BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1760, AFSCME, AFL-CIO

and

ST. MARY'S HOSPITAL OF SUPERIOR

Case 29
No. 57112
A-5737

(Beverly Lanning Grievance)

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin 54880, for the Union.

Mr. Greg Hansen, Labor Relations Specialist, St. Mary's Medical Center, 407 East Third Street, Duluth, Minnesota 55805, for the Employer.

ARBITRATION AWARD

Pursuant to a request by Local 1760, AFSCME, AFL-CIO, herein the "Union," and the subsequent concurrence by St. Mary's Hospital of Superior, herein the "Employer" or "Hospital," Dennis P. McGilligan was appointed Arbitrator by the Wisconsin Employment Relations Commission on January 5, 1999, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. The hearing was held in Superior, Wisconsin, on March 17, 1999. The hearing was not transcribed, and the parties completed their briefing schedule on May 7, 1999.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUE

> Did the Employer violate the terms of the collective bargaining agreement and the long-standing past practice of "time slipping" when a less senior employee was called in to work instead of the Grievant who has more seniority?

The parties also agree that if the answer to the first question is affirmative, the next question relates to the appropriate remedy. However, the parties do not agree on the exact wording of said question. The Union frames the issue as follows:

> And if so, the appropriate remedy is for the Employer to pay the Grievant for the lost eight (8) hours of work plus two (2) hours call in pay and the Employer to follow seniority for future call ins.

While the Employer frames the issue accordingly:

> . . . its proposed remedy, to provide the Grievant with an opportunity to work the hours she should have worked had she been called in proper seniority order.

Having reviewed the entire record, the Arbitrator frames the issue in the following manner:

> If so, what is the appropriate remedy?

FACTUAL BACKGROUND

Facts Giving Rise to the Instant Dispute

Beverly Lanning, hereinafter referred to as the "Grievant," works as an Environmental Services Aide I in the Environmental Services Department of the Hospital. Her seniority date in the Environmental Services Department is July 20, 1997, and her original date of hire is April 20, 1996.

On July 17, 1998, the Grievant was not scheduled to work. On said date another employe, Marilyn Orlandi, who worked as an Environmental Services Aide assigned to the Linen Room, called in sick for the 7:00 a.m. to 3:30 p.m. shift. Environmental Services Department Supervisor, Priscilla Khaler, was on vacation that day. Likewise, the Department Manager, Dennis Gunderson, was on vacation. With the absence of these supervisors, Maintenance Engineer James Graskey was in charge.

Another employe, Dianne Nindorf heard a page for Khaler. She knew that Khaler was on vacation that day so she contacted Graskey. She informed Graskey that an Environmental Services Aide had called in sick. Graskey asked her what to do. She told him to call in Shirley Johnson, another Environmental Services Aide. Graskey called in Shirley Johnson and she worked the eight-hour shift. However, Graskey reassigned work between Johnson and another employe who was already at work because Johnson was not qualified to work in the Linen Room.

Nindorf testified that she mistakenly told Graskey to call in Johnson to work. She stated that she should have told Graskey to call Pat West in.

The Grievant also has more seniority than Johnson. When the Grievant discovered she had not been called in, she requested to "time slip" and to be paid for the lost hours of work due to not being called in. When her request was denied, she filed a grievance on July 17, 1998, stating that "Someone with less seniority than I was called in to fill a vacant position (because they had a sick employe call in)" and alleging that a violation of Article 19, 19.02C and 19.02D had occurred. The Grievant asked "to be paid eight (8) hours for that day" and "two (2) hours call in pay."

The grievance was denied at Steps One and Two and efforts to settle the matter failed so it subsequently proceeded to arbitration.

Time Slipping

Time slipping occurs when senior employes are not called in to work while less senior employes are called in, and the senior employes "time slip" the Hospital for the lost hours. Senior employes are paid for the number of hours they would have worked had they been called in to work.

In the past, when senior employes were not called in, the employes and the Union always attempted to enforce the principle of "time slipping." Usually, they were successful although sometimes the Employer settled the grievance recognizing the principle of "time slipping" but on a non-precedential basis.

PERTINENT CONTRACTUAL PROVISIONS

. . .

1902 C) All non-scheduled employees shall be contacted on the basis of departmental seniority in the event of a temporary/shift vacancy.

In the event there are no qualified non-scheduled employees, the Department Manager will contact cross-trained employees from the voluntary call list referred to in Article 23.

19.02 D) A shift vacancy, for purposes of this agreement, shall be defined as any vacant shift due to an unexpected opening. These vacant shifts shall be filled based upon departmental seniority.

