

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WINNEBAGO COUNTY (HIGHWAY DEPARTMENT)

and

**WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION
LOCAL 1903, AFSCME, AFL-CIO**

Case 278
No. 54596
MA-9734

(Assignment of Overtime to Less Senior Employee)

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54913, appearing on behalf of the Union.

Mr. John A. Bodnar, Corporation Counsel, Winnebago County, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, appearing on behalf of the County.

ARBITRATION AWARD

Winnebago County (Highway Department), hereinafter referred to as the County, and Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request to Initiate Grievance Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the assignment of overtime. Hearing in the matter was held in Oshkosh, Wisconsin on October 3, 1997. Post-hearing arguments were received by the undersigned by December 2, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issues:

"Is the grievance properly before the Arbitrator?"

"Did the County violate the collective bargaining agreement when it offered overtime to a less senior employe and failed to offer it to a more senior employe?"

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE 6

SENIORITY

The County recognizes seniority. Seniority is defined as the length of County service as it is measured from the last date the employee was hired by the County and continuing until he quits or is discharged. Persons who move from temporary or seasonal positions to permanent positions without a break in their continuous service shall have such service recognized for purposes of establishing a last date of hire.

Eligibility for benefits shall be determined in accordance with the above.

The term "departmental seniority" shall mean length of service within a specific department. For purposes of interpreting this article, the departments are the following:

1. Highway (including Highway Department employees assigned to the Landfill).
2. Parks
3. Airport
4. Solid Waste Department

Seniority shall not be diminished by temporary layoffs of leaves of absence without pay, or while receiving temporary Worker's Compensation.

The County shall provide the Secretary of the Union with current department seniority rosters in December of each year.

For posting purposes, the seniority of full-time employees shall be given preferential treatment over part-time employees regardless of department.

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ARTICLE 9

GRIEVANCE PROCEDURE

The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Only matters involving the interpretation, application or enforcement of the terms of this agreement shall constitute a grievance under the provisions as set forth below.

All such grievances shall be processed as follows:

Step 1. If an employee has a grievance, he shall first present the grievance orally to his immediate management supervisor. The said grievance shall be presented within the first five (5) working days after the date of the event or occurrence which gave rise to the complaint. Said grievance may be presented by the employee either alone or accompanied by one (1) Union representative.

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ARTICLE 20

OVERTIME

With the exception of hours worked by Janitor-Watchmen and the Custodians at the Airport, and emergencies as defined herein, all time worked outside the regular basic work hours shall be considered overtime and shall be paid for at the rate equivalent to one and one-half (1-1/2) times the employee's regular hourly rate. Custodians at the Airport who work more than eight (8) hours in a day or forty (40) hours in a week shall be paid at the rate of one and one-half (1-1/2) times the employee's regular hourly rate. Janitor-Watchmen shall be paid overtime at the rate of one and one-half (1-1/2) for all hours worked in excess of their eight (8) hour shift and for hours worked in excess of forty (40) in their established work week.

All employees except those performing work as Highway Janitor-Watchmen and the part-time Airport Custodian, who are requested to and perform work on any Saturday or Sunday, or on any of the dates provided for in Article 12 of this Agreement, shall receive pay equivalent to one and one-half (1-1/2) times their regular hourly rate for each hour worked, and, in addition, holiday pay, if any.

In emergencies, such as snow removal, ice control, and flood control, the County may vary an employee's regular basic work schedule hours inclusive of a lunch/break allowance.

Except for valid reasons, the employees agree to work overtime in non-emergency situations when requested by the County. For purposes of this Agreement, refusal to work overtime because of the time of day or nature of work shall not be considered valid reasons. Nothing herein shall in any way affect the management rights of the County with respect to emergency overtime work.

Weekend overtime work, which is scheduled in advance, shall be scheduled and paid for at a minimum of one (1) unbroken hour.

Persons who are voluntarily assigned, on a temporary basis, to a position with a regular basic work schedule different from their regular schedule shall be eligible for overtime pay in accordance with their temporary schedule.

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BACKGROUND

The County and the Union have been parties to a series of collective bargaining agreements. During 1996 the County was completing a work project at its new Highway Department facility. On July 11, 1996, Ken Haas, who normally operates the County's crawler, No. D8, was asked if he would work some overtime to perform some landscaping work at the new facility. At 3:30 p.m. Haas and his supervisor went to the facility. After looking at the site Haas' supervisor determined that because of wet conditions the D8 was too heavy to perform the task and he directed Haas to go get the No. D5 crawler to complete the job. At approximately 3:45 p.m. Haas got the D5 and performed the three (3) hours of overtime. The next day Stuart Schwerin, hereinafter referred to as the grievant, learned that Haas did the work. The grievant normally operates the D5. He discussed the matter with Union Steward Larry Buehring who informed him he would raise the matter as a grievance at the end of the work day.

