

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WALWORTH COUNTY

and

WALWORTH COUNTY COURTHOUSE
EMPLOYEES, LOCAL 1925B, WISCONSIN
COUNCIL OF COUNTY AND MUNICIPAL
EMPLOYEES, AFSCME, AFL-CIO

Case 131
No. 53463
MA-9367

Appearances:

Mr. James R. Korom, von Briesen & Purtell, 411 East Wisconsin Avenue, Suite 700,
Milwaukee, Wisconsin 53202-4470, appearing on behalf of the County.

Mr. Laurence S. Rodenstein, Staff Representative, AFSCME Council 40, 8033 Excelsior
Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the
Union.

ARBITRATION AWARD

At the joint request of the County and Union above, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz to hear and decide a dispute concerning the above grievance under the grievance arbitration provisions of their calendar 1994-1996 contract (herein Agreement).

Pursuant to written notice, the Arbitrator conducted a hearing in the matter on January 30, 1996, at the County Personnel Department offices near Elkhorn, Wisconsin. No verbatim record of the proceedings was maintained. The Arbitrator received numerous documents into the record, along with the parties' stipulation as to certain facts.

The parties summed up their positions orally at the end of the hearing.

BACKGROUND

The Union represents a bargaining unit consisting of the County's non-professional courthouse employees and clerical employees of the County's Lakeland Nursing Home. The Union and County are parties to a series of collective bargaining agreements, the most recent of which is the Agreement. Among the County's functions is a Sheriff's Department emergency services dispatch operation in which bargaining unit Communications Officers are employed.

At issue in this case is an aspect of the County's compensation of its Communications Officers for weekly overtime. Those employees work a 5-2, 5-2, 6-3 schedule. In 1995, the County responded to a US Department of Labor audit by paying its Communications Officers additional overtime compensation as needed to assure that each received half-time overtime premiums for hours actually worked in excess of 40 in the seven-day (Sunday-Saturday) workweek. Prior to that time, the County had been paying a half-time overtime premium to those employees for hours worked (including hours on paid excused absences) in excess of eight hours in a day and for hours worked on days outside their scheduled days of work, i.e., without additional payments to assure that they received the premium for all hours actually worked in excess of 40 in the workweek. By way of example, prior to the County's response to the audit, when a Communications Officer was scheduled to work six straight days all within a single Sunday-Saturday workweek, the employee was not paid the weekly overtime premium for the portion of their regular schedule that exceeded 40, but only for hours worked, if any, outside the six eight-hour days which the employee was scheduled to work.

The County notified the Union in a May 19, 1995 memorandum that it had made the above-noted change in its overtime compensation of Communications Officers effective at the beginning of 1995 and that it was in the process of computing payments that would make the change effective retroactive to the beginning of 1992. The memo stated that it had been provided to each of 13 affected Communications Officers, and it read in pertinent part as follows:

The County has conducted an audit of the timecards for Communications Officers for the calendar years 1992 and 1993. The results of this audit indicate that overtime payment for certain hours you worked is required. Payment for these hours will be included on your paycheck of Friday, May 26, 1995. Following is an explanation of the requirement for these payments to be made.

Overtime payments may be required for employees under the labor contract or under the Fair Labor Standards Act (FLSA):

LABOR AGREEMENT: Section 10.01 of the Courthouse agreement provides for overtime pay for hours worked in excess of eight (8) per day or in excess of the scheduled days of work. For full-time communications Officers, the normal schedule is a rotating schedule of 5-2, 5-2, 6-3 (days on-days off). **Under the contract provisions only,** "hours worked" includes excused paid absences such as sick leave, vacation, holidays, etc.

FLSA: Under the FLSA, the County may also incur

overtime liability even though no overtime premium is required under the labor agreement. Persons employed as Communications Officers are required, under the FLSA, to be paid overtime for all hours worked in excess of forty (40) hours per calendar week. Note, however, that "hours worked" under the FLSA only includes hours actually worked and excludes hours for paid absences. Whenever a Communications Officer works each shift of his/her regular schedule and the six-days-on fall in the same calendar week, the County is required to pay overtime for the 6th day, even though there is no requirement for overtime under the labor agreement.

The County considers other employees of the Sheriff's Department with a 5-2, 5-2, 6-3 schedule to fall under a special law enforcement exemption under the FLSA. This law enforcement exemption, by express reference, includes security personnel in county correctional institutions (i.e., Correctional Officers). The exemption permits this type of rotating schedule without overtime liability being due based on the regular work schedule. However, overtime may otherwise be due under the labor agreement, or for extra shifts outside the regular schedule.

You are required to sign the attached form as an official receipt of these back wages. . . .

