BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

VILAS COUNTY HIGHWAY EMPLOYEES
UNION, LOCAL 474, AFSCME, AFL-CIO

and

VILAS COUNTY

Case 48
No. 54540
MA-9711

Appearances:
Mr. David A. Campshure, Staff Representative, on behalf of the Union.
Prentice & Phillips, by Mr. John J. Prentice, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Eagle River, Wisconsin, on January 9, 1997. The hearing was not transcribed and both parties filed briefs and reply briefs which were received by April 16, 1997. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

> Did the County violate the contract when it refused to include paid time off for the purpose of calculating overtime pay and, if so, what is the appropriate remedy? 1/

DISCUSSION

The County for at least the last 5 or 10 years has included paid time-off for funeral leave, vacation leave, sick leave, and compensatory time off when calculating the total number of hours for overtime purposes. 2/ For example, employees who were on vacation from Monday-

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1/ The parties have agreed that the resolution of the issue covers all of the 14 or so grievances filed over this issue.

2/ There is no exact date as to when this practice was first instituted. That lack of certainty, however, is immaterial since the record shows that it was followed for at least the last 5

Wednesday and who then worked eight hour days on Thursday, Friday and Saturday received overtime for the Saturday hours even though they did not work more than 40 hours that week.

Highway Assistant Bookkeeper Louise Krus, who is not in the bargaining unit, testified that she was trained to calculate overtime in this fashion by Office Manager Harold Numrick. Krus also said that Highway Commissioner Jim Fisher knew about this practice because "he would look at payroll." Throughout this time, no member of the County Board or the County's Personnel Committee was aware of this practice.

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years, which is more than long enough to constitute a past practice given the fact that it was followed in all such situations.

They first learned about it in about May, 1996, after which the County no longer included paid time-off for the purpose of calculating overtime. The County set forth its new policy in its recently enacted Employee Handbook, (Joint Exhibit 5), which it unilaterally adopted without bargaining with the Union. 3/ When the Union learned about the County's changed policy, it grieved.

The Union argues that the County violated the contract because "a binding past practice of counting paid time off as hours worked when calculating overtime clearly existed"; because the contract language supports its position; and because there "was no waiver of the Union's right to enforce past practices."

The County, in turn, contends that neither the contract nor past practice require it to "perpetuate the error of including paid time-off in the calculation of overtime compensation" and that the error here does not rise to the level of a past practice because of the clear and unambiguous contract language dictating otherwise. The County asserts that none of the key elements needed for a past practice - such as being well-established, knowledge, mutual acceptance, and not being in conflict with the contract - are present here. It thus contends that sustaining the grievance would raise serious public policy implications because, "It is simply ludicrous to think that a mistake on the part of one or two (non-management) County employes can have the ability to establish a binding practice without the consent or even the knowledge of the appropriate management authority."

3/ The County subsequently informed the Union that to whatever extent it may have existed, the County was repudiating the prior practice at the expiration of the contract. That latter issue is not before me.

DISCUSSION

The District correctly points out that but for holidays, there is no express language in the contract which dictates overtime payments for paid, but unworked, hours. Thus, Article 21 states:

ARTICLE 21-OVERTIME PAY

> A. Time and one-half (1 1/2) shall be paid for all hours worked in excess of forty (40) hours per week or eight (8) hours per day. No employee shall be sent home or laid off to evade the payment of overtime.
>
> B. Compensatory time may be accrued at the time and one-half (1 1/2) rate for overtime hours worked up to a maximum of forty (40) hours.
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> C. Scheduling of compensatory time off shall be subject to the approval of the Highway Commissioner and employees unable to take compensatory time off by the end of the year shall receive payment for all unused time.

By referring to "hours worked in excess of forty hours per week or eight (8) hours per day", this language supports the County because it is pegged to "hours worked" rather than to total hours paid which is what the Union is seeking.

The County's position is further buttressed by Article 11, Section A, which states that "time off for holidays shall be considered time worked in computing overtime." This language shows that the parties knew how to provide for overtime for paid, but unworked hours and that - as the County correctly points out - there thus "would be no need to explicitly state in the [contract] that holidays shall be considered time worked in computing overtime" if the County had ever agreed to the Union's contrary interpretation.

All of this supports the County's position, as does the County's additional claim that the County's Personnel Committee never knew about the practice in issue.

But, having said that, it also is true that Highway Commissioner Fisher knew about and approved this practice since Assistant Bookkeeper Krus testified that Fisher "would look at payroll, yes" and since Fisher was never called as a witness to contradict Krus' testimony. 4/

4/ The County asserts that Krus' testimony on this point "was not very compelling. . ." I disagree. The record establishes that Krus' testimony was clear as a bell and that it was undisputed. That is why it must be credited.

Since Fisher is part of management, his knowledge and approval is imputed to the County because he acted as the County's agent and because he was clothed with apparent authority to do so pursuant to the contract between the parties which states that the County Board "is represented by the Highway Committee and Highway Commissioner. . ." The fact that the County's Personnel Committee did not know about the practice is thus immaterial, as Fisher acted as its agent throughout this time and since it is an internal management problem as to how well (or badly) Fisher communicated with his superiors - a problem which does not affect how this issue must be resolved.

The County tries to pooh-pooh this past practice by asserting that it does not meet all of the criteria needed to constitute a past practice. I disagree. The record conclusively establishes that the County for at least the last 5-10 years always has counted paid time off for overtime purposes and that its highway management knew about this practice and mutually agreed to it by paying overtime for all such hours.

The only possible basis for reaching a contrary conclusion is the fact that the contract does not expressly provide for such overtime payment. However, it also is true that the contract does not expressly prohibit such overtime payment.

In such circumstances, a binding past practice exists because it relates to an employe benefit, rather than to management's core right to manage its operations. For, it is well-established that:

> "In contrast to the above-indicated freedom of management to make changes in the exercise of basic management functions, arbitrators have often ruled custom to be binding where it involved a 'benefit' of peculiar personal value to the employees. These cases generally did not involve methods of operations or control of the working force (except perhaps indirectly). Thus, where the benefit was supported by established custom, management was not permitted to discontinue (or in some cases to change) the following benefits or 'working conditions': wash-up periods, lunch period arrangements, paid work breaks, free coffee or free meals,. . .bonuses, various other monetary benefits and allowances . . .and a wide variety of other 'benefits' and 'working conditions'."
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> . . .

> "The above discussion suggests a test of 'employee benefits' versus 'basic management functions', with which test many reported arbitration awards are compatible. . .The test gives employees the benefit of the doubt as to certain matters and management is given the benefit of the doubt as to others. . ." From this standpoint, too, the test may be deemed "fair" or "just". (Footnote citations omitted).

How Arbitration Works, Elkouri and Elkouri, pp. 444-446 (BNA, 4th Ed., 1985).

I therefore conclude that a binding past practice has existed under which the County was required to include holiday leave, funeral leave, compensatory leave, vacation leave, and sick leave for the purpose of calculating overtime. The County therefore is directed to pay such overtime to all affected employes who qualify for it up to December 31, 1996.

In light of the above, it is my

AWARD

1. That the County violated the contract by refusing to include paid time-off for the purpose of calculating overtime pay.

2. That the County shall immediately make whole all employes affected by its change of policy up to December 31, 1996.

3. That to resolve any questions which might arise over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin, this 22nd day of April, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator