past practice binding have been variously stated by arbitrators. What lends practice its binding force must ultimately be traced to the agreement manifested in the bargaining parties' conduct. 1/ Arbitral authority varies less on this point than on defining the evidentiary standards which can reliably establish conduct on which agreement can be implied. In this case, however, there is no persuasive basis to doubt that the parties mutually understand the call-in procedure outlined in the March 5, 1993 letter from Jeffrey Christensen to Miller to be that governing winter call-ins in the Parks Department.

This conclusion is established both by testimony and by the grievance responses. Lohry's testimony establishes that he knew he should call in the assigned duty man first, then the most senior available employe. He called Chris Christensen believing Christensen was the assigned duty man. Chris Christensen's testimony confirms this. Whether or not he realized he was the assigned duty man that weekend, he knew the overtime assignment turned on assigned duty status first, then seniority. Thus, management and unit front-line employes each understood the call-in process.

The correspondence documenting the grievance process confirms that this understanding was shared throughout the Union and County hierarchy. Jeffrey Christensen's March 16, 1995 memo confirms that "a mistake was made" and that "management will endeavor to follow the call-in procedure in the future." The March 17, 1995 grievance confirms this by noting a County failure to "follow proper call in procedure." Further correspondence, including Wagner's April 10, 1995 letter, confirms this understanding. In sum, the evidence establishes the parties share a mutual understanding on how winter overtime call-ins are handled. That understanding establishes how Articles 1 and 6 are reconciled regarding winter call-ins in the Parks Department.

With this as background, it is apparent that the County failed to follow the call-in procedure understood by the parties to govern winter call-ins in the Parks Department.

The focus of the grievance thus becomes the remedy appropriate to this violation. The authority cited by the Union establishes both the strength and the weakness of its position. Elkouri & Elkouri state their view of the relevant authority thus:

1/ See Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, Arbitration and Public Policy, (BNA, 1961).

> Unquestionably the most frequently utilized remedy where an employee's contractual right to overtime work has been violated is a monetary award (generally at the overtime rate) for the overtime in question . . . In some cases, however, the arbitrator has considered make-up overtime within a reasonable time to be the appropriate remedy. 2/

Hill & Sinicropi address the point thus:

> Absent contractual language specifying the exact remedy to be applied, the predominate view . . . is to award back pay at overtime rates where overtime assignments are to be allocated according to seniority. In those cases where seniority opportunities have been lost under an equalization allocation scheme, the decisions are split. The better weight of authority holds that if equalization is still possible within the time frame for equalizing assignments . . . an order to permit the grievant to make up lost overtime before the equalization period expires is the appropriate remedy. If, on the other hand, the overtime is forever lost, either as a result of an assignment outside of the equalization unit or because the period of equalization has expired, a monetary award may be appropriate. 3/

These summarizations are not, strictly speaking, applicable here. The call-in procedure used in the Parks Department is not, strictly, either an equalization or a seniority system. The summarizations do, however, highlight the spectrum of views on remedy. More to the point here, selection of an appropriate remedy must turn on the contract, relevant past practice and an examination of the facts posed. 4/

2/ How Arbitration Works, Elkouri & Elkouri, Fourth Edition (BNA, 1989) at 536.

3/ Remedies in Arbitration, Hill & Sinicropi, First Edition (BNA, 1981) at 129.

4/ See, generally, Remedies in Arbitration, Hill & Sinicropi, Second Edition (BNA, 1991) at 369: "While a majority of the arbitrators prefer a monetary award rather than a 'make-up' remedy for improper distribution of overtime, a study of the reported cases indicates that the remedy has varied depending upon the specific context of the violation."

With one qualification, the contract provisions and practice established in this case will support either a monetary remedy or an order requiring make-up overtime for the Grievant. The one qualification is that ordering a make up of the misassigned overtime should involve a trade between Christensen and the Grievant. Any make-up order would remedy a contract violation with an additional contract violation, since the appropriate call-in procedure would again have to be suspended. However, a trade-off between Christensen and the Grievant at least assures that the second breach does not involve "innocent bystanders." With this qualification, however, a make-up order would be appropriate.

The issue posed, then, turns on whether the facts posed in this case make a monetary make-whole the most appropriate remedy. On balance, the evidence indicates it is. As preface to an examination of this conclusion, it is necessary to touch on the need for any remedy at all. At least some of the grievance correspondence questions whether any remedy beyond a written statement that the error will not be repeated is necessary.

The provision of some remedy is necessary. The contract, as clarified by past practice, has been violated. A remedy is necessary to make the Grievant whole for the lost opportunity to receive premium pay and to afford some disincentive for the violation to be repeated. The evidence indicates the error was inadvertent, and will most probably not be repeated. The provision of a remedy assures this will be the case. The remedy does not indicate a personal failing on Lohry's part. Rather, it underscores the need for Lohry to either keep the assigned duty man list available or to question an employe regarding who the assigned duty man is prior to the offer of any overtime.

The evidence does, on balance, favor the provision of a financial make-whole. The primary reason for this is that financially making the Grievant whole is the most efficient means to bring finality to this dispute. It can be noted that this remedy is the "majority rule" noted in the authority cited above. The significance of this point is, however, more easily overstated than understated. More significantly, it does remedy the lost opportunity suffered by the Grievant, and does provide a disincentive for this violation to be repeated. The significance of these considerations should not be obscured in this case. Because of the rotating system of overtime, it is difficult to know when, if at all, a six and one-half hour overtime opportunity would arise for Christensen which could be "traded" to the Grievant. It could be that this amount of overtime might require more than one call-in. It is impossible to know if such an opportunity or opportunities would fit within the Grievant's schedule. Since an assigned duty man is not necessarily, during winter months, required to work a call-in, it cannot be assumed that the call-in opportunity or opportunities would remedy the opportunity denied the Grievant in February of 1995. Merely drafting these potential contingencies in an award would pose some difficulty. Even assuming the difficulties could be addressed in an award, the uncertainty underlying the award would call for a retention of jurisdiction. With the retention of jurisdiction comes the possibility of further proceedings, further time lost due to such proceedings and the inevitable delay. The provision of a financial make-whole obviates these uncertainties, and reliably brings

finality to this dispute. The litigation of the dispute on the merits may have already been more costly than the financial remedy. In any event, finality should be brought to this dispute, and the financial make-whole noted below does so.

This remedy is afforded, however, with misgivings and those misgivings require that the remedy be restricted to the facts of this case. Lohry's mistake was inadvertent and understandable. The response which followed is not clear on the record, but does pose troublesome points. It appears that three unit members claimed the time worked by Chris Christensen on their own time records. It is not apparent how anyone other than the Grievant could claim this time. Even ignoring this, it is not apparent how the Grievant could claim time not worked. It is not surprising that a grievance would be filed. It would, however, be noteworthy if a time record for time not worked was filed. Because of the uncertainty of the

evidence on this point, no further discussion is appropriate. It is, however, troubling that this dispute may have arisen not with the filing of a grievance but with the filing of a time card seeking pay for time not worked.

Beyond this, the remedy sought by the County has support in the authority cited above. The overtime does arise within the same "equalization unit." While it may be difficult to work a trade of overtime between the Grievant and Chris Christensen, it would not appear to be impossible. Beyond this, it is at least arguable that the Grievant reaped a windfall from February 26, 1995. Chris Christensen testified that he was unaware if he was the assigned duty man. There is no persuasive evidence to rebut this testimony. If, however, an overtime opportunity is sufficiently significant to prompt three claimants to one opportunity, it would appear plausible that employes have a fairly good idea who the assigned duty man is. Contractual duties are mutual, and it is no less appropriate for an employe than for a supervisor to question an out-of-seniority call-in. Arguably, the remedy asserted by the County underscores the mutual nature of the duties involved.

On balance, I have concluded that bringing finality to this dispute outweighs the considerations noted above. While it can be argued that a financial make-whole constitutes a windfall, damages have long been considered an appropriate remedy at law and arbitration. In significant part, this reflects the difficulty of recreating lost opportunities and the simplicity of paying the equivalent of that lost opportunity. The reasons for considering the Award noted below as damages are set forth above. It should be added that restricting this remedy to the facts should assure that future grievants do not assume a financial make-whole is the inevitable end result of the arbitration process. This should assure that the Award avoids the creation of incentives to litigate. The roughly one year delay from incident to remedy in this case itself provides a disincentive to unnecessarily litigate cases.

AWARD

The County did violate the contract by its call-in practices on February 26, 1995.

As the remedy appropriate to the County's violation of Articles 1 and 6 of the contract, the County shall make the Grievant whole by paying him the difference between the wages and benefits he earned for the pay period covering February 26, 1995, and the wages and benefits he would have earned if he had been called in for the overtime worked by Chris Christensen on that date.

Dated at Madison, Wisconsin, this 12th day of January, 1996.

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