BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NICOLET HIGH SCHOOL DISTRICT (Glendale, Wisconsin)

and

NORTHSHORE EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION – NICOLET CHAPTER

Case 46
No. 56335
MA-10243

(Rosa Cyrier overtime pay grievance dated October 6, 1997)

Appearances:

Mr. Patrick A. Connolly, Executive Director, North Shore United Educators, appearing on behalf of the Association and Grievant.

Quarles & Brady LLP, by Attorney **Carmella A. Huser**, appearing on behalf of the District.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance under what subsequently became the parties' 1997-99 Agreement (Agreement) entered into by them on June 9, 1998.

Pursuant to notice, the grievance dispute was heard at Nicolet High School on July 28, 1998. The proceedings were transcribed. The parties' post-hearing briefs were exchanged on October 19, 1998, and reply briefs were exchanged on November 25, 1998, marking the close of the hearing.

ISSUES

At the hearing the parties authorized the arbitrator to decide the following issues:

1. Did the District violate the Collective Bargaining Agreement by failing to pay overtime to Rosa Cyrier for the period August 18 through August 29, 1997?

2. If so, what is the appropriate remedy?

PERTINENT AGREEMENT PROVISIONS

ARTICLE 12 - Conditions of Employment

. . .

12.3 Overtime - Overtime will be paid for time worked in excess of 40 hours per week. Overtime must be requested by the employee or supervisor and approved by the District Administrator or his designee in advance of any overtime worked. Approved overtime will be paid at the rate of one and one-half (1-1/2) times the regular hourly rate.

. . .

ARTICLE 15 - Leaves

. . .

15.3 Funeral Leave - All employees shall be entitled to, but not to exceed, five (5) days personal absence with no deduction in pay, for death in the immediate family. Immediate family is defined to include . . . . Each day's absence for death in the immediate family shall be deducted from the employee's accumulated sick leave. Notice of intended absence must have been given to the District Administrator, or designee, prior to such absence. . . .

BACKGROUND

The District is a public school district which operates Nicolet High School serving various suburban communities north of Milwaukee, Wisconsin. The Association and District have been parties to collective bargaining agreements covering certain non-professional school personnel since 1993. The Grievant, Rosa Cyrier, has been employed by the District since 1983, and has been a secretary in the Guidance Department for 10 years.

The incident giving rise to this dispute is not factually disputed. The dispute is succinctly summarized in the parties' initial written grievance and answer, below.

The October 6, 1997, written grievance giving rise to this proceeding was contained in a memorandum from Association Negotiations/Grievance Coordinator Beth Ludeman to District Administrator Elliott L. Moser. That grievance reads in pertinent part as follows:

> Re: Overtime Pay for Rosa Cyrier
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> . . .
>
> The week in question is August 18-22, 1997. The Association's position is that Ms. Cyrier is due overtime pay (at the rate of 1.5 times her regular hourly rate) as stated in the contract in Article 12.3, for 9.5 hours between August 21 and 22, 1997. Ms. Cyrier had obtained prior approval to work overtime during that week due to registration activities. As of August 21, Ms. Cyrier's hours exceed 40. Included in that is time she used as funeral leave. According to Article 15.3, "All employees shall be entitled to, but not to exceed, 5 days personal absence **with no deduction in pay** (my emphasis), for the death in the immediate family." Ms. Cyrier used only five hours for the necessary funeral leave that week, and it is the Association's contention that "no deduction in pay" means just that: Ms. Cyrier should be compensated at the same rate for the funeral leave as she would have been had she been able to be on the job.
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> . . .

The District Administrator's October 7, 1997, letter response to Ludeman reads, in pertinent part, as follows:

> On October 6, 1977, I received a grievance letter from you concerning overtime pay for Rosa Cyrier. . . .
>
> This grievance should not proceed because the payment of overtime wages is dictated by federal and state law. Wisconsin law and the Federal Fair Labor Standards Act require employers to pay employees time and one-half for "hours worked" in excess of 40 hours per week. Article 12.3 of the Collective Bargaining Agreement reflects the requirement of those laws. Although, in the current negotiations for a new Agreement, the Association has a proposal to require the District to pay overtime wages in excess of what is required by law, there currently is no such provision in the Agreement.
>
> Article 15.3 is not relevant in terms of the payment of overtime wages. Article 15.3 provides only that employees are entitled to pay for funeral leave. Such paid time off, however, does not constitute "time worked" under state and federal law.

