BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOUGLAS COUNTY

and

DOUGLAS COUNTY PROFESSIONAL CHILD SUPPORT EMPLOYEES, LOCAL UNION NO. 2375, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICPAL EMPLOYEES, AFL-CIO

Case 261
No. 64133
MA-12818

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, 8480 E. Bayfield Road, Poplar, WI, appearing on behalf of Douglas County Professional Child Support Employees, Local Union No. 2375, American Federation of State, County and Municipal Employees, AFL-CIO.

Ric Felker, Douglas County Corporation Counsel, 1313 Belknap Street, Superior, WI, appearing on behalf of Douglas County.

ARBITRATION AWARD

Douglas County, hereinafter County or Employer, and Douglas County Professional Child Support Employees, Local Union No. 2375, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement covering the period January 1, 2003 through December 31, 2004 that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Commissioner Susan J.M. Bauman was so appointed on November 4, 2004. A hearing was held on January 7, 2005, in Superior, Wisconsin. The hearing was not transcribed. The parties made post-hearing oral arguments and the record was then closed.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties did not agree on the Issue. The Union frames the issue as:

> Did the Employer violate the terms of the parties' Labor Agreement when it denied paying the Grievants time and one-half overtime pay for additional hours worked beyond the Grievants' regular scheduled hours of work? And if so; the appropriate remedy is to make the Grievants whole for any and all lost wages and benefits.

The Employer frames the issue as:

> Did the County violate the labor contract when it failed to pay Grievants Johnson and LaGesse time and one-half for one hour of scheduled overtime on September 20, 2004? If so, what is the appropriate remedy?

The parties agreed that the Arbitrator should determine the issue to be decided. The undersigned adopts the following statement of the issue:

> Did the County violate the terms of the parties' labor agreement when it failed to pay Grievants Johnson and LaGesse time and one-half overtime pay for scheduled overtime on September 20 and September 29, 2004, respectively? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 6.

GRIEVANCE PROCEDURE

. . .

Section 5.

. . .

C. Role of Arbitrator: The Arbitrator shall not add to, subtract from, or vary the terms of this Agreement. All decisions must be rendered in accordance with the language of this Agreement. The decision of the Arbitrator shall be final and binding upon the parties.

ARTICLE 13.

WORK DAY – WORK WEEK

Section 1. The work day shall be from 8:00 a.m. to 4:30 p.m. with a one hour unpaid lunch break. The work week shall be five (5), seven and one-

half (7 ½) hour days, Monday through Friday, for a total of thirty-seven and one-half (37 ½) hours per week. The hours of work may be changed by mutual consent of the parties. If it is deemed necessary that the office is held open during the lunch period by the Director of Child Support then the office would be staffed by one (1) employee on a rotating basis.

Section 2. Overtime is not required of employees; however, should an employee be asked to put in additional time as needed to carry out their duties and responsibilities, the employee would be paid overtime pay at the rate of one and one-half (1 ½) times the regular rate of pay or compensatory time off at the rate of one and one-half (1 ½) times the hours worked at the option of the employee. Compensatory time off shall only be taken upon prior approval of the employee's supervisor. Employees who are called out to work outside the work day – work week as set forth in Section 1 above, shall be paid at the applicable rate for such work performed, but in no case shall they receive less than four (4) hours straight time pay.

FACTS

Historically, employees of the Douglas County Child Support Unit work very little overtime. Over the course of the four year period, 1999 through 2004, approximately 75 hours of overtime were worked by members of the department. In 1996, a significant amount of overtime was worked when the department underwent a change in its computer system. In June 2004, the County received a grant of approximately $60,000 to improve the Child Support Department's standing in two of four incentive categories. The funds were to be used for the remainder of 2004 and all of 2005 to pay voluntary overtime worked by members of the Child Support Unit. Due to grant restrictions, the overtime had to be paid in cash, rather than in compensatory time as allowed by the collective bargaining agreement. The County and the Union agreed that all overtime worked under the grant would be paid overtime, not compensatory time.

On September 20, 2004, Grievant Lisa Johnson worked from 7:30 a.m. to 12:00 noon, took her one (1) hour unpaid lunch in accordance with the collective bargaining agreement, then was at a doctor's appointment from 1:00 p.m. to 4:00 p.m. for which she was paid three (3) hours sick time. Ms. Johnson was scheduled to work one (1) hour of overtime, from 4:00 p.m. to 5:00 p.m., that afternoon. She returned to her work site and completed this one (1) hour of work. Instead of being paid at one and one-half (1 ½) times her hourly rate of $20.11 per hour for this overtime work, she was paid straight time. Ms. Johnson filed a grievance, seeking payment of $10.33. On December 6, 2004, Ms. Johnson worked from 7:30 a.m. to 7:50 a.m., and then went to a dentist appointment from 7:50 a.m. to 9:20 a.m., for which she was paid one and a half (1 ½) hours sick time. She returned to work, worked her regular hours plus one (1) hour of scheduled overtime. Again, she was only paid straight time for this additional hour worked. Ms. Johnson filed a grievance regarding her September 20 pay on October 13, 2004.

On September 29, 2004, Grievant Cheryl LaGesse took one and one-half (1 ½) hours sick time in the morning, worked the remainder of her regular schedule and then worked one (1) hour of previously scheduled overtime. Like Ms. Johnson, Ms. LaGesse was paid straight time rather than one and one-half (1 ½) times her hourly rate of $17.51 for the hour of overtime worked. On December 6, 2004, Ms. LaGesse took half an hour (1/2) sick time in the morning, worked seven (7) hours of regular time and then worked an additional hour of scheduled overtime. Again, Ms. LaGesse was paid this hour at straight time. Ms. LaGesse filed a grievance regarding her September 29 pay on October 13, 2004. 1/

1/ Ms. LaGesse's grievance form erroneously states the date of the overtime paid as straight time as September 20, 2004. At hearing, she clarified that the sick leave and overtime occurred on September 29. This is confirmed by Ms. LaGesse's time card, page 2 of Union Exhibit 3.

On July 27, 2004, Kim Moen worked five and one-half (5 ½) hours, took two (2) hours of paid sick time, and worked one-fourth (1/4) hour of overtime. Initially, she was paid at one and one-half (1 ½) times her regular hourly rate of $19.201 for this overtime. By memo dated October 6, 2004, from Linda Corbin, Human Resources Department, however, she was advised that she was "paid inappropriately based upon putting in less than 7.5 hours in a day and claiming overtime". Accordingly, her pay was reduced by $2.46 for the next payroll period.

On August 11, 2004, Robert Peterson worked four and one-half (4 ½) hours, took three (3) hours of paid leave, and worked one (1) hour of overtime. On September 14, 2004, Mr. Peterson worked five and three-fourths (5 ¾) hours, took one and three-fourths (1 ¾) hours paid leave, and worked one (1) hour of overtime. Initially, he was paid one and one-half (1 ½) times his regular hourly rate of $20.10 for this overtime. By memo dated October 6, 2004, from Linda Corbin, Human Resources Department, he was advised that he had been paid "inappropriately" and that the error of $10.33 would be corrected for each day during the next payroll period.

The October 6, 2004 memos to Mr. Peterson and Ms. Moen also state:

> In the event you work less than 7.5 hours in a day and use leave to be paid for 7.5 hours, you will be paid straight time for any time claimed until you "put in" an excess of 7.5 hours as defined in Article 13. Section2. of your contract.

Right after the October 6 memos were issued, Dennis Arras, Child Support Unit Administrator, issued the following memo to all employees of the Child Support Unit:

> Due to miscommunication with Human Resources, we are not able to claim overtime on a day that sick time or vacation was used. You must be here the 7.5 hours or you will be paid straight time.

> Also there will be no switching of days on the calendar, if you are unable to work your scheduled day your time will be forfeited.

The parties to this dispute are in the process of negotiating a successor labor agreement. The County made its initial proposal to the Union on August 18, 2004. On October 25, 2004, subsequent to the filing of the instant grievances, the County presented a listing of its proposals, including Proposal 13:

> Article 13. Section 2. Work Day – Work Week
> Overtime is not required of employees; however, should an employee be asked to ~~put in~~ *work* additional time as needed …… (*see handout 10/15/04)*

The referenced handout is a restatement of Article 13 of the then current collective bargaining agreement, with the proposed change of "put in" to "work". The County introduced this language to "clarify" the collective bargaining agreement, and contended that it did not change the meaning, which it interprets to require an employee to work seven and a half (7 ½) hours in a day before being paid at time and a half for additional hours worked. The Union disagrees with this interpretation and so stated at the bargaining table. The Employer subsequently dropped the proposal.

