BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PRICE COUNTY

and

PRICE COUNTY PROFESSIONALS LOCAL 607 (SOCIAL WORKERS)

Case 75
No. 58927
MA-11115

Appearances:

For Price County, **David Deda,** Price County Corporation Counsel, Slaby, Deda, Marshall, Reinhard & Fuhr LLP, 215 North Lake Avenue, P.O. Box 7, Phillips, Wisconsin 54555-0007.

For Price County Professionals Local 607 (Social Workers), **Steve Hartmann,** Representative, AFSCME, Council 40, P.O. Box 364, Menomonie, WI 54751.

ARBITRATION AWARD

Price County (hereinafter referred to as "County" or "Employer") and Price County Professionals Local 607 (Social Workers), (hereinafter referred to as "Union") are parties to a collective bargaining agreement covering the period from January 1, 1999 through December 31, 2001. That agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On June 2, 2000, the Union filed a request with the Wisconsin Employment Relations Commission for a WERC commissioner or staff member to serve as the sole arbitrator of the grievance that had arisen between the parties. Commissioner A. Henry Hempe was appointed by said Commission to hear and decide said dispute. A hearing was conducted on September 22, 2001 in Phillips, Wisconsin. No transcript of the proceeding was prepared. The Union filed an initial brief on October 19, 2001 and a reply brief on October 26, 2001. The County filed an initial brief on October 17, 2001 and a reply brief on October 29, 2001.

STATEMENT OF THE ISSUE

The Union proposes the following statement of the issue:

> Did the Employer violate the collective bargaining agreement by failing to pay at the rate of time and one-half for hours worked in excess of the normal workweek for Janet Balzer for the week ending Saturday, January 15, 2000 and any other similarly situated employee?
>
> If so, what is the appropriate remedy?

The Employer suggests the following statement of the issue:

> Did the Employer violate the terms and conditions of Article 15, paragraph E of the Collective Bargaining Agreement when the Employer refused to pay overtime at a rate of time and a half when the employee had not actually worked over forty hours during the normal work week?

I adopt the following statement of the issue:

> Did the employer violate the terms and conditions of Article 15, paragraph E of the Collective Bargaining Agreement by failing to pay Janet Balzer the premium rate of time and one-half for 2 ½ hours of work claimed by her as overtime for the week ending Saturday, January 15, 2000?
>
> If so, what is the appropriate remedy?

At hearing, the parties verbally stipulated that the grievance decision by the arbitrator would also apply to all bargaining unit persons listed on Exhibit 2, and that said listing may be subsequently expanded to cover any other employees of the bargaining unit for whom sick leave, vacation leave, holiday leave, funeral leave, etc. have been denied as components of a 40-hour workweek since January 2000.

FACTS OF THE CASE

Most of the relevant facts of the case are set forth in the Stipulation that follows, duly signed by both parties.

> The facts in this case are not in dispute. The employee, Janet Balzer, submitted a time slip for the week starting Sunday, January 10, 2000, and ending Saturday, January 15 [sic], 2000, totaling 42 ½ hours. The employee requested 2 ½ hours of overtime. The employee took eight hours sick leave. Therefore, the hours actually worked out of the 42 ½ hours was 34 ½ hours. The County did not pay overtime.

The parties further stipulated to the existence of a past practice they described as follows:

> Prior to January 2000, Price County followed the practice of paying overtime after 40 hours per week whether the 40 hours was all work time or a combination of work time and other paid time such as sick leave, vacation, holiday pay funeral leave, etc. This was the practice of at least 15 years or longer. Starting in January, 2000, Price County has interpreted the contract language to provide for paying overtime only after 40 hours of actual work.

At hearing, the County presented testimony from Mary Hahn, Director of the County Department of Human Services. Ms. Hahn's initial appointment in Human Services in March 1999 was as interim Director. She replaced the previous Director, Tom Benz, who had served in that position for seven years.

In February 2000 Ms. Hahn received a permanent appointment to the Director's position. Prior to becoming interim Director of the County's Human Services Department, Ms. Hahn had held the position of County Health Director. From March 1999 until her permanent appointment as Human Services Director in February 2000, Ms. Hahn functioned as both County Health Director and the County Director of its Department of Human Services.

Ms. Hahn testified that as County Health Director, she paid County health nurses premium pay (time and one-half) for overtime only when they actually worked more than 40 hours in a given workweek. She asserted that she has consistently applied the same policy to social workers since January 2000. Under Ms. Hahn's policy, if a social worker is sick (for which she has presumably taken sick leave) and subsequently works more than eight hours on other work days in the same work week, Ms. Hahn will not authorize overtime if the social worker has actually worked 40 or less hours that week.