> Ms. Cyrier will be paid for five hours of funeral leave and for the overtime she worked during the week of August 18-22, 1997. The amount of overtime paid, however, will be limited to the actual hours worked in excess of 40 hours. The five hours in which Ms. Cyrier was absent from the District for funeral leave will not be credited as "time worked" for overtime pay purposes.
>
> . . .

The grievance arose between the nominal June 30, 1997 termination date of their 1995-97 agreement and the June 1, 1998 execution date of their 1997-99 agreement, such that the parties were engaged in bargaining about the successor agreement when the instant grievance arose and the above grievance and answer were exchanged.

The dispute was ultimately submitted for arbitration as noted above. At the hearing, the Union presented testimony from Grievant Rosa Cyrier and Payroll Clerk Sharel McVeigh. The District offered testimony from Moeser and Director of Business Services Jeff Dellutri.

Additional factual background is set forth in the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The Association

The District violated both Agreement Secs. 12.3 and 15.3 by not counting Grievant's five hours of funeral leave toward the 40 hour weekly overtime threshold. Doing so violated Sec. 15.3 because it amounted to a deduction in Grievant's pay relative to what she would have been paid had she worked rather than taken leave. It also violated Sec. 12.3 because it was inconsistent with the parties' established past practice of counting compensated leave time as "time worked" under Sec. 12.3.

When the parties negotiated their initial agreement covering 1993-95, the overtime and funeral leave language in 12.3 and 15.3, respectively was drawn with non-material changes from the District's unilaterally drafted and administered Handbook. Sharel McVeigh, the District payroll clerk since 1986, testified that she consistently included paid leave for funerals, sickness, snow days, etc. as hours worked when computing overtime. Although Ms. McVeigh has been a member of the bargaining unit since about 1996, she was outside the bargaining unit prior to that time. At all times, however, as the District's payroll clerk, she has been under the direct supervision of the District's business managers who in various ways reviewed and at times signed off on employe time sheets. She has worked for four different managers during her tenure, including the incumbent, Jeff Dellutri. According to McVeigh, prior to 1997, McVeigh's inclusion of paid leave in computing hours worked for overtime compensation purposes was never questioned. McVeigh only changed from her prior practice

when Moeser directed in early July of 1997 that the "Regular Hours Worked" category on support unit employes' time sheets "did not include time off for your unpaid lunch period" because that category "includes only time actually worked each day and time off taken for authorized breaks during the day." McVeigh took that directive to mean that she was to count only hours actually worked as "time worked" in determining the overtime eligibility of support unit employes.

The summary of overtime calculations prepared by McVeigh at the direction of the District, overwhelmingly supports her testimony regarding past practice. It shows that with one inconsequential exception, there was a clearly established pattern of counting compensated leave as time worked for support unit employes overtime eligibility purposes from November 1994 until August 1997. Indeed, several employe time sheets in evidence were signed and dated by the District Administrator himself, confirming both the existence of the practice and Moeser's knowledge of it.

The District improperly asks the Arbitrator to interpret Sec. 12.3 in isolation, whereas the Agreement is properly to be interpreted as a whole. It was the District, not the Association that has for many years interpreted the language of 12.3 as the Association proposes it be interpreted in this case. McVeigh's position did not become a part of the bargaining unit from the beginning of the collective bargaining relationship, but only sometime in the third year of that relationship. Citing tr. 68. Thus, for about ten of the eleven years prior to the instant grievance being filed, McVeigh's payroll clerk position was not in the bargaining unit. It is not reasonable to believe that the District's business managers and the District Administrator were unaware of how McVeigh was calculating support employes' overtime. Even if that were so, District management was responsible for the way the District calculated overtime under the Agreement since 1993 and under the Handbook prior to that time, whether they actually had knowledge of it or not.

