

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**MANITOWOC COUNTY SHERIFF DEPARTMENT EMPLOYEES,  
LOCAL 986-B, AFSCME, AFL-CIO**

and

**MANITOWOC COUNTY**

Case 325  
No. 55153  
MA-9911

---

Appearances:

**Mr. Gerald D. Uglund**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. Steven J. Rollins**, Corporation Counsel, appearing on behalf of the County.

**ARBITRATION AWARD**

Manitowoc County Sheriff Department Employees, Local 986-B, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Manitowoc County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an Arbitrator to hear and decide a grievance involving a back pay calculation. The undersigned was so designated. Hearing was held on October 2, 1997 in Manitowoc, Wisconsin. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which was received on January 15, 1998.

**BACKGROUND**

The facts underlying the grievance were stipulated to by the parties. The Grievant, Shelly Braun, posted for and received a Secretarial-Bookkeeper position. During the trial period, the Grievant gave notice on January 10, 1997 that she wanted to return to her prior position of Telecommunicator. The effective date for the Grievant to have returned to the Telecommunicator position was January 15, 1997 but the Grievant

actually returned on April 7, 1997. The issue involves the amount of back pay for the Grievant from January 15 to April 7, 1997. The Grievant worked 13.6 hours of overtime during the period of January 15 to April 7, 1997 and was compensated for 141 hours of "training premium" during this same period. The Grievant received 32 hours of training as a Telecommunicator and was paid at the training rate of \$12.69/hr. Of the 32 hours, one and one-half hours were overtime but for some reason, she was paid straight time for one hour and only one-half hour of overtime. The County calculates that the Grievant would have worked 7.53 hours of overtime if she would have been a Telecommunicator during the January 15 to April 7, 1997 period. Secretarial staff work a 38 hour week and Telecommunicators work four days on and two days off for an average of 37.5 hours/week. The County paid the Grievant the difference between what she earned as a Secretary-Bookkeeper and what she would have earned as a Telecommunicator for the period in question. The Grievant disagreed with this amount and the instant grievance was filed and appealed to arbitration.

### **ISSUE**

The parties were unable to agree to a statement of the issue. The Union views the issue as follows:

Did the Employer violate the collective bargaining agreement in its payment to Shelly Braun for services between January 15, 1997 and April 7, 1997?

If so, what is the appropriate remedy?

The County presents the issue as follows:

What is the proper formula for computing the amount of back pay necessary to make an employe whole, and, applying that formula to the present case, what is the amount of back pay due to Shelly Braun?

The undersigned adopts the issue as stated by the Union.

### **PERTINENT CONTRACTUAL PROVISIONS**

#### **ARTICLE 11 - TRIAL PERIOD**

An employee upon being promoted or transferred to another classification shall serve a trial period of six (6) months in the new

classification. An employee who cannot do the work of the new classification within the six (6) month trial period shall be returned to his or her former position. The Employer may step the employee back to his or her former position at any time

during the trial period, subject to the grievance procedure. The employee may return to his or her former position if he or she so elects during the six (6) month trial period upon giving five (5) calendar days written notice to the Department Head. The employee shall receive the new wage rate at the commencement of the trial period. The six (6) month trial period may be waived by mutual written agreement between the parties. Continued service beyond the six (6) month trial period shall be deemed evidence of satisfactory completion of the trial period.

...

**ARTICLE 26 - HOURS OF WORK**

...

A. Secretary-Bookkeeper, Secretary-Clerk: All Secretary-Bookkeepers and Secretary-Clerks shall work five (5) consecutive days per week, Monday through Friday. The work week shall be thirty-eight (38) hours.

...

A. Telecommunicators: Telecommunicators and Lead Telecommunicator shall work a four-two (4-2) work cycle, that is four (4) consecutive work days followed by two (2) consecutive days off. The work day shall be eight (8) consecutive hours.

...

**APPENDIX "B"**

1996-1997 Sheriff's Department Wage Schedule  
AFSCME

<b>JOB CLASSIFICATION</b>	<b>1996 RATE (3.0%)</b>	<b>1997 RATE (3.75%)</b>
---------------------------	-------------------------	--------------------------

...

<b>Secretary/Bookkeeper (hire)</b>	<b>\$10.39</b>	<b>\$10.78</b>
------------------------------------	----------------	----------------

...