POSITIONS OF THE PARTIES

Union's Position

The Union initially argues that the past practice of "time slipping" supports its position. In other words, the Union claims that in the past when senior employes were not called in to work while less senior employes were called in, the senior employes time slipped the Hospital for the lost hours and then were paid for the number of hours they would have worked had they been called in to work. The Union adds that the employes and the Union always enforced the principle of "time slipping" while the Employer always honored "time slipping" grievances or requests. (Emphasis in original)

The Union refutes the Employer's attempt to disprove the Union's contention of the long-standing past practice of "time slipping." In this regard, the Union claims that its witnesses were able to rebut the Hospital's cited grievances and their individual resolutions as being a refutation of "time slipping." In particular, the Union argues that its witnesses established that none of the resolutions of the grievances cited by the Employer in support of its position and contained in its Employer Exhibit Number 1 was a denial of time slipping. Instead, according to the Union, either the grievances were dropped due to the fact the particular grievant was not the most senior employe (the senior employe was paid) or in cases where non-precedent setting resolution was reached payment for lost hours was made. The Union points out: "being non-precedent setting means what it says. The Employer cannot argue using these particular settlements to refute the past practice." The Union adds: "excluding non-precedent setting agreements and those where no payment was made because another senior employe received time-slipping payment, all the remaining grievances were resolved by time slipping." (Emphasis in original) The Union concludes that a practice exists recognizing seniority rights for call ins and must be enforced.

The Union maintains that the language in Article 19 of the parties' collective bargaining agreement also underscores employe's seniority rights. Based on same, the Union opines that a senior employe who is denied the opportunity to work overtime has the right to time slip to seek a monetary remedy to his/her grievance.

The Union states that the Employer's "make-up" remedy of allowing the Grievant to work additional hours up to the amount of hours in question is unacceptable. Instead, the Union feels the Grievant should be paid for the hours in question (eight hours plus the two hours call-in pay). (Emphasis in original) The Union cites two arbitration awards in support thereof.

The Union further argues its officers never had the responsibility to call in employes and, therefore, have no responsibility for the aforesaid violation. The Union points out that Jim Graskey was acting as management's designee within the meaning of Article 25 of the agreement when he called the junior employe to perform the disputed work. The Union adds that Dianne Nindorf was simply trying to be helpful when she suggested that Shirley Johnson be called in and simply made a mistake as to who had the most seniority. Mistakes notwithstanding, the Union believes a monetary award for the Grievant's loss of overtime is appropriate citing another award in support of its position.

Finally, the Union argues that bargaining history does not refute past practice. The Union points out that it did not propose any language on "time slipping" because the long-standing past practice was working well and there wasn't any reason to seek changes in that area. The Union also points out: "**neither did the Hospital make any proposals related to 'time slipping.'"** (Emphasis in original)

For a remedy, the Union requests that the Arbitrator sustain the grievance and make the Grievant whole for all lost wages and benefits due to her not being called in to work on July 17, 1998.

Employer's Position

The Employer basically argues that "time slipping" is not "a just and fair resolution of this grievance" or "similar mistakes in the future" for the following reasons.

One, there is no clear or binding past practice of "time slipping" because there has not been a consistent event occurring with some frequency. All instances where time slipping has been allowed since settlement of the last two contracts has been pursuant to written grievance settlements on a non-precedent setting basis. Therefore, those instances when payment was

made with such an agreement do not comprise evidence of a past practice. Combine the aforesaid instances with the cases where payment was denied outright, and it is clear that there were no circumstances that would lead to the establishment of a consistent past practice of "time slipping."

Two, Section 1.03 of the agreement provides that said agreement **embraces the entire** understanding and relationship between the parties. (Emphasis in original) The agreement is moot on the subject of a remedy in case a junior employe is mistakenly called out of seniority order. No letter of agreement providing for "time slipping" is attached to the agreement. Contract language also does not provide for such a remedy.

Three, the Union had an affirmative duty to propose remedies like "time slipping" at the bargaining table and to secure agreement for them to be binding. However, neither party proposed language on the subject of "time slipping" during either the 1994 or 1996 labor negotiations. No intent was ever expressed during negotiations by either party to include the practice of time slipping in the contract, and if the Union had proposed such a provision it would have been rejected by management.

Four, the error in calling another employe out of seniority order was not made by a representative of management; it was made by a Union member who had failed to properly observe the chain of command in authorizing such calls and inappropriately exceeded his authority.

Five, management is philosophically opposed to the kind of labor/management relationship that acquiescence to a demand of payment for time not worked represents. "Time slipping" is a unilateral imposition of a monetary penalty by the Union against the Employer that engenders an unhealthy attitude of entitlement among employes and violates both the spirit and the substance of the agreement. One measure of organizational health is the extent to which the institution's interests and the employes' interests overlap. There is no mutual concurrence of interests in this case of "time slipping" because the Union would have the Hospital pay sick time for the person originally scheduled to work the shift in question, 8 hours of pay plus 2 hours of call-in pay for the person who did the work and the same amount of pay for the person who should have worked it, or a total of 3½ times what was budgeted for a single shift. The Hospital would receive nothing in exchange for acquiescing to the grievance while the Grievant would receive 10 hours of unearned pay to be made whole for what might have been.

In conclusion, the Employer believes that this grievance and others like it should be resolved by offering "the grievant an opportunity to work the extra available hours which would have been assigned had she been called in proper seniority order."

DISCUSSION

At issue is whether the Employer violated the terms of the collective bargaining agreement and the past practice of "time slipping" when a less senior employe was called in to work instead of the Grievant.

The Union argues that the Employer committed the aforesaid violations while the Employer takes the opposition position.

The record is undisputed that a less senior employe was called in to work instead of the Grievant on the date in question. The record is also undisputed that Sections 19.02 C) and 19.02 D) of the agreement require that such temporary shift vacancies be filled based upon departmental seniority. The record further indicates that the Grievant was available/willing to work on the date in question. However, the Employer argues that because a Union member instead of a management representative improperly called another employe out of seniority order there is no contract violation.

It is true that Union member Jim Graskey made the decision to call in another Environmental Services Aide instead of the Grievant. However, the record is clear that he was acting in the absence of the Chief Engineer pursuant to Section 25.02 of the agreement and was within his authority to assign the disputed overtime. The record is also undisputed that Graskey was following past practice when he called in another employe to fill in for the employe who called in sick. Therefore, the Arbitrator rejects this argument of the Employer, and finds that the Employer violated the applicable contractual provisions by its actions herein.

The Employer next argues that there is no binding past practice regarding the remedy of "time slipping." The Arbitrator agrees. While the majority of grievance resolutions related to "time slipping" and cited by the parties in support of their respective positions resulted in payment to the grievant therein, many of those settlements were on a non-precedent setting basis. (Union Exhibit Number 6 and Employer Exhibit Numbers 8, 11 and 13) In resolving said grievances without precedent, the Employer often took the position that it was admitting no "wrong-doing on the part of management" (Employer Exhibit Number 8) and was maintaining its position on the proper interpretation of Article 19. (Union Exhibit Number 6) In addition, the Employer sometimes rejected time slipping. (Employer Exhibit Number 4) In the absence of a written agreement, "past practice" to be binding on both parties must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Elkouri and Elkouri, How Arbitration Works, 5th Edition, page 632 (1997). It is clear from the foregoing, that the Employer has not always accepted the practice of "time slipping."

The Employer further argues that management is philosophically opposed to the kind of labor-management relationship that acquiescence to a demand of payment for time not worked represents. However, the most frequently utilized remedy where an employe's contractual

right to overtime work has been violated is a monetary award (generally at the overtime rate) for the overtime in question. Elkouri and Elkouri, supra, p. 745. In some cases, however, the arbitrator has considered make-up overtime within a reasonable time to be the appropriate remedy. Elkouri and Elkouri, supra, 745. Those cases include when the bypass was inadvertent, when the parties' past practice mandates otherwise, or when the make-up work does not prejudice the rights of other employes. The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, Theodore J. St. Antoine, Editor, Chapter 10, Remedies in Arbitration by Marvin F. Hill, s. 10.29, p. 354 (1998). Inadvertence is defined as "The quality of being inadvertent. 2. An instance of being inadvertent; mistake; oversight." The American Heritage Dictionary of the English Language, New College Edition, (10th Ed. 1981), p. 419. In the instant case the overtime work was assigned by a Union employe acting on behalf of management to a less senior employe in error based on mistaken information supplied by another Union employe. Testimony of Jim Graskey and Dianne Nindorf. The Arbitrator finds that due to the aforesaid inadvertent nature of the overtime bypass, make-up overtime within a reasonable time period is the appropriate remedy. This is especially true since it is not even clear that the Grievant would have worked the overtime in question because another employe (Pat West) should have been called and offered the overtime but was not due to a Union employe's failure to recommend the proper person for the overtime. (Testimony of Dianne Nindorf)

For the above reasons the Arbitrator also rejects the Union's argument that its members should not be held responsible for the events that took place.

In reaching the above conclusions, the Arbitrator rejects the Union's reliance on the following Awards in support of its position because they are distinguishable from the instant dispute.