The Association has a right to expect that a language interpretation in place for many years will mean what it has always meant. Citing COCA-COLA BOTTLING CO., 9 LA 197, 198 (JACOBS, 1947) ("A union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have grown up around it over the course of time. . . ."); and ESSO STANDARD OIL CO., 16 LA 73, 74 (MCCOY, 1951) ("Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term.") There is nothing in the labor standards laws referred to by the District that precludes the parties from interpreting the Agreement as it has been interpreted for many years.

The District's contention that the Association did not know of the past practice is without merit. Clearly the employes were fully aware of how paid leaves were treated for purposes of overtime. That is why the instant grievance was filed. The Grievant herself

testified that she considered not being paid for overtime as a consequence of taking funeral leave amounted to a deduction in pay violative of Agreement Sec. 15.3 and that she believed such a deduction was a change from the way the District had calculated her overtime pay in the past. The past practice evidence adduced in this case directly supports the interpretations of both Secs. 12.3 and 15.3 which the Association set forth in its written grievance.

The bargaining history supports the Association's proposed interpretations of the Agreement, as well. The Association's proposal on overtime was essentially to change the threshold for overtime from forty hours per week to eight hours per day. The parties never discussed how compensated leaves were to be treated in conjunction with overtime pay. The parties left the status quo language of Secs. 12.3 and 15.3 unchanged. The status quo was that compensated leaves such as funeral leaves were treated as regular hours worked for purposes of computing overtime just as they had been for at least the preceding 12 years.

For the stated reasons the grievance should be sustained. By way of remedy, the Arbitrator should order the District to pay Rosa Cyrier the amount of 28.80 in overtime pay. In addition, the Arbitrator should "order the District to pay overtime to other bargaining unit members who have been similarly affected since August 18, 1997 by not having compensated leaves credited toward regular hours for purposes of calculating overtime, specifically with respect to funeral leaves, vacations, holidays, sick leaves and snow days to which they are entitled under the [Agreement]."

The District

Agreement Sec. 15.3 does not amend the clear and unambiguous language of Sec. 12.3 stating that employes are paid overtime only for time worked in excess of 40 hours per week.

The Association's past practice claim must be rejected because the language of Sec. 12.3 is clear. It is a well-settled arbitral principle of contract interpretation that past practice is not to be used to interpret language which is clear and unambiguous. Citing published awards.

Even if the language in Sec. 12.3 were ambiguous, the Association has failed to prove the existence of a binding practice in this case. To be binding, a practice must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Citing, Elkouri & Elkouri, How Arbitration Works, 632 (5 ed. 1997) and published awards cited therein.

The Association's past practice theory rests primarily on the equivocal testimony of, and the flawed summary prepared by McVeigh, a member of the bargaining unit. The District does not dispute that McVeigh erroneously calculated paid time worked for overtime purposes on many occasions over the years. However, the evidence reveals inconsistencies in the

manner in which she did those calculations. Furthermore, the evidence is clear that neither the Association nor the District knew what she had been doing until the Association filed for arbitration in this matter many months into the processing of the grievance.

Both Moeser and Dellutri gave sworn testimony that they did not realize how McVeigh, a bargaining unit member, was calculating overtime. Both relied on McVeigh's experience in calculating payroll and clearly did not second-guess her method of calculating overtime. While this reliance may have been an administrative oversight, it is not evidence of a knowing and mutually accepted past practice.

The Association did not know how McVeigh was calculating overtime either. That is why the Association did not mention the alleged past practice in the written grievance, at any pre-arbitral step in the grievance procedure, during the parties' first contract negotiations when the former Handbook funeral leave and overtime language was agreed upon with certain changes, or during the 1997-99 negotiations throughout which the Association unsuccessfully proposed to broadly amend Sec. 12.3 to eliminate the phrase "time worked" from the overtime language. The Association's lack of knowledge of the alleged binding practice is also evidenced by the Association's failure to grieve Moeser's in July 2 and September 2, 1997, memoranda regarding unpaid lunch time directing McVeigh and other bargaining unit employes that in filling out employe time sheets, "'Regular Hours Worked' includes only time actually worked each day and time off taken for authorized breaks during the day. . . ."

An ongoing, unnoticed mistake in implementing the contract by a member of the bargaining unit does not constitute a mutually accepted, binding past practice.

For those reasons, the Association's request that the District pay overtime to Grievant and to other bargaining unit members who have not filed grievances regarding the payment of overtime should be rejected, and the instant grievance should be denied.

DISCUSSION

As the District argues, the language of Secs. 12.3 and 15.3, taken together, does not, on its face, provide that time not worked on funeral leave is properly to be counted toward the "time worked in excess of 40 hours per week" requirement for applicability of the 1.5x overtime premium rate. By the plain meaning of the words, time not worked while on funeral leave simply cannot be deemed "time worked" for overtime calculation purposes.

The statement in Sec. 15.3 that employes eligible for funeral leave are entitled to take that leave "with no deduction in pay" assures that employes will be paid for time not worked due to a contractual funeral leave. It does not persuasively support the further notion that employes will also be credited with "time worked" for overtime purposes for funeral leave time not worked. In this case, Grievant was paid (at her regular hourly rate) for the five hours she was away from work on funeral leave.

The District would have the case analysis end right there in its favor based on the traditional arbitral principles reflecting the parol evidence rule: clear agreement language makes resort to evidence beyond the four corners of the agreement unnecessary. Many arbitrators, including those whose awards are cited by the District, would no doubt reach that conclusion in this case.

However, the Arbitrator finds it appropriate to assess the evidence beyond the four corners of the agreement in this case to determine whether and to what extent it may be appropriate to use past practice to modify or amend the clear contract language involved in this case.

As noted in a recently-published compendium of arbitral thinking, some arbitrators recognize a potential fourth arbitral use of past practice -- besides clarifying ambiguities, fleshing out general provisions and creating separate enforceable conditions of employment. Specifically, "[s]ome arbitrators use past practice to modify or amend clear and unambiguous contract language." St. Antoine, Theodore, ed., The Common Law of the Workplace, 81 (BNA, 1998). The authors offer the following comments related to that observation:

> b. Uses of Past Practice. A controversial use of past practice is to modify clear and unambiguous contractual language. Arbitrators who refuse to use past practice in this way reason that the written agreement is the best evidence of the parties' mutual intent and that, where it is unambiguous, an arbitrator is not permitted to go beyond the express bargain of the parties. Moreover, arbitrators who will not use past practice to modify clear contractual language argue that there is no reason to rely on past actions of the parties as an interpretive aid because the meaning of the agreement is clear from express terms in the labor contract.
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> Other arbitrators disagree with such a restrictive approach and use past practice to modify clear and unambiguous contractual language. They reason that in some instances the initial written agreement is not necessarily the best evidence of contractual intent and that the parties' conduct after contract formation may provide a clearer expression of their intent. When parties' conduct during the life of an agreement consistently conflicts with written terms of the contract, some arbitrators conclude that, in fact, the parties meant to alter their agreement by substituting what they actually do for what they said in writing they intended to do. There is no judicial consensus regarding the propriety of an arbitrator's using past practice to modify clear and unambiguous contractual language, and the occasions on which such conflict arises are rare.
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> c. Altering a Past Practice. An established practice that is an enforceable condition of employment, wholly apart from any basis in the agreement, cannot be unilaterally modified or terminated during the term of the contract. Either party may repudiate such a past practice, however, at the time a new agreement

> is negotiated, since its continuing existence depends on the parties' inferred intent to retain existing conditions, in the absence of any objection. On the other hand, a practice that serves to clarify an ambiguous provision in the agreement becomes the definitive interpretation of that term until there is a mutual agreement on rewriting the contract. The practice cannot be repudiated unilaterally. Finally a change of conditions that initially produced the practice may permit a party to discontinue it. For a full analysis, see Mittenthal, Richard, Past Practice and the Administration of Collective Bargaining Agreements, in 14 NAA 30, (1961)

ID. AT 82-83.

A pertinent and recent example of an arbitrator's use of past practice to modify clear and unambiguous contractual language can be found in VILAS COUNTY (HIGHWAY), WERC grievance award MA-9711 (Greco, 1997). There, without the knowledge of the County's Personnel Committee, the County's Assistant Bookkeeper had been for many years consistently including hours of paid leave in determining overtime despite contract language providing for payment of the overtime premium "for all hours worked in excess of forty (40) hours per week or eight (8) hours per day." While acknowledging that the County's interpretation was supported by clear language, the arbitrator held that the County was bound to honor the uniform, longstanding and more generous overtime calculation practice that its management had allowed to develop, at least until expiration of the agreement in effect when the violations occurred. Arbitrator Greco reasoned that "…Highway Commissioner Fischer knew about and approved this practice since Assistant Bookkeeper Krus testified that Fischer 'would look at payroll, yes'. . . Since Fischer is part of management, his knowledge is imputed to the County because he acted as the County's agent and because he was clothed with apparent authority to do so." In a footnote, arbitrator Greco noted that "The County subsequently informed the Union that to whatever extent it may have existed, the County was repudiating the prior practice at the expiration of the contract. That latter issue is not before me."

Similarly here, as the Association argues, the record evidence persuasively shows that for many years prior to the circumstances giving rise to this grievance, with only a very few inconsequential exceptions, overtime payments to the employes in this bargaining unit before and after the establishment of the Association-District collective bargaining relationship have been calculated such that hours not worked on paid leaves of all kinds (including funeral leave) have been counted toward the "time worked in excess of 40 hours per week" for overtime eligibility determinations.

Whether the District Administrator and District Business Managers were aware of that practice or not, the Arbitrator finds it appropriate to charge management with knowledge of and acquiescence in that practice. If the District's management personnel relied over the years on the District's Payroll Clerk to interpret and apply the language of the parties' agreements (and the materially parallel provisions of the Classified Staff Handbook prior to the existence

of the parties' first agreement), they were free to choose to do so. However, the Payroll Clerk has at all times been an employe under the direction and control of District management personnel. The Business Managers and District Administrator have, at all times, been authorized and able and well-positioned to check the Payroll Clerk's work to make sure that it was being performed in a manner consistent with management's understanding of the applicable Handbook and labor contract provisions. Neither the facts that District management may have chosen to rely on the Payroll Clerk, nor the fact that the Clerk involved became a member of the bargaining unit in 1995-96, nor even the fact that McVeigh became a member of the Association bargaining team shortly thereafter, are sufficient to relieve the District of the consequences of allowing a longstanding, uniform past practice to develop as it did in this case.

District management allowed this practice to begin when the District was in a position to unilaterally draft and administer the Handbook without the involvement of a collective bargaining representative. It allowed the practice to continue through the 1993-95 and 1995-97 agreement rounds of bargaining. Under the arbitral principles quoted above, the District could have repudiated the practice during either of those bargains and forced the Association to either materially change Sec. 12.3 or live by its terms strictly construed. However, as discussed further below, until October of 1997, the District did not do so.

Because the District's longstanding method of calculating overtime was comparatively favorable to the employes, it seems reasonable to presume that the Association agreed with the District's historical pattern of conduct in that regard before, during and after the parties negotiated their first agreement. The Association therefore might well have seen no reason to materially change the Handbook language on the basis of which the District was historically calculating overtime in a manner that was presumably satisfactory to it and those it represented.

The Association's failure to expressly assert past practice in its grievance and the related step meetings is too speculative a basis on which to conclude that the Association was unaware of the practice it is relying on in this case.

The Association's 1997-99 overtime proposals would have eliminated the "time worked" language from Sec. 12.3, and hence would have materially changed the meaning of that provision; but it is not clear that that was the Association's objective in advancing that language at the outset of the negotiations. At that point, the Association might have been seeking to establish for the first time a daily overtime benefit in addition to weekly, and while they were at it, the Association may simply have decided to make their language parallel to that of the custodial unit.