An audit of 1994 timecards is presently being conducted. Once completed, any similar overtime payments found to be required will be paid to you in the near future. Beginning in 1995, all overtime liability of this type has been identified and is being appropriately calculated per FLSA guidelines.

. . .

The first checks constituting retroactive payments were in fact issued on May 26, 1995, as planned.

The instant grievance was filed on July 5, 1995, asserting that employees in Communications were suffering lost wages because the County was not following Agreement Sec. 10.06, in violation of Agreement Secs. 10.01 and 10.06 and Sec. 1.01 of the FLSA, and "any & all others that apply." By way of remedy, the grievance requested that the County "Pay in accordance w/ Agreement - Retro / Forward using [Sec.] 10.06" and that the County "make employees whole."

The County thereafter addressed and rejected the grievance on its merits (the Personnel Committee denial was expressly "based on no contract violation"), without asserting or preserving any procedural defense related to its timeliness of initiation.

The grievance was submitted to arbitration as noted above.

At the hearing the parties authorized the Arbitrator to frame the issues in dispute. The Union proposed the statement of the issues set forth below.

1. Is ISSUE 2 properly before the Arbitrator?
2. Did the County violate the applicable Agreement(s) by failing to pay Communications Officers time and one-half for all hours worked in excess of 40 in the seven-day workweek (including hours worked as defined in 10.06) at all times when it paid such employees at time and one-half for all hours actually worked in excess of 40 in the seven-day workweek?
3. If 1 and 2 are answered "yes," what shall the remedy be?

The County proposed an identical statement of the issues but without the portion of ISSUE 2 after the parenthetical ending "10.06)".

PORTIONS OF THE AGREEMENT

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 Grievance Defined. The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Any complaint concerning wages, hours or other conditions of employment, and including interpretation, application, or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below.

. . .

4.02 Procedure. Grievances may be initiated by employee(s) covered by this Agreement or their union representative and shall be processed as follows:

Step 1 (Department Management): A grievance shall first be

presented in writing to the Supervisor in charge of the work being carried on by the aggrieved employee . . . within thirty (30) days from the date of the event or knowledge thereof which gave rise to the complaint or the grievance will be barred. . . .

. . .

Step 4 (Arbitration): . . .

. . . The arbitrator shall have no authority to add to, subtract from, amend or modify any provisions of this Agreement. . . .

. . .

4.03 Back Pay. If the arbitrator finds any action taken by the County to be in violation of this labor agreement, he/she shall be authorized to award any employee involved back pay and benefits, if any, but not more than the regular wages or benefits that would have been paid had the violation not occurred.

. . .

ARTICLE VI - HOURS

6.01 Work Schedule. The standard work schedule for full-time employees shall consist of eight (8) consecutive hours per day, excluding an unpaid lunch period. Hours of work shall fall between 8:00 a.m. and 5:00 p.m., said hours being regulated according to the needs of the department as hereafter provided for. The lunch period shall be a minimum of thirty (30) minutes.

. . .

6.02 Workweek defined. The standard workweek for full-time employees shall consist of five (5) days, Monday through Friday, totaling forty (40) hours, except in the Sheriff's Department as identified in 6.06.

. . .

6.05 Changes in Work Schedule. Any changes in work schedule shall be made by mutual agreement of the department head and employee, providing the change does not result in any overtime liability under the Fair Labor Standards Act (FLSA).

6.06 Special Sheriff's Department schedules. The standard work

schedule for full-time corrections and communications employees of the Sheriff's Department shall normally be a rotating schedule of 5-2, 5-2, 6-3 (days on-days off). The standard work day shall consist of 8 hours.

. . .

ARTICLE X - OVERTIME

10.01 Outside of Work Schedule. Except for employees scheduled pursuant to 6.06, employees shall be paid one and one-half (1 1/2) times their regular rate of pay for all hours worked in excess of eight (8) hours per day or forty (40) hours per week. Employees scheduled pursuant to section 6.06 shall be paid one and one-half (1 1/2) times their regular rate of pay for all hours worked in excess of eight (8) hours per day or in excess of their scheduled days of work pursuant to section 6.06 of this agreement.

The contractual requirement under this section for payment of overtime for hours worked in excess of eight (8) hours per day shall not apply to changes in work schedule pursuant to section 6.05. In such situations, the requirement for overtime pay for hours worked in excess of forty (40) hours per week shall apply, or as otherwise required under the Fair Labor Standards Act.

. . .

10.06 Hours Worked. Excused paid absences such as sick leave, vacation, holidays, etc., shall be considered hours worked in computing overtime pay.

. . .

ARTICLE XXIV - VALIDITY

24.01 Validity. In the event any clause or portion of this Agreement shall be invalidated, the remainder of the Agreement shall remain in full force and effect and negotiations shall be immediately instituted to adjust such invalidated clause or portion of the Agreement.

. . .

POSITION OF THE COUNTY

ISSUE 2 is not properly before the Arbitrator. The Agreement contains no provision for Communications Officers to be paid weekly overtime for hours worked in excess of 40 in a week,

so the grievance is not substantively arbitrable. Moreover, the grievance is untimely filed because the Union and all affected employees had reason to know since 1985 that the FLSA applied to public sector employees and what the County was and was not paying by way of overtime compensation to its Communications Officers. The grievance was also untimely filed because it was filed more than 30 working days after the County put the Union on written notice by its May 19, 1995 memo of the limited circumstances in which it would be paying additional

weekly overtime compensation. At a minimum, the time of filing of the grievance makes inappropriate any retroactive relief for a period of more than 30 working days preceding the date the grievance was filed.

If ISSUE 2 is reached, no violation should be found. The County has met its overtime compensation obligations to the Communications Officers as set forth in Secs. 10.01 and 10.06, both on the clear and unambiguous language of those provisions, and in the context of longstanding practice, the absence of any bargaining history, and the absence of any inequity.

The County's actions in response to the audit were taken to conform to the requirements of the Fair Labor Standards Act. The County was not required by the Agreement to make those changes, only by the law. The County is now complying with the somewhat different overtime compensation requirements of both the Agreement and of the FLSA. There is no conflict between the contract and the FLSA to be harmonized. Even if there were such a conflict, the Arbitrator is without authority to alter the Agreement to achieve such a harmonization. If harmonization were appropriate, the County's current conduct properly gives effect to the employees' rights under both the Agreement and the law, whereas the Union seeks to obtain rights that are provided by neither the contract nor the law.

The Union's request is not even supported by purely equitable considerations because, while most County employees receive a weekly overtime premium for hours worked in excess of 40 in a week, the Agreement expressly treats Communications Officers differently -- sometimes more beneficially (when they are scheduled to work less than 40 hours in the seven-day workweek) sometimes less beneficially (when they are scheduled to work more than 40 hours in the seven-day workweek). In any event, if the Union wants to alter the overtime arrangements provided for in the Agreement, then it should attempt to do so at the bargaining table and not through the grievance procedure.

The County therefore asks that the grievance be denied in all respects.

POSITION OF THE UNION

It was not until the County unilaterally began paying Communications Officers for hours worked in excess of 40 hours that the claim advanced by the Union in this case arose. By that County action, the County effectively altered the Agreement to make the half-time overtime premium applicable where the Communications Officer works in excess of 40 hours in the seven-day workweek. The Union grieved because the County failed to administer the changed overtime compensation arrangements in a manner consistent with the Sec. 10.06 requirement that excused paid absences be deemed hours worked for overtime computation purposes.

The notice of the County's intention to make such payments does not preclude the Union from waiting until the payments were actually made to start a 30-working-day grievance clock running. In any event, the violations alleged are continuing in nature, rendering the grievance timely with respect to at least some retroactive period and all times after the grievance was filed.

The County's unilateral change in overtime compensation administration materially altered the conditions in effect at all times prior to that change. Accordingly, the County's reliance on alleged Union acquiescence to practices prior to the time of that change are neither a basis for finding the grievance untimely filed nor a basis for binding the Union to the practices in effect prior to the change.

Once the County unilaterally began paying Communications Officers overtime for time worked in excess of 40 hours, it was required by Sec. 10.06 to treat excused paid absences as time worked in computing that overtime. While the FLSA permits the County to count only time actually worked toward the 40-hour weekly overtime premium threshold, the Agreement unequivocally requires that excused paid absences be included in computing overtime. The provisions of the Agreement and of the FLSA can and should be harmonized by requiring that the County count excused paid absences in determining whether employees have worked in excess of 40 in a seven-day workweek. The FLSA does not forbid the County from computing overtime compensation in that way, and Sec. 10.06 of the Agreement requires it to do so. If the audit is viewed as a determination that the Agreement overtime provisions violate the FLSA, Sec. 24.01 preserves the remainder of the Agreement, including Sec. 10.06, "in full force and effect."

The Union requests that the Arbitrator order the County to include excused paid absences in its computation of whether a Communications Officer has worked in excess of 40 hours in the seven-day workweek. The Union further requests that the Arbitrator's order in that regard be made effective from and after January 1, 1995.

DISCUSSION

Formulation of ISSUE 2

Both of the parties' proposed formulations would satisfactorily represent the subject matter of the instant dispute. The Arbitrator, of course, adopts the parties' agreed-upon formulation of ISSUE 1.

The Arbitrator has adopted the Union's proposed formulation of ISSUE 2 because it aptly reflects that the Union's claim as asserted at the hearing is based entirely on the fact that the County has unilaterally begun paying, in a limited range of circumstances, a half-time overtime premium for time worked by Communications Officers in excess of 40 hours in the seven-day workweek.

