

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 1266, AFSCME, AFL-CIO**

and

**IOWA COUNTY**

Case 91  
No. 55408  
MA-10006

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Appearances:

**Mr. David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Brennan, Steil, Basting & MacDougall, S.C., by **Attorneys Howard Goldberg**, appearing on behalf of the County.

**ARBITRATION AWARD**

The Union and the Employer named above are parties to a 1996-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a grievance involving the equalization of overtime. The undersigned was appointed and held a hearing on July 15, 1998, in Dodgeville, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. At the conclusion of the hearing, the parties waived filing of briefs and argued their case orally, and the record was closed.

**ISSUE**

The parties ask:

Did the Employer violate the collective bargaining agreement in the assignment of overtime on April 11 and 12, 1997? If so, what is the appropriate remedy?

## BACKGROUND

This is a dispute about the overtime that arose during a snow storm that started on Friday, April 11 and continued into the evening hours of Saturday, April 12, 1997. (All dates will refer to the year of 1997 unless otherwise noted.)

Roger Venden is the Patrol Superintendent for the state highways. He has been in that position for six years and worked for the County for 18 years altogether. He is responsible for calling out employees to clear roads during storms. The parties use the terms "State patrolmen" and "County men" or "County patrolmen" in this proceeding, but all these employees are employed by the County in its Highway Department. The State patrolmen list includes Conway, Ernzen, McKernan, Meeden, Reynolds, Jones, Gratz, Casper and Zablotowicz. The last four are regularly assigned on class two roads. Class one roads are the major State highways in the County – Highways 14, 18 and 151.

The April storm started about 1:00 p.m. on Friday afternoon. The snow was wet and melted until about 6:00 p.m. Two of the State patrolmen – Conway and Ernzen – stayed over from their regular shift and worked until about midnight. Two others – McKernan and Reynolds – had the option of staying, but chose to go home so that they could work later, starting at midnight. When Venden decided he needed more help about 6:00 p.m., he could not reach either McKernan or Reynolds. However, two County workers – Kosharek and McConnell – were also available and came in when called in the early evening. Venden had the dispatcher start calling people about 6:20 p.m. He tried to call six employees who had less overtime than others but did not reach any of them. At that time, Venden did not document anything if no one answered, but he documented it if someone declined the overtime.

Venden did not call the three grievants – Casper, Gratz or Zablotowicz – because their regular sections are called class two roads. The County wants to clear class one roads right away. Also, Venden does not replace the patrolmen assigned to class two roads because those roads are hilly and curvy and need someone familiar with them to plow them. The wide class one roads are the safest places to put someone when filling in. Venden needed Highway 151 cleared, and the employees who were normally assigned to that section were called first – Ernzen, Reynolds and McKernan. Neither Reynolds nor McKernan answered the call at 6:20 p.m. on Friday, April 11<sup>th</sup>, and they had already indicated that they wanted to plow at midnight. So Venden looked for two more employees and got Kosharek and McConnell.

Venden did not call in class two State patrolmen because they would have been called later anyway. The State patrolmen on class one have to go 24 hours sometimes and Venden does not use State patrolmen assigned to class two roads for fill in for State patrolmen assigned to class one roads. He uses the County patrolmen to fill in for class one patrolmen. Venden can use anyone

not committed to work on County roads because those employees assigned to work go out on County roads early in the morning. If Venden used them at night, no one would be available to cover the County roads.

Venden keeps a list of the County patrolmen to call, and he checks their names when he uses them for overtime work. He tries to even up the overtime where possible. He also has to use some judgment about the road conditions – if there is treacherous ice, he wants experienced employees. He rotates everyone, but uses the most experienced employees on the difficult situations.

The employees all start out with zero hours of overtime on January 1st. The State and County patrolmen get more overtime in the winter, and other Highway Department employees, such as those who work on paving crews or oil crews, get more overtime in the summer. Venden starts worrying about the equalization of overtime in the fall, at the end of the year. He finds that the overtime usually washes out by the end of the year and he rarely has to make many adjustments.

All of the State and County patrolmen worked overtime during the April 11<sup>th</sup> and 12<sup>th</sup> storm. Conway and Ernzen were available right away, and then they went home to rest around midnight and came back again for more work on Saturday. So they got to work overtime twice during that weekend. Reynolds and McKernan, who did not answer their phones for the first round of calls on Friday night, became available later that evening and started out about midnight. So they missed the first six or seven hours that Conway and Ernzen worked. McKernan and Reynolds both worked 14½ hours starting at midnight and going until Saturday afternoon. Meanwhile, Ernzen worked a total of 16½ hours because he went out twice and the snow continued until 9:00 p.m. Saturday night. Venden was trying to save the class two patrolmen to go out Sunday morning if necessary to clear up icy roads that might freeze again during the night. McConnell also went out two nights, both Friday and Saturday, since he was home and rested. He went out Saturday afternoon and took care of two sections.

Meeden was working on Highway 14 and wanted to quit after 13 hours of overtime on Saturday, but noted that his section should be checked later. McConnell went down to look at that section. Then Sauk County asked for help with an accident because their employees were gone. McConnell turned around and went back to tend to the accident. Then he started to come back when he blew a hydraulic hose. He came back to the shop and fixed the hose, then went back out to check some ramps and roads. Ernzen and Conway offered to help McConnell. McConnell ended up with more overtime because of those circumstances.

The weather forecasters predicted that the storm would end about 3:00 p.m. on Saturday. Therefore, Venden wanted to use his regular State patrolmen who could go around the clock. The storm actually continued on until about 9:00 p.m. Saturday, April 12<sup>th</sup>.

Venden has often given employees options of whether they want to go out to plow right away or later, and employees sometimes play that option out to try to take advantage of the maximum overtime opportunity based on the way the storm might last. Venden shoots for a guideline of 14 to 16 hours of overtime at one stretch during these storms. As the work force has grown smaller, it has become more difficult to fill the hours and get the roads covered.

Ernzen and Conway worked 7:00 a.m. to 3:30 p.m. on Friday, then worked overtime to midnight, 16½ hours. Venden has had employees working 17 to 18 hours in the past. McKernan and Reynolds went home at 3:30 p.m., and said they would be available to start the midnight run and work through Saturday. On Saturday, Ernzen came in at 9:30 a.m. and worked until 2:00 a.m. on Sunday morning, a total of 16½ hours. McKernan and Reynolds worked from midnight until 2:30 p.m. on Saturday, a total of 14½ hours. McConnell then covered the sections for both McKernan and Reynolds.

Ernzen and Conway would have had about 25 hours of overtime from the April storm, more than others such as McKernan and Reynolds who picked up 14½ hours, and more than the employees who signed the grievance, Gratz, Casper and Zablutowicz. The three grievants worked from 3:45 a.m. on Saturday morning until about 3:00 p.m. Saturday, working about 11¼ hours overtime. McConnell was still working at that time on Highways 151 and 14. The employees working on County sections also quit working in the middle of Saturday afternoon. Venden figured that if the snow continued, he would have a few people available to come back later if necessary, since they went home about 3:00 p.m. Later that night, he found the roads in good condition and he generally does not call out employees working on class two roads after 9:00 p.m.

Venden has never substituted his class two employees and put them out on class one roads. He saves them generally for their own sections. He tries to be fair and has changed his procedures through past grievances when things have been pointed out to him.

Venden interprets the labor contract to equalize overtime among the groups, such as class one, class two, operators, and truck drivers. The parties agree that employees have to be qualified to perform the overtime work. Gratz, Casper and Zablutowicz were qualified to perform the overtime work in the April snow storm.

The way overtime was handled for the April storm was the same as had been done in the past. Venden did not call Gratz, Casper and Zablutowicz because he anticipated needing them

later. That is how he always called out employees in the past. No one grieved it in the past. Venden has never tried to equalize overtime during a storm, just over the calendar year, and no one has grieved that yearly equalization of overtime.

### **THE PARTIES' POSITIONS**

The Union objects to the fact that some employees got as little as 8 to 12 hours of overtime while other employees got up to 25 hours of overtime, and it believes that the employees who did not get as much overtime should be made whole for the overtime they missed. The Union states that it does not object to Venden's procedures as he testified about them, but that they do not comply with the collective bargaining agreement. The bargaining agreement calls for the equalization of overtime, and it was not done in this case. Although Venden thought he had good reasons, those reasons did not follow the contract. The County should refer to what the contract calls for. While the County has talked about equalizing overtime over the term of a year, there is no reference to that in the contract. One employee – McConnell – gets lots of overtime in the summer, and yet he got a lot of overtime in the storm also. The Union asserts that the County did not pay any attention to the language of the contract regarding the equalization of overtime.

The County argues that the Union would have it equalize overtime in such small increments that it would be impossible to administer the contract. It is not reasonable to interpret the contract in that manner. Arbitrator McLaughlin previously decided that Venden's tracking of accumulation of overtime on a calendar year basis reflects tradition and tracks the labor contract. The fall is the time of the year when the County tries to make employees as equal as possible. That is what has been consistently done and this approach has been approved in arbitration. Any other approach is impossible, and the County has the right to maintain efficiency and assign the work. Venden constantly juggled several balls during the storm, consistent with past practice. While some employees may be jealous of McConnell's overtime, they should work this out. There is no violation of the contract.

### **DISCUSSION**

Section 8.02 of the collective bargaining agreement is the controlling language. It states:

It shall be the policy to keep overtime at a minimum and it is expected that overtime will be worked only in emergencies which are beyond the control of either party to this Agreement. All overtime shall be authorized by the Highway Commissioner or his/her representative. However, when it becomes necessary to work overtime, it shall be divided as equally as is reasonably possible among those employees qualified to perform the overtime work required and all employees shall

be paid time and one-half (1½ ) for all such overtime worked in excess of eight (8) hours per day and forty (40) hours per week. All time paid shall be considered time worked.

The parties agree that all the Grievants were qualified to perform the overtime work.

While the County points to Arbitrator McLaughlin's award as being controlling of this issue, the award itself rested on a finding that the grievance was not timely filed under the contract. However, Arbitrator McLaughlin, pointing out that his comments on the merits of the grievance before him were dicta, wrote the following concerning the case:

The fundamental weakness of the evidence supporting the grievance is that it attempts to resolve an issue of unit-wide significance by asserting one employe's entitlement. Neither the Union's nor the County's calculation of unit-wide overtime accumulation points to a clear entitlement on the Grievant's part to the Green County work. Venden tracks such accumulations on a calendar year basis . . . Venden's approach appears to reflect tradition and at least tracks the contract.

Accordingly, both the Union and the County knew as of August 25, 1995, when Arbitrator McLaughlin issued the above opinion, that an arbitrator approved of Venden's approach to tracking overtime accumulations on a calendar year basis for the purpose of equalizing it. The parties did not negotiate in their 1996-97 successor contract any period of time that would deviate from a calendar year. The County could reasonably rely on the calendar year basis for equalizing overtime as an accepted method at that point.

Moreover, the County has traditionally used a calendar year to equalize overtime, since some employees get a lot of overtime in the winter and others in the summer, due to the nature of their jobs in the Highway Department.

The Union does not complain that overtime is not generally equalized, and Venden appears to take into account the amount of overtime that employees have accumulated when calling in employees for overtime work. However, some matters are always outside of the employer's control. If employees do not respond to phone calls, the employer must bypass them and find someone else to perform the work. Snow storms are somewhat unpredictable and create emergency or special circumstances. In emergencies or in cases of special circumstances, there is a limited period of time in which the work needs to be done. Venden was making choices based on many factors, such as the fact that Casper, Gratz and Zablutowicz were assigned to class two roads, roads that were hilly and curvy and needed people who were familiar with them to work

them. Other factors were out of his control, such as the fact that McConnell ended up with more overtime than expected because he had to respond to an accident in Sauk County and then had to fix his truck when it blew a hose.

The evidence only shows that the Grievants worked less overtime by several hours during one weekend. However, the evidence also shows that Venden at least made a good faith effort to consider the equalization of overtime in calling people out. The language of the contract does not specify any particular time period in which overtime has to be equalized. The evidence does not show that there was any intent to violate or bypass the contract, or that the contract was indeed violated. The grievance will be denied.

**AWARD**

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin, this 5<sup>th</sup> day of August, 1998.

Karen J. Mawhinney /s/  
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Karen J. Mawhinney, Arbitrator

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