

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**DOOR COUNTY COURTHOUSE EMPLOYEES LOCAL #1658,  
AFSCME, AFL-CIO**

and

**DOOR COUNTY**

Case 142  
No. 63885  
MA-12738

(Felhoffer Grievance)

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**Appearances:**

**Mr. Michael J. Wilson**, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin and **Mr. Neil Rainford**, Staff Representative, 1311 Michigan Avenue, Manitowoc, Wisconsin, appearing on behalf of Local 1658.

**Mr. Grant P. Thomas**, Corporation Counsel, Door County, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, Wisconsin, appearing on behalf of Door County.

**SUPPLEMENTAL AWARD**

Door County Courthouse Employees Local #1658, AFSCME, AFL-CIO, hereinafter "Union," and Door County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on February 2, 2005, in Sturgeon Bay, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and the County filed a reply brief which was received on May 10, 2005, whereupon the record was closed. An Award was issued on August 31, 2005 wherein the amount of overtime due the Grievant was returned to the parties

for calculation due to illegible documents in the record. On November 18, 2005 the County requested assistance in implementing the remedy, offered its position as it related to the remedy and submitted legible payroll records. On November 28, 2005 the Union submitted its position with regard to the number of hours of overtime due the Grievant. Having reviewed the additional legible evidence and arguments of the parties, the undersigned makes and issues the following Supplemental Award.

### **BACKGROUND**

On August 31, 2005 I issued the following Award:

1. The County violated the collective bargaining agreement, Article 8, Section D, when it used Jay Virlee to perform North Shop winter overtime work without first offering the overtime work to Keith Felhoffer.
2. The appropriate remedy is to compensate Keith Felhoffer for lost overtime wages and benefits for any and all of the dates January 12, 14, 22, 27 and February 3, 6, 10, 12, 20, 23, and 24, 2004 that Felhofer was the most senior highway employee available, but not called in to work overtime. Felhofer is not required to perform any work to receive this overtime pay.

The payroll data submitted at hearing was illegible and I was not able to cross-reference the dates contained in the grievance with payroll records to ensure that the Award was not directing the County to pay the Grievant overtime twice for the same date of work. I was therefore unable to identify a specific amount of back pay in the Award and directed the parties to make that calculation consistent with the Award and the parties' labor agreement. The parties were unable to do this for a variety of reasons and requested the undersigned's assistance.

### **DISCUSSION**

The County argues that pursuant to the Award, the Grievant is not due any overtime pay for January 12, 14, 22, 27 and February 3, 6, 10, 12, 20, 23, and 24, 2004. The County points out that there were more senior employees on the seniority list that were available to work on those dates and therefore the Grievant was not the "most senior available employee" and thus he is not entitled to the overtime monies.

The parties' labor agreement establishes a two-fold eligibility requirement for overtime compensation. Logic dictates that I address the available element before the most senior element simply because seniority is irrelevant if the employee is not available to work. The November 2005 submitted payroll records indicates that Grievant did not work overtime on any of the 11 dates in question and the evidence adduced at the hearing indicates that he was available to work. The Grievant has fulfilled this first element.

The second element, whether he was the most senior, is more complicated. There is no question that on the 11 dates in question, there were more senior employees that did not work and therefore were not paid for overtime work. But the fact that they did not work and therefore were not paid does not allow for the automatic conclusion that they were available on those dates. There is no evidence in the record that addresses who was called and who turned down overtime. Thus the direct evidence is inconclusive as to whether there were any "more senior employees" available to work overtime hours on the dates in question. The absence of this direct evidence is not disconcerting simply because I must presume that if there were individuals with more seniority than the Grievant available on any one or all of the 11 dates and were denied overtime, they would have filed a grievance seeking that compensation. This presumption encompasses the concept that the more senior employee that was available and did not file a grievance has waived his right to any compensation. The fact that no other grievance was filed allows for the conclusion that the Grievant was the most senior employee available for the overtime work.

In conclusion, payroll records indicate that on the 11 dates in question, the Grievant did not earn any overtime compensation. As a result, consistent with the Award, he should be paid 35 1/2 hours at the rate time and one-half consistent with the August 31, 2005 Award.

Dated at Rhinelander, Wisconsin, this 7<sup>TH</sup> day of February, 2006.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator