BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
DOUGLAS COUNTY BUILDING AND GROUNDS AND FORESTRY EMPLOYEES, LOCAL 244-B, AFSCME, AFL-CIO	Case 219 No. 52893 MA-9141
and	
DOUGLAS COUNTY	

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Douglas County Building and Grounds and Forestry Employees, Local 244-B, AFSCME, AFL-CIO.

Mr. John Mulder, Personnel Director, on behalf of Douglas County.

ARBITRATION AWARD

Douglas County Building and Grounds and Forestry Employees, Local 244-B, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Douglas County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on November 29, 1995 in Superior, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by January 22, 1996. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE:

The parties stipulated there are no procedural issues and to the following statement of the substantive issue:

> *Did the Employer violate the terms of the Collective Bargaining Agreement and the long standing past practice by awarding overtime to a less senior employee?*
>
> *And if so; the appropriate remedy if (sic) for the Employer to pay the Grievant (more senior employee) for the lost overtime.*

CONTRACT PROVISIONS:

ARTICLE 5.

> Section 1. VESTED RIGHT OF MANAGEMENT. The right to employ, promote, to transfer, discipline, and discharge employees and the management of the property and equipment of Douglas County is reserved by and shall be vested exclusively in the Douglas County Board of Supervisors through its duly appointed Committees. The Department Head, with authority from either the Douglas County Board, its appointed committees, or State Statutes, shall have the right to determine how many employees there will be employed or retained together with the right to exercise full control of the operation of the respective departments. The County Board through its committees, and the Department Head shall have the sole right to contract for any work it chooses, direct employees to perform such work wherever necessary. The County shall have the exclusive right to determine the hours of employment and the length of work week and to make changes in the detail of employment of various employees from time to time as it deems necessary for the efficient operation of its respective departments. The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.

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BACKGROUND

The Grievant, Chuck Stensland, is employed as a Conservation Technician III (Tech III) Mechanic in the County's Forestry Department.

On June 29, 1995, the Grievant was operating a Roller/Chopper 10-12 miles from the Department's Shop and the other Tech III in the Department, Dewey Smith, was operating a Caterpillar approximately 15 miles from the Shop in the opposite direction. Smith would be completing his 40 hours for the week, and it was intended that he leave the Cat at the worksite at the end of the day. The routine is that the employes out in the field call-in on their radios at around 2:00 p.m. to check-in. Smith's radio was not working and the Shop did not hear from him at 2:00 p.m. that day. The County Forest Administrator, Epperly, was the only manager in the Shop by that hour and he eventually became concerned and sent a Forester and a Tech I probationer, Blaylock, to look for Smith, and told the Grievant to come back to the Shop. The Grievant was running low on fuel and and on the way back took the Equipment Truck and stopped and filled the vehicle with fuel.

Smith called in around 5:00 - 5:15 p.m. that day when he returned to his mobile unit and reported that his Cat was low on fuel. Epperly told Smith to bring the Cat in, but Smith told him it was too low on fuel to move. The Grievant monitored the conversation between Smith and Epperly on his radio. While the Grievant was filling the Equipment Truck with fuel approximately a half-block from the Shop, Epperly called him and told him that he (Epperly) needed to talk to him. The Grievant testified that when he got to the Shop, Epperly had a brief (2-3 minute) conversation with him about the power steering fluid in Truck No. 3 and at the same time sent Blaylock, who was standing nearby, to refuel and load Smith's Cat. Epperly testified that he was working on the Department's 1996 budget that afternoon and needed to talk to the Grievant about some of the items in the budget, and that he sent Blaylock out to Smith's site and that at about that time the Grievant came in and asked him why Blaylock was sent. Epperly testified that he told the Grievant he needed to talk to him about the tires and other budget items and about a report that Truck No. 3 was out of power steering fluid.

Blaylock earned one hour of overtime pay due to his being sent out to refuel and load Smith's Cat. The Grievant, being the second most senior employe in the Department, filed a grievance on the basis that he should have been given the overtime work based on his seniority and his being qualified and available to do the work. The grievance proceeded through the steps of the parties' grievance procedure, and not being resolved in the process, the parties arbitrated the dispute before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the County violated basic seniority rights of one of its most senior employes, the Grievant, by assigning the overtime to a probationary employe.

The Union asserts that both of its witnesses, the Grievant and Smith, clearly testified that the past practice in the Forestry Department was that overtime was always assigned by seniority. The Union contends it actively policed the Agreement and never permitted management to violate the fundamental principle of seniority. As to the significance of past practice, the Union cites the standards arbitrators have utilized to determine whether a course of conduct constitutes a binding past practice. 1/

The Union asserts that management's right to assign overtime is limited by the clear past practice that senior employes were offered and assigned overtime without exception. The Union cites the discussion in Elkouri and Elkouri, How Arbitration Works, regarding the importance of

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1/ Citing, Hill and Sinicropi, Management Rights, at pp. 23-24, in turn, citing Arbitrators Mittenthal, Justin and Block.

seniority to employees and unions and the limitations placed upon the exercise of management rights by the recognition of seniority. 2/ According to the Union, a review of the facts in this case shows that management rights were used to undermine seniority rights. While Epperly testified he needed to discuss matters related to tires and power steering fluid with the Grievant at the end of that day, their conversation took only five minutes and was regarding only minor, routine issues. A need for such a discussion does not excuse depriving the Grievant of an overtime opportunity; if it did, any reason could be used to deny employes their basic seniority rights.

The Union also asserts that the past practice negates any argument by the County that the inclusion of the boilerplate ". . .other duties as assigned. . ." in the job descriptions for Conservation Technician I, II and III gives management the right to assign overtime as it sees fit.

The Union concludes that not only was the Grievant qualified to perform the refueling task, the employe that was sent out to do the work was a probationary employe, who had yet to prove his qualifications.

In its reply brief, the Union responds to the County's assertion that the Union failed to provide proof of the existence of a past practice beyond mere claims by employes that it existed, arguing that it provided the testimony of employes with years of service in the Forestry Department. They testified that the Union has always enforced the principle of seniority, and cited an instance where the County paid a senior employe for a missed overtime opportunity. Further, the County offered no evidence to rebut the testimony of the Union's witnesses. As to the County's assertion that the Union's claim of past practice is "general", the Union asserts that the practice has been that seniority was the rule generally, and was enforced specifically as to overtime assignments.

The Union asks that the grievance be sustained and, as a remedy, that the County follow seniority by offering overtime assignments to senior and qualified applicants first, before contacting less senior employes, and that the Grievant be made whole for the lost hour of overtime.

County

The County contends that it retains the right to assign work as needed without consideration of seniority. Article V, Vested Rights of Management, states that the Department Head shall have "the right to exercise full control of the operation of the respective departments. . ." That provision goes on to state, "The County shall have the exclusive right to determine the hours of employment and the length of work week and to make changes in the detail of employment of various employees from time to time as it deems necessary for the efficient

2/ Fourth Ed., at pp. 516-590.

operation of its respective departments."

In this case, the Administrator decided that he needed to discuss issues related to budget and maintenance of equipment with the Grievant, and directed the Grievant to stay in the office while sending Blaylock out to refuel. The County asserts it retains the right to direct the work force and to discuss items with employes when needed. The argument that the conversation could have taken place at another time is irrelevant. The Department Head must retain the ability to discuss items with an employe whenever he chooses. Once Epperly decided he needed to talk to the Grievant, the latter was no longer available to perform the overtime work. There is no evidence that work in progress has ever been reassigned in order that a more senior employe would receive the overtime.