According to the Union, Arbitrator Raleigh Jones in CITY OF SUPERIOR (WASTEWATER TREATMENT PLANT), CASE 142, NO. 53704, MA-9438 (JUNE 11, 1996), rejected the Employer's attempt to propose a "make-up" remedy instead of monetary relief in "a similar situation." However, Arbitrator Jones reached his conclusion to award monetary relief in that case based on specific contract language which provided:

> Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file grievance (sic) to receive pay for the number of hours worked by a junior employee. (Emphasis added) CITY OF SUPERIOR (WASTEWATER TREATMENT PLANT), SUPRA, P. 5.

Arbitrator Jones interpreted said contract language: "The word 'pay' means that the senior employe shall be paid for the overtime hours which were worked by the junior employe."

CITY OF SUPERIOR (WASTEWATER TREATMENT PLANT), SUPRA, P. 5. There is no contract language expressly providing for a monetary remedy where a senior employe is bypassed for overtime work in the instant case.

Likewise, according to the Union, Arbitrator James Engmann preferred to award monetary relief in MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, Case 240, No. 45506, MA-6620 (August 6, 1992). It is true that Arbitrator Engmann ordered the District to pay the grievant pay at the overtime rate for the overtime work lost as a result of the District's action. However, unlike the instant case, the District did not assign the disputed overtime as the result of a mistake. Instead, it made a deliberate decision to schedule the disputed overtime work over several days and to ignore its contractual deliberations "to determine who qualified for the overtime on those two days and to assign it to that employe as required by the agreement." MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, SUPRA, P. 5.

The last case relied upon by the Union is much closer. In CITY OF MANITOWOC, CASE 108, NO. 51628, MA-8678, P. 4 (FEBRUARY, 1995), Arbitrator Karen J. Mawhinney concluded:

> Even where employers have made good faith mistakes about calling in senior employees for overtime, arbitrators have awarded the overtime pay without requiring make-up work. 1/ Moreover, where the contract is silent on the remedy, the weight of arbitral authority is to award monetary relief. 2/
>
> While mistakes happen, a monetary award without make-up work gives employers the incentive to see that supervisors assign overtime properly according to the contract. It resolves credibility questions when excuses are made for skipping over senior employees. It gives the grievant involved a remedy without infringing on the rights to other employees to have the next available overtime work assigned to them. A monetary remedy is particularly appropriate where the language, as in this contract, gives senior employees preference and does not attempt to equalize overtime. The remedy under an equalization scheme may well be different, because the parties intend to spread the overtime to all employees. Under the contract language used in this labor agreement, the parties intended that the senior employees always get the assignment if they want it.
>
> For those reasons, I prefer the monetary award and will order such relief in this case. (Footnotes omitted)

In the instant dispute, the Employer adopted a new written policy the day after the instant grievance was filed to provide for a management person to make the decision to call the

proper person in to fill an unexpected shift vacancy. (Testimony of James Graskey) Presumably, the Employer believes this will reduce similar errors in the future. The Arbitrator also puts the Employer on express notice that the general rule, as stated above, where an employe's contractual right to overtime work has been violated is to award monetary relief (generally at the overtime rate) for the overtime in question. Given the Employer's adamant philosophical objection to payment for time not worked, the Arbitrator would expect it to take every step possible in the future to avoid the kind of mistake in the assignment of overtime that occurred in the instant case. Finally, the Arbitrator limits his award in the instant dispute to make-up work based solely on the "unique facts" of this case. (A Union employe mistakenly offering overtime to a less senior employe based on the erroneous advice of another Union employe.) The Arbitrator concludes that based on these "unique facts" the instant Award shall not have any precedential value and shall not be considered in determining what the parties' rights are in the future. Based on the foregoing, the Arbitrator rejects the Union's reliance on Mawhinney's Award.

Finally, the Arbitrator finds it unnecessary to order the Employer to follow seniority for future call ins, as requested by the Union in its framing of the remedy issue, since the Employer did not really contest its need to follow seniority in the instant case.

Based on all of the foregoing, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the parties is YES, the Employer violated the terms of the collective bargaining agreement when a less senior employe was called in to work instead of the Grievant who has more seniority. For the reasons discussed above, I prefer make-up work and will order such relief in this case.

In reaching the above conclusions, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the above and the record as a whole, it is my

AWARD

The grievance is sustained.

The Employer is ordered to offer the Grievant make-up work to make her whole for the eight (8) hours pay and two (2) hours call-in pay she lost as a result of the Employer's action.

Dated at Madison, Wisconsin, this 11th day of June, 1999.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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