RELEVANT CONTRACT PROVISIONS

The relevant contract provisions are contained in the labor agreement between the parties covering the period from January 1, 1999 through July 31, 2000. [By mutual agreement of the parties, the Arbitration Board set forth in Article 12 that immediately follows has been waived in preference for a sole arbitrator.]

Article 12 – Grievance Procedure

. . .

E. Arbitration:

. . .

3. Arbitration Hearing: The Arbitration Board selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony related to the grievance. Upon completion of this review and hearing, the Arbitration Board shall render a written decision to both the County and the Association which shall be binding upon both parties.

. . .

6. Limitation: The Arbitration Board shall not modify, add to or delete from the express terms of the Agreement.

. . .

Article 15 – Work Week – Overtime Pay

A. Work Week: The normal work week for Social Workers and for Family Skills Counselors shall consist of forty (40) hours. The normal work week is Monday through Friday and employees are to be provided a one (1) hour lunch break unless mutually agreed to otherwise as set forth in paragraph B. (FOR INFORMATION PURPOSES ONLY: Currently for the purposes of The Fair Labor Standards Act, the work week designated by Price County is Sunday through Saturday.)

B. Flexibility in Work Schedule for Individual Employees: At the sole option of the Employer, with the consent of the employee, there can be adjustments in hours worked per day, days worked per week and length of lunch break for an individual employee. A decision by the Employer under this section, including a decision to revert back from a flexible schedule to a regular schedule is not grievable. If an employee is to revert back to a regular schedule without the employee's consent, then the employee is to be provided with written notice of not less than fourteen (14) calendar days for the return to the regular schedule. If there is no agreement to a flexible schedule, then the work schedule is to be Monday through Friday 8:00 A.M. to Noon and 1:00 P.M. to 5:00 P.M.

C. No Guarantee: The above schedule of hours shall not be considered a guarantee.

D. Breaks: Employees will be entitled to take two (2) coffee breaks of fifteen (15) minutes duration; one in the morning and one in the afternoon. Employees shall take their coffee breaks as past practice so as to least interrupt the need for public service. Breaks may not be taken immediately before or after the starting or stopping time so as to alter the work day.

E. Overtime: Employees shall receive compensatory time off or pay at the rate of one and one-half (1- ½) hours for each hour worked in excess of their normal work week (i.e. 40 hours of straight time). All hours worked between midnight and 6:00 A.M. are to be at double time. All hours worked on Saturday or Sunday are to be paid at the rate of time and one-half unless it is part of a mutually agreed flex schedule and the employee has not been compensated for forty (40) hours of straight time during the normal work week (i.e. Monday through Friday). IT SHALL BE AT THE SOLE OPTION OF THE EMPLOYER WHETHER TO REQUIRE THE EMPLOYEE TO TAKE COMPENSATORY TIME OFF, PAY, OR A COMBINATION.

F. Part-time Employees: Part-time employees may be assigned hours of work different from those listed in paragraph "A". Part-time employees are not entitled to overtime compensation except that which is required pursuant to the Fair Labors Standards Act.

POSITIONS OF THE PARTIES

Union:

The Union contends the County's position that an employee must actually work more than forty hours in a week to qualify for overtime is a fundamental misreading of the language of the Agreement.

The Union asserts that Human Service Director Hahn's response to the grievance as well as the County's proposed statement of the issue demonstrates this point.

In her response to the grievance, Director Hahn had written:

> Fact 8 is incorrect as stated. As is consistent with County policy, Fair Labor Standards Act and your union contract, overtime is paid for hours in excess of 40 hours worked in a week.

In similar fashion, the Union argues, the County's proposed statement of the issue reflects the belief that the employee must work in excess of 40 hours in a week to qualify for overtime.

The Union believes the overtime standard as reflected by the contract language is not 40 hours worked in a week, but is rather hours worked in excess of the normal work week. The Union posits that the normal work week is 40 hours, Monday through Friday and that the normal work day is 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. The Union notes that by mutual agreement between the Employer and the employee the employee may work an alternate work schedule as the grievant did on January 12 and 13, 2000 (8:15 to 4:45 with a ½ hour lunch.

The Union notes that on January 12 the grievant worked from 4:45 p.m. to 6:45 p.m. and on January 13, from 4:45 p.m. to 5:15 p.m. This, according to the Union, created two and one-half hours the grievant worked in excess of her normal work week for which she should be compensated at the rate of time and one-half.