On July 17, 1996 the written grievance was filed and the County responded that the grievance was not timely filed at step 1 of the grievance procedure as the grievant did not properly file the grievance with his supervisor. At the hearing Buehring testified he raised the matter with Supervisor Merle Davey on July 12, 1996 in a manner consistent with how he had raised grievances in the past. Davey testified the matter was not raised with him until after the step 2 grievance was filed, around July 22, 1996. Davey had been a relatively new supervisor at the time and this was the first grievance ever raised with him. On July 25, 1996 Highway Commissioner Ray Grigar sent the following letter to the grievant:

Mr. Stuart Schwerin
Wisconsin Council of County and Municipal Employees
Council #4, Local 1903

Re: Grievance #1996 HLF 004

Dear Mr. Schwerin:

This letter is a follow up to my response letter dated 7/22/96 to Grievance #1996 HLF 004. I have been further informed that a very informal complaint may have been presented to Supervisor Merle Davey in the Landfill lunch room. I would suggest that in the future a more formal oral complaint be given in step one.

In any case my response to the above named grievance is that Article 6 does not dictate that overtime work must be scheduled by seniority. Although in most cases we do try to schedule overtime work by seniority, this scheduling is at management's option. In this case as has happened in the past, an employee who is familiar with the work, has been performing the work and does not need a supervisor to be present to give him further instruction was chosen.

Grievance #1996 HLF 004 is therefore denied.

Sincerely,

Ray Grigar /s/
Ray Grigar, Highway Commissioner
Winnebago County Highway Commission

RG:lr

PC: Union
William Wagner, Personnel

Thereafter the matter was processed to arbitration in accordance with the parties grievance procedure.

Union's Position

The Union contends the grievance was properly filed and that the County violated the collective bargaining agreement when it assigned the least senior man to do overtime work. The Union acknowledges that neither the supervisor or the steward would have a reason to lie in this matter. However, the Union argues the testimony of the seasoned steward and the grievant must out weigh that of a new supervisor. The Union also argues that Davey may not of realized that a grievance could be filed informally, in a group meeting, in the Highway Department's lunch room, but since the grievant and the steward were both present the Union concludes it was a valid filing of the grievance. The Union further argues that while Grigar's July 25, 1996 letter described the Union's actions as too informal, Grigar was not present when the grievance was present. The Union also argues that Buehring testified this method of filing grievances had been his practice for many years and the Union argues this practice should continue. The Union also points out that Buehring's work diary supports his testimony.

The Union contends the least senior employe should not have been assigned overtime before more senior employes such as the grievant. The Union points out that this was not an emergency situation. The Union stresses Haas was not the only employe qualified to do the work and asserts the County should not be rewarded by allowing it to sidestep seniority. The Union also points out Grigar's July 25, 1996 letter is inconsistent with the following June 1, 1995 letter from him to John M. Schnyder:

Mr. John M. Schnyder
Wisconsin Council of County and Municipal Employees
Council #4, Local 1903

Re: Grievance #9018

Dear Mr. Schnyder:

In response to your grievance #9018 dated May 31, 1995 stating that the senior Class 3 man was bypassed on May 19, 1995, I would remind you that the date in question was for overtime work. Article 1, Management Rights of the agreement between Winnebago County and Winnebago County Highway Department Employees Union Local 1903, AFSCME, AFL-CIO states Management has the right to assign overtime work.

When overtime work is required management normally assigns to those employees available by seniority of job classification and job position. On the day in question a Classification #3 grader operator position was needed. Your primary Classification #3 position is paver operator. Also as a point of fact you have had more overtime hours than any other employee regardless of classification or position at the new highway facility construction site since its beginning.

Grievance #9018 is therefore denied.

Sincerely,

Ray Grigar /s/
Ray Grigar, Highway Commissioner
Winnebago County Highway Commission

RG:lr

PC: William Wagner

The Union argues that the statements are inconsistent and that the June 1, 1995 letter would support the Union's position that management had violated the collective bargaining agreement. The Union also points out that all employees had performed some work at the project, that the grievant was not uniquely qualified to do the job, and, contrary to Grigar's July 25, 1996 letter, a supervisor was present for most of the three hours of overtime. The Union concludes there is no reason why others could not perform the work and thus no reason to circumvent seniority.

County's Position

The County argues the grievant failed to orally present the grievance to his immediate supervisor thus not following Step 1 of the grievance procedure. The County acknowledges that this a matter of credibility, Buehring's or Davey's. The County also calls into question the credibility of Buehring's diary as the ink notations concerning the filing of the grievance could of been added at a later date to support the allegation the grievance had been filed properly. The County also stresses that it was not the grievant who presented the grievance, as required by Step 1, but Buehring if his testimony is credited. Thus there is no evidence the grievant personally presented the grievance to his supervisor. The County concludes Article 9 of the collective bargaining agreement has not been complied with and the grievance is therefore not arbitrable.