<b>Telecommunicator 18 Months</b>	<b>\$12.23</b>	<b>\$12.69</b>
-----------------------------------	----------------	----------------

### **Union's Position**

The Union observes that both parties agree that the Grievant should be paid the Telecommunicator rate rather than the Secretary rate during the period of January 15 to April 7, 1997, but they disagree on how the Telecommunicator rate is to be applied. The Union contends that the Telecommunicator rate should be applied to actual hours worked under the standard applied to Telecommunicators. It argues that as Telecommunicators work 37 ½ hours per week and Secretarial 38 hours per week, the Grievant is entitled to one-half hour of overtime per week. It notes that the Grievant worked 13.6 hours of overtime as a Secretary and this should be compensated at the Telecommunicator rate at time and one-half. It observes that she was paid for one and one-half hours at the higher rate, thus she is owed an additional 12.1 hours at the higher Telecommunicator rate. The Union claims that the Grievant should receive the training premium because she trained other employees and this should not be eliminated from her back pay which it asserts is \$141.00. The Union argues that application of a Supreme Court decision is not warranted because this matter is contractual and not statutory. It insists that the Grievant should not be penalized because the County needed her to do clerical work but should be given all the benefits that she is entitled to under the contract. It seeks \$911.67 plus wage related benefits to make the Grievant whole.

### **County's Position**

The County contends that the Grievant is entitled to the difference between what she would have earned as a Telecommunicator and what she actually earned during the period in question. It argues that back pay is an equitable remedy designed to make the employee "whole" by compensating the employee for actual damages sustained. It asserts that this formula is not punitive and furthermore, the employee is not entitled to be put in a better position than she would have been had the County complied with the contract. It argues that unless interim earnings are deducted from back pay, a wronged employee would receive double benefits.

Page 5  
MA-9911

The County states that the Grievant would have earned \$5,651.37 had she been placed in the Telecommunicator job from January 15, through April 7, 1997. It arrives at this figure on the basis of regular pay plus longevity equaling \$5,506.23. Additionally, it estimates that she would have worked 7.53 hours of overtime based on the percentage of hours she actually worked in the same time period in 1996 which at time and one-half would equal \$145.14 for a total earnings of \$5,651.37.

The County asserts that the Grievant is not entitled to be paid at the Telecommunicator rate for hours of overtime she worked as a secretary as these have

nothing to do with the hours she would have worked as a Telecommunicator. It argues that these hours should be subtracted from the back pay award. As to the Union's claim for a one-half hour of overtime per week because of a "schedule difference", 38 vs. 37 ½, the County believes that the Union is seeking pay for time the Grievant would not have worked had she been in the Telecommunicator position. The County objects to the Union's seeking \$203.56 for Rate Differential/Additional compensation sought by the Union because it includes 32 hours that the Grievant was paid at the higher rate for training which is already included in the amount of back pay and this addition is simply a request to be paid twice for the same work. The County agrees that the Grievant should have gotten \$ .96 more in her 3/14/97 check.

It submits that the Grievant would have earned \$5,651.37 and she had \$5,165.63 actual earnings and thus the net back pay due is \$485.84 of which the County has paid \$485.07, so she is due \$ .77. The County asks that the Union's method of calculating back pay be rejected and the County's method be adopted.

### **Union's Reply**

The Union contends that the County's argument is based on the law and not the contract. It argues that the Grievant is to be compensated for the service she actually provided but at the correct rate. It claims that hypotheticals need not be dealt with and she worked more overtime than the County's hypothetical. It submits that payment as calculated by the County would result in unjust enrichment to the County. It suggests that the County could assign an employe out of class and pay the employe without regard to actual duties or hours worked. It insists that the Grievant is entitled to Telecommunicator pay for all time worked including overtime and is entitled to the training premium. It asserts that the Grievant is entitled to \$853.71 and made whole for any wage related benefits.

Page 6  
MA-9911

### **County's Reply**

The County contends that the Grievant will be made whole if she is paid the difference between what she would have earned and what she actually earned and this method is supported by substantial legal authority. It contends that the Union dismisses any notion that any interpretation of the contract is guided by legal principles and advances an unprincipled, disjointed and confusing back pay claim.

The County notes that the Union seeks Telecommunicator pay for all hours the Grievant worked as a secretary as well as training premium. It asserts that the Union is mixing apples (Telecommunicator pay) with oranges (secretarial hours). Contrary to the Union, the County maintains that the Grievant's interim earnings are not in dispute as she was correctly paid as a secretary and the only issue in dispute is what she would have earned if placed in the Telecommunicator position on January 15, 1997.