Additional facts will be included are discussed below.

POSITIONS OF THE PARTIES

The Union

Article 13 clearly defines the work day and work week. Employees have always been paid overtime or compensatory time if they put in additional hours, without having time spent for doctor's appointments, etc. factored against them. The language of the labor agreement does not reference "productive time" or time worked, it simply references additional time put in by the employee. Past practice and the clear contract language support the Union's interpretation. Application of the provision, the combination of use of paid time off and working overtime, is relatively rare, so payroll records would not contain many examples of employees receiving overtime on days that they also received paid leave. The employer's review of four years is incomplete inasmuch as it does not reflect compensatory time that may have been earned on a day that paid leave was also used.

The fact that the Employer proposed to change the language through the bargaining process, and was unsuccessful in so doing, supports the Union's position. The County cannot obtain through arbitration what it was unable to obtain at the bargaining table. The Union did not accept the Employer's proposal and does not agree with the Employer's interpretation of the current language. The employees who work scheduled overtime should be paid one and one-half (1 ½) times their regular hourly wage for all hours over seven and one-half (7 ½) in a day, regardless of whether they were on paid leave or working during those hours.

The Employer

Although the contract language is not ideal, the meaning is clear that one needs to "put in" more than seven and one-half (7 ½) hours "to carry out duties and responsibilities" in order to be paid the overtime premium. A review of the County's records over the past four (4) years reveals that there is no past practice of paying overtime premium when an employee worked beyond his or her normal schedule if they were on paid leave for part of the day. The only instance where it appears that an employee received overtime on a day with paid leave was, apparently, an error. The two recent instances cited by the Union, Mr. Peterson and Ms. Moen, were errors that were corrected by the County when it was discovered. The 1995 example provided by Ms. Moen was when she was in a different bargaining unit, covered by a different contract. Furthermore, the only evidence offered was a timesheet prepared by Ms. Moen, not an actual time card or pay stub.

The Union failed to request any payroll information. Therefore, it cannot argue that the information provided by the County is incomplete. An inquiry regarding compensatory time earned on days that paid leave was taken was not requested by the Union, which has the burden of proving the past practice it claims. It has failed to do so.

The County offered Proposal 13 during bargaining in order to clarify the language at issue. The proposal did not change the meaning of the provision, which has consistently been enforced by the Employer to require actual work in excess of seven and one-half (7 ½) hours in a day or thirty-seven and one-half (37 ½) hours in a week in order to qualify for the overtime premium.

DISCUSSION

The core question to be decided is the meaning of the first sentence of Section 2 of Article 13 of the collective bargaining agreement:

> Overtime is not required of employees; however, should an employee be asked to put in additional time as needed to carry out their duties and responsibilities, the employee would be paid overtime pay at the rate of one and one-half (1 ½) times the regular rate of pay or compensatory time off at the rate of one and one-half (1 ½) times the number of hours worked at the option of the employee.

Neither the requirement of overtime nor the question of compensatory time is before the undersigned. Thus, the dispute is focused on the language

> . . .should an employee be asked to put in additional time as needed to carry out their duties and responsibilities, the employee would be paid overtime pay at one and on-half (1 ½) times the regular rate of pay. . .

Section 1 of Article 13 defines the work day as 7 ½ hours, Monday through Friday, from 8:00 a.m. to 4:30 p.m. unless mutually agreed by the parties, for a total of 37 ½ hours

per week. The "additional time" referenced in Section 2, therefore, clearly means time in addition to the regularly scheduled 7 ½ hours per day or 37 ½ hours per week.

In the instant matter, the Grievants were scheduled by the Employer to work overtime beyond their normal work day, to perform "duties and responsibilities" that were assigned by the Child Support Unit Administrator, work that was funded by a special grant. It is apparent that the dispute does not involve a situation where an employee works past the end of his/her regular work day, upon his/her own volition, and then claims overtime pay, perhaps where the "duties and responsibilities" of the job did not require overtime. In fact, the language of the contract requires that the "employee be asked" to work additional hours, making it very clear that overtime is controlled by the Employer and cannot be utilized at the whim of the employee to make up for time lost while on paid leave or where an employee has failed to timely complete assignments.