The Union further argues that Article 15, Section E does *not* define overtime eligibility as first requiring 40 hours of straight time *worked*.

Finally, the Union emphasizes that the grievance merely seeks a remedy that has existed as a past practice of the parties for at least the past 15 years. The Union acknowledges that there was a language change in Article 15, Section E but asserts that no change was made or requested as to alteration or elimination of the past practice. The Union also notes that what the Union describes as the County's unilateral attempt to change the agreement occurred in the second year of the two-year agreement.

As to remedy, the Union requests that the grievant be made whole for all losses, together with interest from the date of violation.

County:

The County maintains that the relevant contract language is clear and should be followed. The County points to the following contract language (set forth in Article 15, Section E): "Employees shall receive compensatory time off or pay at the rate of one and one-half (1 ½) hours for each hour worked in excess of the normal work week (i.e., 40 hours of straight time)."

The County further argues that its interpretation of the labor agreement is consistent with the Fair Labor Standards Act, which requires overtime only after forty hours of work in a week.

In the instant situation, says the County, the employee did not work in excess of 40 hours. Therefore, the County concludes, under the contract language only straight time need be paid.

Union's Response:

In response, the Union argues that the County's reference to FLSA is a false argument. The Union notes that Article 15 of the parties' labor agreement contains two references to the FLSA, Section A and Section F.

In Section A the parties agree that for Fair Labor Standards Act purposes, the County shall designate the workweek as Sunday through Saturday.

In Section F, part-time employees are excluded from overtime compensation ". . . except that which is required by the Fair Labor Standards Act."

Neither reference deals with the issue at hand, says the Union. It contends that if the parties wanted to make the contract consistent with the FLSA rule for overtime, they certainly knew how to do so.

In the view of the Union, the fact that the parties did not do so, considered in conjunction with the County's 15-year past practice that was not consistent with FLSA overtime guidance leads to the conclusion that the County's current interpretation is a matter never bargained by the parties.

County's Response:

The County's response accused the Union of minimizing the change made in Article 15, Section E. The County repeats the language that was added to Article 15, Section E, effective January 1, 1999: "(i.e., 40 hours of straight time)."

The County asserts that the ". . . added phrase explains the language immediately before it so that the paragraph could be read as follows: Employees shall receive compensatory time off or pay at the rate of one and one-half (1- ½) hours for each hour worked in excess of 40 hours of straight time."

DISCUSSION

Both parties find support for their respective views in the contract language set forth in Article 15, Section E. That section provides:

> E. Overtime: Employees shall receive compensatory time off or pay at the rate of one and one-half (1- ½) hours for each hour worked in excess of their normal work week (i.e. 40 hours of straight time). All hours worked between midnight and 6:00 A.M. are to be at double time. All hours worked on Saturday or Sunday are to be paid at the rate of time and one-half unless it is part of a mutually agreed flex schedule and the employee has not been compensated for forty (40) hours of straight time during the normal work week (i.e. Monday through Friday). IT SHALL BE AT THE SOLE OPTION OF THE EMPLOYER WHETHER TO REQUIRE THE EMPLOYEE TO TAKE COMPENSATORY TIME OFF, PAY, OR A COMBINATION.

The County argues that this language limits the liability of the County to pay overtime pay at the rate of time and one-half to those instances where the employee has actually worked in excess of forty hours of straight time. Since 8 of the 42 ½ hours submitted by the grievant

for the week beginning January 10, 2000 consisted of sick leave, her actual work hours for the week amounted to only 34 ½. Because this does not exceed what the County perceives as the necessary threshold for overtime of 40 hours in a week, the County denies it has any liability for overtime pay to the grievant for the week in question.

The Union focuses on the phrase "normal work week." It describes the normal workweek as Monday through Friday, 8:00 a.m. to noon and 1:00 p.m. to 5:00 p.m. (unless altered by mutual agreement). By mutual agreement the grievant's work day on January 12 and 13, 2000 ran from 8:15 a.m. to 4:45 p.m. with a half an hour for lunch. On the 12th, the grievant worked 2 additional hours from 4:45 p.m. to 6:45 p.m.; on the 13th, an additional one-half hour, from 4:45 p.m. to 5:15 p.m. Therefore, the Union argues, since the hours the grievant worked were in excess of the normal work week, she is entitled to overtime pay at the rate of time and one-half of the normal hourly rate for those two and one-half hours.

The Union's argument is somewhat bolstered by consideration of the last sentence of Article 15, Section B:

> "If there is no agreement to a flexible schedule, then the work schedule is to be Monday through Friday 8:00 a.m. to Noon and 1:00 p.m. to 5:00 p.m."

By virtue of this sentence a daily schedule of work hours is inserted into the weekly work week. Since the grievant's hours of claimed overtime were performed outside the daily schedule of work hours, some support is provided to the Union's argument that the work was in addition to the normal work week.

But that argument also has its limitations, for it fails to deal fully with the parenthetical phrase the parties inserted in Article 15, Section E as they bargained their 1999-2001 labor agreement. Yet even that parenthetical phrase, although of some help to the County, is not entirely dispositive of the competing contentions made by the parties. The Union asserts the phrase had nothing to do with the computation of straight time. The County doesn't deny this, but suggests an alternative way of reading the entire sentence to which the phrase is appended that is consistent with its interpretation. Neither party offers an explanation as to why the parenthetical phrase was included.

Certainly, the County's interpretation of Article 15, Section E, based solely on the words of the contract, is a reasonable one. But on the same basis, the interpretation urged by the Union is also plausible.

It is hornbook arbitration law that ". . . an agreement is ambiguous if plausible contentions may be made for conflicting interpretations . . ." Elkouri, 5th Ed., at 470, citations omitted. Under these circumstances it is generally held that recourse to extrinsic evidence is appropriate. 1/ A practice, once developed, is the best evidence of what the language meant to those who wrote it. 2/

1/ Some authorities restrict the examination of extrinsic evidence only to those cases in which contract language ambiguity is found to exist. See Elkouri, 5th Ed. at 470. Others believe that language, on its own, generally does not convey one unambiguous meaning without reference to the context in which the language arose. See Snow, Carlton, "Contract Interpretation," The Common Law of the Workplace, 2.3 at 67.

2/ Mittenthal, Richard, "Past Practice and Administration of Bargaining Agreements, from Arbitration and Public Policy at 37, BNA (1961).

In this case the extrinsic evidence consists of a past practice that the parties described in writing and stipulated to have existed for at least 15 years. The written stipulation describing this past practice and signed by a representative of each party, reads as follows:

> Prior to January, 2000, Price County followed the practice of paying overtime after 40 hours per week whether the 40 hours was all work time or a combination of work time and other paid time such as sick leave, vacation, holiday pay funeral leave, etc. This was the practice of at least 15 years or longer. Starting in January, 2000, Price County has interpreted the contract language to provide for paying overtime only after 40 hours of actual work.

Based on the stipulation, the practice it describes is of very long standing. Its duration of at least 15 years inferentially suggests that it was also a practice well known to the each of the parties. 4/ Obviously, its beneficiaries would have been aware of it. Almost as obvious is that the County was also aware of it, for without the County's knowledge and consent to the practice, checks for overtime in the appropriate amounts would have never been cut and distributed.

4/ In construing contract language, a past practice must be of sufficient generality and duration to imply acceptance of it as an authentic extension of the contract. SHELLER MFG. CORP., 10 LA 617, 620 (1948).

The continuation of the practice midway into the parties' 1999-2001 labor agreement is persuasive evidence that the insertion of the parenthetical phrase into Article 15, Section E was not intended by either side as a means of excluding leave time from the computation of straight time. If the phrase had been so intended it seems reasonable to assume that implementation would have taken place at the beginning of the contract term, not midway through it.

Under all of these circumstances, it appears to me that the past practice described by the parties in their stipulation has become a part of the parties' manner of doing business with each other, long accepted by each, and has provided a clear meaning of the words to which the parties agreed and set forth in Article 15, Section E. Indeed, it is difficult to obtain a clearer indication of the parties' intent than a track record of this duration.

Very clearly, then, the County lacked the authority to unilaterally abrogate the past practice of the parties by excluding leave time in the computation of a 40-hour workweek. The abrogation of that practice by which by parties had been calculating 40-hour workweek for at least 15 years constituted a violation of the labor agreement between the parties. The fact that Director Hahn attempted to invoke with the social workers a precedent she believed she had established in her prior supervision of county nurses is immaterial, for the nurses were not a part of the social worker bargaining unit. Any alteration of the aforesaid past practice established by the parties as to the social workers must be accomplished through collective bargaining of the parties.

In a passage cited by the Union, Arbitrator Richard Mittenthal writes:

> By relying upon practice, the burden of the [arbitrator's] decision may be lifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretative guide lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. 5/

5/ SUPRA at 38.

Based on the aforesaid and on the entire record herein, I sustain the grievance.

AWARD

The employer *did* violate the terms and conditions of Article 15, paragraph E of the Collective Bargaining Agreement by failing to pay Janet Balzer the premium rate of time and one-half for two and one-half hours of work claimed by her as overtime for the week ending Saturday, January 15, 2000.