For those reasons, the Arbitrator finds it appropriate to conclude in this case, as arbitrator Greco did in VILAS COUNTY, that notwithstanding the clear language of contract supporting the District in this matter, the past practice evidence is sufficient to bind the District to following the practice it created and followed for many years unless and until the practice has been appropriately terminated.

As noted in the quoted principles above, a past practice like this one, which is not an interpretation of ambiguous language, is subject to unilateral repudiation by either party at the time a new agreement is being negotiated.

In the Arbitrator's opinion, the District's answer to the instant grievance in early October of 1997, coming as it did when a new agreement was being negotiated, constituted a notice sufficient to effectively repudiate the practice unless the Association conformed the language of the agreement to the practice in that round of bargaining. That grievance answer clearly put the Association on notice that the District was not willing to count paid leave hours as time worked for Sec. 12.3 overtime eligibility calculations. Its clear implication was that the District did not intend to conform its interpretations of Secs. 12.3 or 15.3 to any past practice that was inconsistent with the plain meaning of the language of those sections. (Moeser's earlier July 2 and September 2 memoranda were not addressed to the Union and were not so clearly related to overtime calculations as to effectively put the Association on fair notice in that regard.)

Once the District gave the Association that grievance answer, the bargaining table stakes were raised as the Association continued to pursue its proposal to eliminate "time worked" from Sec. 12.3. By ultimately agreeing to maintain the language of 12.3 unchanged, the Association failed to take the step necessary to prevent the District from terminating the past practice and strictly construing Secs. 12.3 and 15.3 as regards all times after the Association Negotiations/Grievance Chair received the grievance answer on October 7, 1997.

Therefore, while the Arbitrator finds it appropriate to give the practice effect until the Association received the grievance answer on October 7, 1997, the Association's ultimate agreement to the contract without eliminating "time worked" from Sec. 12.3, makes it inappropriate to give the practice effect at any time after the District effectively repudiated it on that date.

Accordingly, the Arbitrator finds it appropriate to require the District to maintain the practice through October 7, 1997, but not thereafter. The Arbitrator has therefore granted the relief requested on the face of the grievance by ordering that the District pay the Grievant what she would have received had it counted her five hours of funeral leave as time worked for overtime calculation purposes.

However, the Arbitrator has denied the further relief requested by the Association in its brief. The further relief requested was for an order requiring the District to recalculate and pay overtime to other bargaining unit members who have been similarly affected since August 18, 1997. Any District failure after October 7, 1997, to calculate overtime in accord with past practice rather than the plain language of the Agreement did not violate the Agreement because the District timely and effectively repudiated the practice as regards all times after that date. Nothing in the STIPULATED ISSUES or in the October 6, 1997, grievance giving rise to this arbitration gives the Arbitrator jurisdiction or remedial authority to remedy other alleged violations of the same type that may have occurred during the period August 18 through October 7, 1997. While the outcome in this case would presumably govern any grievance that may be pending regarding such an alleged violation during that period, it is beyond the authority accorded to the Arbitrator by the parties in this case to issue a remedial order concerning them.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the issues submitted that:

1. The District violated the Collective Bargaining Agreement by failing to pay overtime to Rosa Cyrier for the period August 18 through August 29, 1997. However, the District did not violate the Agreement by failing to pay overtime to other bargaining unit members who have been similarly affected after October 7, 1997, and the Arbitrator's jurisdiction in this case does not extend to any other alleged violations of the same type that may have occurred during the period August 18 through October 7, 1997.

2. As the remedy for the violation noted in 1, above, the District shall pay Rosa Cyrier the sum of $28.80, less regular payroll withholding and deductions.

3. The Association's request for further relief in the form of an order requiring the District to recalculate and pay overtime to other bargaining unit members who have been similarly affected since August 18, 1997, is denied.

Dated at Shorewood, Wisconsin this 24th day of May, 1999.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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