The County insists that there is no basis in the contract for the Union's claim that the Grievant should be paid at the Telecommunicator rate for time she worked as a secretary. The County points out that the Union's claim for one-half hour of overtime per week because of the difference between the secretarial work week and the four - two (4-2) schedule of the Telecommunicator is contrary to the language of the contract which provides that overtime is due for work in excess of eight (8) hours per day or for hours outside the scheduled hours of work. It notes that the Union is attempting to apply Telecommunicator language not applicable to secretaries. The County argues that the Union has vacillated on the amount of overtime the Grievant performed as a secretary but submits this dilemma is resolved by payment of the overtime hours she would have gotten as a Telecommunicator. With respect to the training premium, the County argues that had the Grievant been placed in the Telecommunicator position, she would not have been paid any training premium at all. It insists this is part of her interim earnings used to offset back pay. It asks that the Grievant be awarded the relief set forth in the County's Back Pay Calculations.

### **DISCUSSION**

The sole issue in this matter is the appropriate remedy for the County's failure to move the Grievant to the Telecommunicator position on January 15, 1997 until it did so on April 7, 1997. The general rule in arbitration is that back pay is restorative and not punitive. [(CITY OF BRIDGEPORT, 94 LA 975 (STEWART, 1990)] Arbitrators in formulating "make whole" orders for a collective bargaining agreement breach make reference to various remedies applicable in the legal sector. 1/ In formulating back pay, arbitrators make a determination of what an employe would have earned but for the employer's breach of the contract. 2/ Arbitrators do not need to be precise and calculate

Page 7  
MA-9911

exactly how much an employe is to receive and it is sufficient to simply supply a specific formula. 3/ A lump sum amount awarded by an arbitration panel was upheld where the actual amounts were larger on the basis that the arbitration board had the authority to decide the amount due upon "principles of equity and good conscience". [PELLETIER V. ANCLAIR TRANSPORTATION, INC., 250 A.2D 834 (N.H. SUP.CT. 1969)] Based on these principles, the undersigned concludes that the appropriate amount of back pay due the Grievant is the difference between what the Grievant would have earned in the Telecommunicator position between January 15, 1997 and April 7, 1997, and the amounts she was paid by the County during the same period. This would make her whole for any loss and yet not be punitive. Thus, the County's calculations are deemed correct.

The Union's calculations have not been accepted for the following reasons:

The Union used the fiction that the Grievant was placed in the Telecommunicator position on January 15, 1997 and then assigned to do the clerical work. This simply did not happen and cannot be a basis for determining a make whole order. The Union's request for an additional one-half hour of overtime per week is contrary to the express terms of the

contract. A Telecommunicator works a 4-2 schedule which averages 37 ½ hours per week but overtime is only paid after 8 hours per day. There is no evidence that the Grievant worked more than 8 hours per day to generate the overtime. The undersigned is unconvinced that the schedule difference requires the payment of any overtime. The Union's request for payment of overtime worked as a clerical is also contrary to the above principles. In the instant case, the Grievant worked more overtime in the clerical position than she would have in the Telecommunicator position. However, had the Grievant worked no overtime as a clerical but would have worked substantial overtime as a Telecommunicator, any make whole order would have required she be paid what she lost which would have been the Telecommunicator overtime. Under the Union's theory, she would have gotten nothing. Therefore, the Union's request that the clerical overtime be paid at the Telecommunicator rate and no overtime paid for Telecommunicator work does not square with the normal standard for a make whole order set out above. The Union has also requested that the training premium be allowed and not taken as an offset as interim wages. This premium is no different than other premiums such as shift differential, lead worker, or hazardous duty premium. The Grievant would not have received this had she been placed in the Telecommunicator position. Thus, the Union's argument that the Grievant should get this without it being considered wages earned is not persuasive.

Therefore, for the reasons set out above, the Union's calculations are not compatible with the contract and the principles set out above and the undersigned concludes that the appropriate back pay due the Grievant is that set forth in the County's Back Pay Calculations.

Page 8  
MA-9911

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

**AWARD**

The County did not violate the collective bargaining agreement in its calculation and payment of back pay due the Grievant for services between January 15, 1997 and April 7, 1997 and the grievance is dismissed in its entirety.

Dated at Madison, Wisconsin this 5th day of February, 1998.

Lionel L. Crowley /s/  
Lionel L. Crowley, Arbitrator

**ENDNOTES**

1/ Hill and Sinicropi, Remedies in Arbitration, (BNA, 1981).

2/ ID.

3/ Fairweather, Practice and Procedure in Labor Arbitration (2<sup>nd</sup> Ed., 1983).