The heart of the dispute appears to be the meaning of the phrase "put in" additional time, words that the County believes to be equivalent to "work" additional time as evidenced by Proposal 13 introduced in October, 2004. The Employer is correct that Proposal 13 does not change the meaning of Article 13, Section 2. This opinion is shared by the Union, as Grievant Lisa Johnson testified that the change proposed by the Employer would not affect the fact that she should be paid time and a half for a scheduled hour of overtime, even when she was gone for part of the day on paid sick leave. The Union and the Employer are both correct. Proposal 13 would not change the meaning of this section of the contract, and the Employer is not seeking something in this grievance arbitration procedure that it did not achieve at the bargaining table.

The employees in the Child Support Unit are exempt from the Fair Labor Standards Act (FLSA) overtime requirements. Accordingly, their entitlement to any overtime pay comes from either county personnel policies or the collective bargaining agreement. Because the labor agreement addresses the overtime issue, the county personnel policies are not relevant. The County contends that the language of the agreement should be considered in the context of the fact that overtime is generally paid to employees either based upon the actual hours worked in excess of the usual number, or upon the number of hours an employee is in paid status. The County looks to its personnel policies which state that

> . . . employees are paid overtime on the bases of actual hours worked, not total paid hours. For instance, paid holidays, vacation, and sick leave is not considered actual hours worked.

to support its contention that employees must <u>work</u> more than 7 ½ hours in a day in order to be paid time and a half for additional time worked.

The language of the County personnel policy demonstrates that the County can write language that is explicit with regard to when overtime is to be paid. The language of the labor agreement does not state that an employee must work the full work day, or full work week, in

order to receive premium pay for overtime. The agreement requires that the employee "put in" or "work" additional time (over and above the work day as defined in Section 1 of Article 13) to qualify for overtime. Section 2 contains no limitations on the nature of the 7 ½ hours that are the prerequisite for the additional time. The "work" or "put in" does not refer to the hours prior to the overtime hours, but rather to the time the employee is asked to work that is in addition to the regular work day. That is, the bargaining agreement does not state that the employee must put in the work day hours. It says the employee who is asked to "put in" time in addition to the regular work day will be paid overtime at time and a half. The undersigned will not read into the language a requirement that is not explicit therein, particularly when it has been demonstrated that the County is capable of writing language that explicitly states what it argues the contract language here requires: that the regular work day must consist of hours worked, rather than hours in paid status.

Having found that the language of Article 13 does not require that an employee work 7 ½ hours in order to be paid time and a half when asked by the Employer to perform additional work but only be asked by the Employer to work hours beyond the work day, it is not necessary to look to the past practice argument presented by the Union. It should be noted, however, that the only relevant past practice is with respect to Mr. Peterson and Ms. Moen in 2004. The Union did not present any evidence, other than those two instances, where an employee doing work under the terms of the collective bargaining agreement between the parties to this dispute was paid overtime on a day that the individual also received paid time off work. With respect to Mr. Peterson and Ms. Moen, the Union established that these individuals were paid time and a half for hours worked in excess of 7 ½ hours in paid status. However, the Employer "corrected" these payments by memo dated October 6, 2004, prior to the filing of the instant grievances.

The grievances are both about situations that occurred during the payroll period ending October 2, 2004, a Saturday. The "correcting" memos were sent to Ms. Moen and Mr. Peterson on October 6, a Wednesday. Payments for the pay period in question are dated October 8, 2004, a Friday. It is unclear, on this record, as to the date upon which Grievants became aware of the fact that they were not paid time and a half for the scheduled overtime on September 20 for Ms. Johnson or September 29 for Ms. LaGesse. 2/ It is clear, however, the County had determined that it erred in making payment at time and a half for Mr. Peterson and Ms. Moen prior to the instant matters being filed by the Grievants. Similarly, Dennis Arras' memo regarding this matter was issued contemporaneously with the October 6 memos, in response to the finance department's direction regarding overtime computation, not in response to the instant grievances.

2/ It may be that employees are given payroll advice memos prior to the date indicated on the memo, as is the practice with some employers.

Although the Union has failed to demonstrate a clear past practice of the Employer to pay overtime based on time in pay status, the language of the Agreement between the parties supports the Union's interpretation of Article 13, Sections 1 and 2.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is sustained.
2. Grievants are to be made whole for any and all lost wages and benefits.

Dated at Madison, Wisconsin, this 20th day of January, 2005.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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