The County contends neither the seniority provisions of the collective bargaining agreement nor the past practice of the parties entitled the grievant to be offered the overtime in relationship to the instant factual situation. The County points out that the collective bargaining agreement is silent concerning entitlement to overtime by seniority or to the assignment of employees to particular jobs and equipment. The County stresses Article 1 of the collective bargaining agreement vests exclusively with the County the right to assign overtime work and the right to assign employees to specific jobs and equipment. The County does acknowledge it has been the practice to normally assign overtime in relationship to the operation of particular vehicles or equipment to the person who normally operates them if it is reasonably feasible to do so. The County argues there is no entitlement to overtime based upon seniority within the collective bargaining agreement. The County also argues that it was originally thought that Haas' crawler was most suited for the work in question. Only when it was determined his crawler was too heavy was it determined to use the crawler normally operated by the grievant. The County points out that by this time most employees, including the grievant, had already left for the day. The County also points out that the grievant acknowledged no grievance would of been filed had Haas used his normal crawler and argues it would of been impractical and inconvenient to attempt to call the grievant back to work when Haas was already on the premises. The County concludes there is no contractual language which supports the Union in this matter.

DISCUSSION

The parties' collective bargaining agreement clearly requires an employee to present a grievance to their immediate supervisor within the first five (5) working days after the date of occurrence which gave rise to the matter. The grievance may be presented alone or the employee may be accompanied by their steward. There is no dispute that the grievant's steward, Buehring, did the presentation of the grievance if such a presentation occurred. The undersigned finds that the fact the steward presented the grievance does not disturb the intent of this provision, that the matter be brought promptly to the attention of the immediate supervisor. Thus the undersigned finds no merit in the County's contention that the grievance is not arbitrable because the Steward presented the grievance. The undersigned also finds that the County did not dispute Buehring's testimony that he presented this matter no differently then how he had presented grievances in the past. Thus Grigar's July 25, 1996 letter that Buehring may be too informal when presenting a grievance does not refute his testimony that he presented this grievance no differently than he had presented grievances in the past. However, because Davey is a relatively new supervisor, and the record demonstrates this was the first grievance presented to him, Davey could reasonably conclude that Buehring's actions did not constitute the filing of a grievance. The fact that Davey is a new supervisor does not mean that Buehring was required to change his presentation methods. Further, there is no evidence which would demonstrate that Buehring had in the past made unfounded claims or falsified documents to support a claim made by the Union. Thus, Buehring's diary, even though it was marked in

different ink and looking as if the notation had been added at a later date as pointed out by the County, supports Buehring's testimony that he presented the matter. Therefore the undersigned concludes the matter, as presented by the Union, complied with the provisions of Step 1 of the parties' collective bargaining agreement's grievance procedure and the grievance is therefore arbitrable.

A careful review of the parties' collective bargaining agreement demonstrates there is no specific provision which mandates that overtime be assigned by seniority. There is evidence that when there is overtime requiring the use of specific equipment that the employe who normally operates that equipment is asked to perform the overtime. The grievant's testimony demonstrated that if Haas had used the D8 instead of the D5 to perform the overtime he would not have filed a grievance. The record also demonstrates that Haas was originally informed to use the D8 and only after he arrived at the work site was a decision made to change to the D5. Thus, based upon the testimony of the Union's witnesses, the original assignment of Haas to perform the overtime did not violate any provision of the collective bargaining agreement or any practices that may be in existence.

The record also demonstrates and the Union did not refute that Haas performed the majority of the landscaping work at the new Highway Department facility. The County has asserted it normally assigns any overtime to employes who are performing or familiar with the job. The Union presented no evidence which would refute this assertion. Thus the undersigned concludes that the County's assignment of Haas to use the D8 to perform overtime work at the new Highway Department facility did not violate any provision of the collective bargaining agreement or any practices that may be in existence.

The record demonstrates that after Haas arrived at the new Highway Department facility his supervisor determined the D8 was too heavy for the task because of wet conditions and directed him to use the D5 to perform the job. By this time, approximately 3:45 p.m., most employes, including the grievant had left work. There is nothing in the record which would demonstrate that at this time the County was required to call in a more senior employe to do the task or that the County was required to call in the employe who normally operated the D5. The burden is on the Union to demonstrate such a requirement. There is no requirement that specific employes operate specific equipment in the collective bargaining agreement. The record demonstrates the grievant was qualified to operate the D5. There is also no evidence that when the County had in the past changed its mind on which piece of equipment to use in an overtime situation that it called in more senior employes if the available employes already performing the overtime were qualified to operate the equipment needed to perform the job. The undersigned concludes the Union has failed to demonstrate that the County violated the collective bargaining agreement or any practices which may exist when it assigned Haas to use the D5 to perform the overtime.

Therefore, based upon the above and foregoing, and the evidence, testimony and arguments presented the undersigned finds the County did not violate the collective bargaining agreement when it assigned the overtime to Haas. The grievance is therefore denied.

AWARD

1. The grievance is properly before the Arbitrator.
2. The County did not violate the collective bargaining agreement when on July 11, 1996 it offered overtime to a less senior employe and failed to offer it to a more senior employe.

Dated at Madison, Wisconsin, this 2nd day of March, 1998.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