The County notes that while Section 17.7 of the Agreement was cited on the grievance, that provision pertains to "job posting, bumping, layoffs, and recall from layoff", and not to work assignments. The Union does not cite any other provision of the Agreement as governing the assignment of overtime, because there is no specific language in the Agreement in that regard to limit management's rights. The Union must instead rely on past practice. The County asserts that there is no past practice that deals specifically with this issue and that, beyond a general claim that the most senior and qualified employe is assigned overtime, the Union has failed to provide any evidence of such a past practice. The Union should be required to provide more proof than mere claims by employes that such a practice exists.

The County also asserts that the Union's claim is so general that it fails to consider that management decided it was necessary to discuss operational issues at the time. A claim of past practice should not be applied so broadly as to prevent management from exercising its basic rights. Such a claim should not be applied to every situation without regard to the specific details of the case. To apply such a general claim in such a broad fashion would result in employes having the right to determine when management can talk to its employes. The County requests that the grievance be denied.

DISCUSSION

It is first noted that there is no provision in the parties' Agreement that specifically addresses the assignment of overtime. The County relies on its right under Article V, Vested Rights of Management, to direct the work of its employes. The Union asserts the existence of a past practice of assigning overtime to the most senior qualified employe available to perform the work to support the Grievant's claim to the overtime work in this case. Given the lack of a contract provision addressing the assignment of overtime and management's reserved rights under Article V, the Union must indeed establish the existence of such a past practice in order to establish the Grievant's right to overtime.

A set of criteria often applied by arbitrators, in a variety of forms, in determining whether

a binding practice exists has been succinctly set forth by Arbitrator Jules Justin:

> "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." 3/

Both of the Union's witnesses, Smith and Stensland, testified it was their understanding that overtime work has been assigned to the most senior, qualified employe available. 4/ While both are long-time employes, between the two of them they cited no specific instances as examples of such a practice, other than one instance approximately three years ago where Smith was also paid overtime for overtime hours Stensland had worked after he threatened to grieve based on his being more senior than Stensland. There was, however, no testimony regarding the circumstances of that instance. Further, Smith's testimony was that seniority was followed "most of the time" where management knows in advance there will be overtime work. The testimony of Stensland, the Grievant in this case, was that the practice is to "usually" follow seniority in offering overtime. Conversely, the County's witnesses, the Forestry Department Administrator, Epperly, and Forest Operations Manager, Radzak, testified that they usually call the person most able to do the job, although Radzak conceded he generally tries to follow seniority. Epperly conceded that at times the employe most able to do the job happens to be the most senior employe. It is noted in that regard, that of the six unit employes in the Forestry Department, three are long-time employes and the other three were probationary employes at the time in question.

Based upon the above, the most that can be said regarding a practice of assigning overtime work is that it is often assigned to the more senior employe available, since that employe is likely to best be able to do the work. Therefore, the Union has failed to establish an unequivocal and clearly enunciated practice of assigning overtime based upon seniority.

While it appears that seniority has been given more consideration where management is aware ahead of time that overtime will be needed, in this case it was not known that Smith's Cat needed refueling that day until Smith made radio contact sometime after 5:00 p.m. The Administrator wished to speak to the Grievant regarding several matters; however, the less senior Tech I was immediately available to be sent out to refuel Smith's Cat. The conversation between

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3/ Celanese Corp., 24 LA 168, 172 (1954). See also the discussion in Elkouri and Elkouri, How Arbitration Works, (Fourth Ed.), pp. 439, et. seq.

4/ It is clear from the manner in which the parties litigated and briefed this case that the testimony of the witnesses in the companion case as to how overtime has been assigned is considered to apply to the instant case as well.

Epperly and the Grievant was quite brief and it could have been possible for Epperly to have talked to the Grievant and then sent him out to refuel Smith, however, given the, at best, murky practice previously described, management was not required to rearrange things to make the Grievant available for the refueling run nor to delay it. Therefore, it is concluded that the County did not violate the parties' Agreement or a binding past practice by assigning the less senior employe the overtime work of refueling Smith's Cat.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 2nd day of May, 1996.

By David E. Shaw /s/
David E. Shaw, Arbitrator