Arbitrability of ISSUE 2

The Arbitrator finds ISSUE 2, as formulated above, is properly before the Arbitrator, i.e. that it is both substantively and procedurally arbitrable.

The claims advanced by the Union in the grievance and at the hearing clearly involve a "complaint concerning wages, hours, or other conditions of employment and including the interpretation, application, or enforcement of the terms of this Agreement" within the meaning of the grievance definition in Sec. 4.01. ISSUE 2 is therefore a matter that is substantively arbitrable under the Agreement.

The County raised the timeliness of grievance initiation for the first time at the arbitration hearing after having previously addressed the merits of the grievance earlier in the processing of the grievance. By addressing the merits of the grievance without preserving its procedural defense, the County waived that defense. ISSUE 2 is therefore procedurally arbitrable under the Agreement, as well.

The question of whether the time at which the grievance was filed should limit the time period covered by a retroactive monetary remedy will need to be addressed if but only if a violation is found.

Merits of ISSUE 2

The County's Agreement obligation to pay a premium for overtime is set forth in Sec. 10.01. Under the terms of that section, because Communications Officers work a special Sec. 6.06 work schedule, their overtime arrangements differ somewhat from those applicable to employees who do not work that special schedule.

Section 10.01 clearly and unequivocally provides that employees working a Sec. 6.06 schedule receive a contractual half-time overtime premium "for all hours worked in excess of eight per day or in excess of their scheduled days of work pursuant to section 6.06 of this Agreement."

Section 10.06 requires the County to treat excused paid absences as "hours worked in computing overtime pay." Reading the Agreement as a whole, the Arbitrator concludes that Sec. 10.06 was intended to apply to overtime computations made pursuant to the overtime provisions of the Agreement but that it was not intended to apply to additional non-contractual overtime payments made by the County to comply with the Fair Labor Standards Act. There is no suggestion in the language of the parties' agreements going back several years, or in the parties' history of administration of those agreements over those years, that the parties mutually intended that Sec. 10.06 would govern any computation of overtime compensation in addition to that provided for in the Agreement. The parties have referred to the FLSA elsewhere in the Agreement, but only in provisions not applicable to the facts of this case, to wit, in Sec. 6.05 which applies to schedule changes, and in the second paragraph of Sec. 10.01 which the parties have agreed in writing does not apply to employees working a Sec. 6.06 special work schedule. The record does not establish that the parties have, by mutual agreement in writing or otherwise, amended the Agreement to include a requirement that the County pay Communications Officers FLSA overtime premiums in addition to the overtime premiums set forth in the language of the

Agreement. On the contrary, the County made those payments unilaterally. While the Union has apparently not objected to those additional payments, that acquiescence is not sufficient to amend the Agreement to include them as part of the Agreement's overtime requirements.

For those reasons, and in light of the limitations on the Arbitrator's authority set forth in Sec. 4.02, the Arbitrator finds no basis on which to conclude that the County is violating the Agreement by its failure to apply Sec. 10.06 to its computation of non-contractual overtime payments required by the FLSA but not by the Agreement.

The County has treated excused unpaid absences as time worked in computing whether Communications Officers are entitled to the overtime premium for hours worked in excess of eight in a day. The County has also paid the Agreement weekly overtime premium in Sec. 10.01 for all hours worked by Communications Officers outside their regular schedule of hours for that seven-day workweek. By so doing, the County has given Sec. 10.06 full effect with respect to the computation of the overtime compensation which the Agreement requires the County to pay to the Communications Officers.

The Agreement does not require the County to pay the additional FLSA overtime premiums that it began paying as a consequence of the Department of Labor audit. Nor does the Agreement, read as a whole, require the County to calculate those non-contractual FLSA overtime premiums in the manner Sec. 10.06 prescribes for computing the overtime premiums that are imposed by the Agreement.

Accordingly, the Arbitrator's answer to ISSUE 2 is "no."

DECISION AND AWARD

Based on the record as a whole and for the reasons set forth above, the Arbitrator's DECISION AND AWARD on the ISSUES noted above is as follows.

1. ISSUE 2 is properly before the Arbitrator.
2. The County did not violate the applicable Agreement(s) by failing to pay Communications Officers time and one-half for all hours worked in excess of 40 in the seven-day workweek (including hours worked as defined in Agreement Sec. 10.06) at all times when it paid such employees at time and one-half for all hours actually worked in excess of 40 in the seven-day workweek.
3. Accordingly, no consideration of a remedy is necessary or appropriate and the grievance is denied.

Dated at Shorewood, Wisconsin this 29th day of April, 1996.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator