BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between VILAS COUNTY SOCIAL WORKERS ASSOCIATION, LOCAL 610 OF THE LABOR ASSOCIATION OF WISCONSIN, INC. and VILAS COUNTY	Case 47 No. 54539 MA-9710

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, 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 10, 1997. The hearing was not transcribed and both parties filed briefs and the County filed a reply brief which was received by April 7, 1997. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the County violate Article XVII, Section B, of the contract when it stopped including paid time-off for the purpose of calculating overtime pay and, if so, what is the appropriate remedy?

BACKGROUND

Bargaining unit employes for some time received credit for non-paid time-off such as holiday leave, funeral leave, vacation leave, sick leave, and compensatory time-off when calculating the total number of hours for overtime purposes. As a result, say, employes who were on vacation from Monday-Wednesday and who then worked eight (8) 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. They continued to do so under the parties' first collective bargaining contract which runs from January 1, 1995, to December 31, 1996.

The County Board and the County's Personnel Committee were unaware of this situation throughout this time. They first learned about it in June, 1996, at which time the County stopped including paid time off for overtime purposes except for holidays which are still used for that purpose.

Payroll and Accounts Clerk Marjorie Hiller in a May 30, 1996, 1/ memorandum thus informed Audrey A. Roecker, the Director of the Department of Social Services:

. . .

> Time off on sick leave, vacation leave, or any leave of absence is not considered hours worked for purposes of performing comp time/overtime calculations. A problem has been occurring on some of your department timesheets. The Corporation Counsel and Vilas County's Attorney, John Prentice, have been consulted on this and agrees that this needs to be corrected immediately.
>
> *Examples:*
>
> An employee came in at 7 A.M.. The employee works until 12 Noon and then decides to take the afternoon off with pay (vacation, sick leave, comp, etc.). Since the employee has worked 5 hours on that day, the employee is only entitled to take 2 1/2 hours of paid leave, a total of 7 1/2 hours for that day. The employee does not get any additional time for comp time or overtime.
>
> OR
>
> An employee came in at 7 A.M., leaves at 8 A.M.; returns to work at 9 A.M.; takes a 1/2 hour lunch and works until 4 P.M. Total time worked is 7 1/2 hours. This employee cannot take any paid leave for the hour absent from work and would not receive any comp time or overtime for coming in one hour early.
>
> If an employee works more than 7 1/2 hours in a day, the employee is entitled to straight time up to 8 hours and overtime after 8 hours per day or 40 hours per week, whichever applies. Reminder: Overtime and Comp Time is earned on total hours actually worked.

1/ Unless otherwise stated, all dates hereinafter refer to 1996.

Thereafter, Union Labor Consultant Patrick J. Coraggio by letter dated June 25 asked Hiller whether her May 30 memo to Roecker also covered Social Workers. Attorney John J. Prentice by letter dated July 8 told Coraggio it did. 2/ The instant grievance followed.

POSITIONS OF THE PARTIES

In the aftermath of the post-Super Bowl glow, the Union argues that the County's representatives have been "in the locker room by not knowing what the players are doing on the field" when they assert that they did not know anything about the County's past overtime payment practices. The Union thus argues that "on the first down, the County attempted to erase a past practice"; that "on second down, the County attempted to quietly revise the Employee Manual and institute their version of overtime calculations"; that "on third down, the County attempted to have one-on-one bargaining" with employes; and that it now is "fourth down", thereby requiring the Arbitrator to "step in and intercept the change in the condition of employment which the County is professing and run the full 99 yards into the end zone for the Association." (Emphasis in original). As a remedy, the Union asks that all affected employes be made whole.

The County, in turn, contends that the grievance is not supported by either the contract or any past practice; that the clerical error here does not rise to the level of a past practice in the face of clear and unambiguous contract language; that the elements needed for a past practice do not exist; and that the "public policy implications" dictate dismissal of the grievance. The County therefore argues that the arbitrator should not "join either team, but continue to wear the black and white stripes of an impartial referee and apply the rules of the game to deny the grievance. . ."

DISCUSSION

This case turns on the applicability of Article XVII, Section B, entitled "Overtime", which states:

> **Overtime**: An employee who is required to work more than their normal work week of thirty seven and one-half (37-1/2) hours, but less than forty (40) hours, shall be entitled to straight time compensation in the form of cash, or by mutual consent, the employee shall be allowed the overtime in compensatory time off. An employee who is required to perform work in excess of forty (40) hours per week, shall be compensated at one and one-half times (1-1/2 X) the employee's regular hourly rate in cash, or by mutual consent, the employee shall be allowed the overtime in

2/ The County also informed the Union that it would terminate whatever practice existed on the expiration date of the contract, December 31, 1996. That other issue is not before me.

> compensatory time off, provided that at no time will the employee be allowed to have more than one hundred (100) hours of compensatory time off. Compensatory time off, as it is used, may be regenerated up to the one hundred (100) hour maximum level.

The County rightfully points out that this language supports its position because it refers to "perform work in excess of forty (40) hours per week." This phrase indicates that hours will count for overtime purposes if they are worked. However, it is also true that there is no contract language which expressly states that paid time off for vacations, sick leave, etc., will not count for overtime purposes. Hence, the contract is not clear on this point.

It therefore is proper to determine how the parties have applied this language over the years. As to that, it is undisputed that the County for years has included hours paid for overtime purposes even if they were not worked.

The County tries to discount this practice by claiming that its Personnel Committee never knew about it and that such payment came about only because of a clerical error. While it is true that the Personnel Committee was not informed about this situation earlier, the fact remains that the County has made such payments and that the head of the County's payroll either knew, or should have known, of this situation, thereby imputing knowledge to the County. Furthermore, the head of payroll was clothed with apparent authority to act on the County's behalf and to therefore bind the County when payroll checks were issued which included paid time off for overtime purposes. In such circumstances, I conclude that a past practice has existed which binds the County for the purpose of this grievance.

I also find without merit the County's claim that an award in favor of the Union is against public policy. For while it is true that neither the Personnel Committee nor the members of the County Board knew about this practice, its payroll clerk either knew about the practice or should have known about it. Since that person was authorized to act on the County's behalf, it was the County's obligation to see that that person (or anyone else similarly situated for that matter) properly complied with management's own internal directives regarding what procedures must be followed. That is all the more so when we are dealing with an important employe benefit such as overtime which cannot be unilaterally abolished mid-contract when management has led employes to reasonably believe that they will continue to receive this benefit throughout the contract's duration.

In light of the above, it is my

AWARD

1. That the County violated Article XVII, Section B, of the contract when it stopped including paid time off for the purpose of calculating overtime pay.

2. That the County shall make all affected employes whole by including their paid time off for holiday leave, funeral leave, sick leave, vacation leave, and compensatory time off for the purpose of calculating overtime pay up to December 31, 1996.

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

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

By Amedeo Greco /s/
Amedeo Greco, Arbitrator