

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**GENERAL DRIVERS, DAIRY EMPLOYEES,
WAREHOUSEMEN, HELPERS & INSIDE
EMPLOYEES LOCAL UNION NO. 346**

and

DOUGLAS COUNTY (HIGHWAY DEPARTMENT)

Case 224
No. 53833
MA-9468

(Todd Gehl - Clarification of the Remedy)

Appearances:

Mr. Timothy Andrew, Attorney at Law, appearing on behalf of the Union.

Ms. Candace Fitzgerald, Douglas County Personnel Director, appearing on behalf of the County.

SUPPLEMENTAL ARBITRATION AWARD

On January 29, 1997, I issued an Arbitration Award resolving a grievance involving General Drivers Union Local 346 (hereinafter referred to as the Union), and Douglas County (Highway Department) (hereinafter referred to as the County) over the County's filling of the working shop foreman position. I sustained the grievance. The "Award" section of the decision provided as follows:

The grievance is sustained. The Employer violated the contract when it filled the position of working shop foreman because it did not determine the qualifications of the applicants by using the six factors specified in Article 18, Section 1. It does not follow from this finding however that the grievant (Todd Gehl) gets the job instead because he was the senior applicant. Since the Employer did not determine the qualifications of the applicants by using the six factors specified in Article 18, Section 1, it is necessary to do the selection over. Therefore, in order to remedy this contractual breach, the County is directed to discard the working shop foreman promotion and determine the qualifications of the four original applicants again, this time using the six factors listed in Article 18, Section 1.

Whoever is selected is to be paid at the applicable rate retroactive to the original filling of the position (December 11, 1995).

I did not retain jurisdiction over the matter to resolve any subsequent disputes. On June 5, 1997, the Union notified me that a dispute existed concerning the backpay owed to Todd Gehl, the employe who had been awarded the position following the issuance of the Award. On June 20, 1997, I advised the parties that I had no jurisdiction to resolve the backpay dispute unless the parties mutually agreed to my reasserting jurisdiction to rule on same. Thereafter, the parties mutually agreed to my reasserting jurisdiction to rule on the Gehl backpay dispute. It was subsequently decided that a hearing was not necessary. The parties then submitted written arguments, the last of which was received September 19, 1997. Having reviewed the materials and arguments submitted by the parties, and being fully advised in the premises, the undersigned makes the following Supplemental Arbitration Award.

FACTS

Following the arbitrator's Award, the County vacated the working shop foreman position then occupied by John Grymala, reposted the position, and awarded it to Todd Gehl. At the time, Gehl was in the position of premium mechanic. Gehl was placed in the position of shop foreman on March 25, 1997.

The shop foreman works mandatory overtime. As the name indicates, mandatory overtime is just that; the employe is expected to work it. The shop foreman works 30 minutes of mandatory overtime each day. He does this by reporting to work 30 minutes early for each shift to organize and prepare his daily work assignments. The 30 minutes a day equals 2.50 hours per week and 130 hours per year. In the relevant time period (i.e. December 12, 1995 through March 25, 1997), Grymala worked 167 hours of mandatory overtime. Gehl did not work any mandatory overtime in this time period because there is no mandatory overtime for the premium mechanic position.

All bargaining unit employes can work voluntary overtime. As the name indicates, voluntary overtime is just that; the employe decides, of their own free will, whether or not to work it after it is offered to them by the Employer. In the relevant time period (i.e. December 12, 1995 through March 25, 1997), Grymala worked 223 hours of voluntary overtime. Gehl worked 135.5 hours of voluntary overtime in that same time period.

When the County computed Gehl's backpay, it did so as follows. First, it subtracted the premium mechanic rate of pay from the shop foreman rate of pay to find the difference in the hourly rates. The difference was then multiplied by the total hours in the relevant time period (i.e. December 12, 1995 through March 27, 1997). Second, the County subtracted the number of voluntary overtime hours which Gehl worked in the relevant time period (i.e. December 12,

1995 through March 25, 1997) from the number of mandatory overtime hours which Grymala worked in the same time period. Thus, it subtracted 135.5 (i.e. Gehl's voluntary overtime hours) from 167 (i.e. Grymala's mandatory overtime hours). The County then paid Gehl for the difference at the applicable shop foreman overtime rate. According to the County, this compensated Gehl for all the overtime hours involved.

DISCUSSION

The last sentence of my Award provided that "Whoever is selected is to be paid at the applicable rate retroactive to the original filling of the position (December 11, 1995)." Gehl was the individual selected. At issue here is whether the County has computed Gehl's backpay correctly. I find it has not.

Gehl's backpay involves two separate areas: one is his regular (straight-time) hours and the other is his overtime hours. I have no problem with the way the County computed the former (i.e. Gehl's regular (straight-time) hours). However, I find that the County has not computed Gehl's overtime hours correctly. In my view, the County's computation of the overtime denies Gehl money he would have earned but for the County's violation of the contract. The following will show this.

It is noted at the outset that there are two types of overtime involved here: voluntary and mandatory. These different types of overtime will be addressed below.

Attention is focused first on the voluntary overtime. The Union contends Gehl should be paid for all the voluntary overtime which Grymala worked. The record indicates that in the applicable time period, Gehl worked 135.5 hours of voluntary overtime while Grymala worked 223 hours. Gehl claims that had he been awarded the shop foreman position the first time, he would have worked at least 223 hours of voluntary overtime during the applicable time period just as Grymala did. This assertion is entirely speculative. By that, I mean that it is easy for Gehl to now say, in hindsight, how many hours of voluntary overtime he would have worked in that time period had he been the shop foreman. Speculation however does not suffice; proof is required. For example, if the Union had shown that Gehl worked all the voluntary overtime he was offered, and never turned down the opportunity to work more overtime, there would be a factual basis for finding that Gehl could have worked more than 135.5 hours of voluntary overtime in that time period had he been shop foreman. However, no such information is in the record. That being so, the Union has not established that Gehl would have worked 223 hours of voluntary overtime in the relevant time period had he been the shop foreman. Having found the figure of 223 hours to be speculative, it is still necessary to determine what figure passes muster. I conclude that the best judge of the number of voluntary overtime hours which Gehl would have worked in that time period had he been the shop foreman is the number of voluntary overtime hours which he worked

in that same time period while he was premium mechanic.

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Since Gehl worked 135.5 hours of voluntary overtime from December 12, 1995 through March 25, 1997, I find he would have worked that same number of hours in that time period had he been awarded the job of shop foreman the first time. Consequently, the figure to be used for computing Gehl's voluntary overtime in the applicable time period is 135.5 hours. The record indicates that Gehl has already been paid for these 135.5 hours, so the only money which is owed him for these hours is the difference between his old (premium mechanic) rate and his new (shop foreman) rate.

The focus now turns to the mandatory overtime. The record indicates that in the applicable time period, Grymala worked 167 hours of mandatory overtime. While voluntary overtime is subjective in that it varies from individual to individual, that is not the case with mandatory overtime. Mandatory overtime is, in essence, scheduled overtime. I find that Gehl would have worked the same number of mandatory overtime hours as Grymala did in the applicable time period. This means that the figure to be used for computing Gehl's mandatory overtime in the applicable time period is 167 hours. Gehl is therefore entitled to be paid for 167 hours of mandatory overtime. While the County asserts that Gehl has already been paid for these (167) hours of mandatory overtime, I find he has not. The County's assertion that Gehl has been paid for these hours is based on the premise that the County could offset Gehl's voluntary overtime hours against Grymala's mandatory overtime hours. Thus, what the County did was offset Gehl's 135.5 hours of voluntary overtime against Grymala's 223 hours of mandatory overtime and pay Gehl the difference. It should not have made this offset. The reason it should not have offset Gehl's voluntary overtime against Grymala's mandatory overtime is because the two types of overtime are completely separate. That being so, the County should have kept them separate for the purpose of computing the overtime owed. Since the County improperly offset them, Gehl is still owed the 167 hours of mandatory overtime which he would have worked in the applicable time period had he been awarded the shop foreman position in the first place. Accordingly, Gehl is to be paid for 167 hours at the applicable shop foreman overtime rate.

Based on the foregoing and the record as a whole, the undersigned enters the following

SUPPLEMENTAL AWARD

The County determined Gehl's backpay incorrectly when it offset his voluntary overtime hours against Grymala's mandatory overtime hours. The County is therefore directed to figure Gehl's backpay anew. This time, the County shall pay Gehl as follows:

1. For his regular (straight time) hours, Gehl shall be paid as the County originally computed (i.e. the difference in the hourly rates multiplied by the total hours in the relevant time period (December 12, 1995 through March 25, 1997)).

2. For voluntary overtime, the figure to be used for computing Gehl's voluntary overtime in the applicable time period is 135.5 hours. Gehl has already been paid for these 135.5 hours, so the only money owed him for these hours is the difference between his old (premium mechanic) rate and his new (shop foreman) rate.

3. For mandatory overtime, the figure to be used for computing Gehl's mandatory overtime in the applicable time period is 167 hours. Gehl has not been paid for these hours, so he is to be paid for 167 hours at the applicable shop foreman overtime rate.

After these figures have been computed, the County can offset the amount which it previously paid to Gehl for backpay.

Dated at Madison, Wisconsin, this 10th day of December, 1997.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