By way of remedy, the County is directed to make Janet Balzer whole by payment of compensation equal to time and one-half of her normal hourly rate in effect on January 12 and 13, 2000 plus benefits, for the 2 ½ hours worked the workweek beginning Sunday, January 10, 2000 and ending Saturday, January 16, 2000.

Based on the verbal stipulation of the parties at hearing, the County is further directed to make whole each of the persons listed on Exhibit 2 by payment of compensation equal to time and one-half of the respective normal hourly rates in effect for each of said persons during the workweek each claimed overtime based on the above-described past practice of the parties plus benefits, for the overtime hours each claimed. (Exhibit 2 is annexed hereto and incorporated by this reference).

Based on the verbal stipulation of the parties at hearing, each party is directed to meet and confer for the purpose of determining whether the listing set forth in Exhibit 2 needs to be expanded to cover any other employees of the bargaining unit for whom sick leave, holiday leave, funeral leave, etc., have been denied as components of a 40-hour workweek since January 2000.

Payment by the County of this award to the grievant and other bargaining unit members impacted by it shall *not* include interest.

I shall retain jurisdiction of this matter for a period of 60 days from the date herein in the event the parties have any questions.

Dated at Madison, Wisconsin, this 25th day of January, 2002.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

[Exhibit 2]

Tracie Burkart	9	04/15/00	04/21/00	Holiday		0.5 Beeper
Lynette Boyea	5	02/20/00	03/04/00	Vacation		3.0 Beeper
	7	03/21/00	04/03/00	Compensation		.5 Beeper
	9	04/16/00	04/29/00	Funeral/Holiday		.25 Beeper
	11	05/14/00	05/27/00	Sick	83	3 Regular
	12	05/28/00	06/10/00	Holiday	83	1 Regular
	12	05/28/00	06/10/00	Holiday		.25 Beeper
	14	06/25/00	07/08/00	Holiday	43	3.0 Regular
	18	08/20/00	09/02/00	Sick	40.5	.5 Regular
	18	08/20/00	09/02/00	Sick		5.0 Beeper
	21	10/01/00	10/14/00	Sick	40	.5 Beeper
	25	11/26/00	12/09/00	Vacation	40	.5 Beeper
	3	01/21/01	02/03/01	Vac/Sick	41	1.0 Regular
	3	01/21/01	02/03/01	Vac/Sick	41	4.5 Beeper
Janet Balzer	5	02/20/00	03/04/00	Holiday	82	2.0 Regular
	11	05/14/00	05/27/00	Sick	80.75	.75 Regular
Bonny Bortz-Wagner	11	05/14/00	05/27/00	Sick	80.5	.5 Regular
Jim McNamee	5	02/20/00	03/04/00	Holiday	83	.5 Regular
Jane Miller	5	02/20/00	03/04/00	Holiday	80.5	.5 Regular
Ruth Pooler	5	02/20/00	03/04/00	Holiday/Sick	85.5	5.5 Regular
	9	04/16/00	04/29/00	Holiday	87	4.5 Regular
	11	05/14/00	05/27/00	Vacation	81.25	1.25 Regular
	12	05/28/00	06/10/00	Holiday	86.5	3.75 Regular
	14	06/25/00	07/08/00	Holiday	41.5	1.5 Regular
	16	07/23/00	08/05/00	Vacation	41	1.0 Regular
	17	08/06/00	08/19/00	Vacation	40.5	.5 Regular
	19	09/03/00	09/16/00	Holiday	42.5	2.5 Regular
	27	12/24/00	12/31/00	Holiday	40.5	.5 Regular
	11	05/03/01	05/26/01	Vac/Sick	82.5	2.5 Regular
	12	05/27/01	06/07/01	Holiday	41.25	1.25 Regular
	12	05/27/01	06/07/01	Holiday		5.25 Beeper
Sarah Reese-Socha	13	06/11/00	06/21/00	Vacation	86.5	6.5 Regular
		06/11/00	06/21/00	Vacation		1.0 Beeper

	5	02/18/01	03/03/01	Holiday	41.5	1.5 Regular
	6	0304/01	03/17/01	Vacation	41.5	1.5 Regular
Deb K-Oswald	14	06/25/00	07/08/00	Holiday	44.75	4.75 Regular
Kim Kring	19	09/03/00	09/16/00	Holiday	41.5	1.5 Regular
Norma Erickson	10	04/29/01	05/12/01	Sick	41.25	1.25 Regular
	12	05/27/01	06/09/01	Holiday	45.5	4.5 Regular