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 220 No. 52894 MA-9142
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.*

BACKGROUND

The Grievant, Kenneth Smith, is the most senior employe in the County's Forestry Department. Chuck Stensland is the second most senior employe in the Department, and he and the Grievant are both Conservation Technician III's. During the time in question, the Grievant was scheduled to work ten hours per day, Monday through Thursday, while Stensland was normally scheduled to work ten hours per day Tuesday through Friday. The week in question involved Memorial Day which fell on a Monday. The Grievant did not work on Monday, and received ten hours of holiday pay for that day, worked ten hours on Tuesday and on Wednesday, and took ten hours of personal leave on Thursday, for a total of 40 hours of paid time for the week. Stensland received ten hours of holiday pay for Monday and worked his regular schedule of ten hours per day on Tuesday through Friday of that week for a total of 50 hours and received ten hours of overtime pay.

The Forestry Operations Manager, Mark Radzak, was an Assistant Manager in the Department at the time of the grievance and was responsible for making up the schedule for the week in question. Radzak testified that he forgot about Monday of that week being a holiday and scheduled the employes pursuant to their normal work schedule. Since Monday was a paid holiday, by working his regularly-scheduled 40 hours Tuesday through Friday, Stensland ended up with a total of 50 hours for the week. Counting the holiday hours on Monday, Smith would have had 40 hours in by the end of the day on Thursday, and would have received overtime for any hours worked on Friday.

Smith grieved the scheduling of Stensland to the work on Friday of the week in question which resulted in the ten extra hours for which Stensland was paid overtime. The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the testimony of both of its witnesses establishes that there has existed a long-standing practice in the County's Forestry Department that employes are always contacted and given the opportunity to work overtime by virtue of their seniority. The Union notes that both witnesses are long-term employes and have been active members in the Local, Stensland being a steward in the Department. According to the Union, there have been three instances where overtime has been awarded to a less senior employe. The first time occurred approximately three years ago and involved the Grievant in this case. Under the threat of a grievance being filed, the County paid the senior employe the overtime pay, in clear recognition that a violation of past practice had occurred. The other two instances involve the grievances pending in this case and the companion case. The Union asserts that the County has not offered any contradictory or disputing testimony. Thus, the Union has actively policed the long-standing

rule in the workplace that seniority for the purposes of overtime has always been followed. The Union cites the standards arbitrators have applied in determining whether a binding past practice exists as demonstrating its role and importance. The Union also cites Elkouri and Elkouri, How Arbitration Works (Fourth Edition) pages 437-438, for the principle that under certain circumstances past practice is held to be enforceable as a part of the party's agreement.

The Union notes that the Grievant was not only the most senior employe, but was also qualified to do the overtime work in question, i.e., site preparation. The Union again cites Elkouri and Elkouri, at pages 586-590, as to the importance of seniority:

> One of the most severe limitations upon the exercise of managerial discretion is the requirement of seniority recognition. Indeed, the effect of seniority recognition is dramatic from the standpoint of employer, union, and employee alike since "every seniority provision reduces, to a greater or lessor degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interests of each worker against those of all others." In the absence of a definition of the term in the collective bargaining agreement, seniority "is commonly understood to mean the length of service with the employer in some division of the enterprise." Seniority "means that men retain their jobs according to their length of service with the employer and that men are promoted to better jobs on the same basis." It is generally recognized that the chief purpose of a seniority plan is to provide maximum security to workers with the longest continuous service."

The Union next asserts that even though management (Radzak) made an error in scheduling the employes, it is not fair to make the Grievant suffer the penalty of losing ten hours of overtime pay. The penalty for the mistake must be borne by the party in error and in this case that is management.

The Union notes that although the Grievant had taken a personal day on Thursday, the day preceding the overtime day (Friday) he testified that he was at home and available and he had let his supervisors know of his whereabouts.

In its reply brief, the Union disputes that there is a lack of evidence regarding a long-standing practice in the Forestry Department of following seniority in awarding overtime. That was established by the testimony of both the Grievant and Stensland, and the fact that no grievance had been previously filed in this area is explained by the fact that management had in the previous instance admitted its mistake and paid the would-be grievant. The Union requests that the grievance be sustained and the County be directed to follow seniority in awarding overtime

opportunities to the most senior qualified employes first, before contacting less senior employes, and to make the Grievant whole by paying him for the lost ten hours of overtime pay.

County

The County asserts that the contract is silent on the issue of assigning overtime. While conceding that it erred in advertently scheduling Stensland to work four days during the week in which the paid holiday fell, there is no testimony as to the prior occurrence of any similar situation. There is, therefore, no evidence of a past practice relating to the specific issue of assigning an additional day during such a week. The County asserts it paid for its mistake by paying Stensland overtime for his work on Friday. Stensland should have had Tuesday off, however, as a Union steward, Stensland could have raised the issue with management prior to his working on Friday and thus avoided any problem, but he failed to do so.

The County asserts that there is no past practice of calling out by seniority, nor would such a practice be relevant in this case. Further, the Union must demonstrate such a binding practice exists, but has failed to meet its burden. In that regard, the County cites Elkouri and Elkouri, How Arbitration Works:

> First, even assuming that a matter is such that it otherwise may be given "binding practice" effect as an implied term of the agreement, it will not be given that effect unless it is well established -- strong proof of its existence will ordinarily be required. (at p. 391)

While the Union witnesses claim that the past practice has been to call out the most senior person available, the Forestry Administrator, Epperly, testified that the County calls out the best people available who are best suited for the job and that is often the most senior employe. The Grievant testified that he recalled one other time that he did get overtime pay when the County had called someone else out, however, there were few details offered about that situation, other than it happened approximately three years ago, i.e., prior to the new building and during negotiations for the first contract for this bargaining unit. That one instance, about which little information is available, should not be considered sufficient to establish a binding practice.

The County concludes that the dispute occurred as a result of a management error and that the County has paid for its mistake by having to pay Stensland overtime for working an extra day in the week in question. The County believes that it has paid for its mistake and should not have to pay double in the absence of a clear past practice requiring the use of seniority in assigning overtime call-outs.

DISCUSSION

There being no provision in its Agreement with the County that specifically addresses the assignment of overtime, the Union relies wholly on a claimed past practice of always offering overtime work to the most senior employe. The County disputes the existence of such a practice and asserts that it would be irrelevant at any rate, since this was simply a scheduling error, a mistake for which it has already paid by having to pay Stensland overtime for the Friday in question. Neither party cites any provision of their Agreement.

The undersigned agrees that this case does not involve the assignment of overtime in the usual sense. Stensland simply worked his regular schedule of Tuesday through Friday which resulted in fifty hours for the week due to the ten hours for the paid holiday on Monday. The mistake in this case was not the assignment of the wrong person to overtime work, rather, it was a scheduling error that resulted in Stensland working more hours than he was supposed to in that week. Radzak testified that Stensland should have been given Tuesday off so that he could have had a four day weekend with forty hours of pay (with the Monday holiday) like everyone else. It was Radzak's failure to take the Monday Memorial Day paid holiday into account that resulted in Stensland receiving overtime, and not an operational need for overtime to be worked. Absent the scheduling error, there would have been no overtime earned. The remedy for the County's error was that the Grievant earned overtime for working more hours that week than he should have worked.

To reiterate, this was not an instance of failing to offer overtime work correctly; rather, the failure on management's part was not to give Stensland a day off, resulting in his working too many hours that week. There was no "overtime" opportunity to offer the Grievant. Thus, even assuming arguendo that the practice claimed by the Union in fact exists, the failure to offer the Grievant overtime work on Friday, June 2nd was not a violation of the parties' Agreement or practice.

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 7th day of May, 1996.

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

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