BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW GLARUS EDUCATION SUPPORT PERSONNEL

and

NEW GLARUS SCHOOL DISTRICT

Case 17
No. 64563
MA-12939

Appearances:

Joyce Bos, Executive Director, South West Education Association, P. O. Box 722, 960 North Washington Street, Platteville, Wisconsin 53818-0722, appearing on behalf of the Association.

Attorney David R. Friedman, Friedman Law Firm, 30 West Mifflin Street, Suite 1001, Madison, Wisconsin 53703, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District" or "Employer," are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, the parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to resolve the dispute set forth below. Hearing was held on September 27, 2005, in New Glarus, Wisconsin. The hearing was transcribed and the parties completed their briefing schedule by December 7, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate to the issues. The Association poses the following issues:

1. Did the District violate the collective bargaining agreement when it denied overtime payment to Mr. Webber for the hours of work in excess of 40 hours during the weeks of May 2nd through May 6th, May 16th through May 20th, May 30th through June 3rd?

2. If so, what is the appropriate remedy?

The District frames the issues as follows:

1. Was the grievance timely filed by either the Association or any individual?

2. Whether or not overtime pay is for hours worked versus hours paid in a given week?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Is the grievance procedurally arbitrable?

2. Did the District violate the collective bargaining agreement when it denied overtime payment to the Grievant for the hours of work in excess of 40 hours during the weeks of May 2nd through May 6th, May 16th through May 20th, and May 30th through June 3rd, 2005?

3. If so, what is the appropriate remedy?

DISCUSSION

James Webber ("Grievant") is a head custodian who has been employed by the District for nineteen years. He works an eight hour day, Monday through Friday, for forty hours a week. During the work week of May 2nd through May 6th, 2005, the Grievant took a paid vacation day on May 2nd and was asked to work ½ hour beyond the eight hour work day on May 6th. In the work week of May 16th through May 20th 2005, the Grievant took a paid sick day on May 18th and then was asked to work ½ hour beyond the eight hour work day on May 19th. Additionally, on May 20th , the Grievant worked 1 ½ hours beyond the eight hour work day. In the work week of May 30th through June 3rd 2005, the Grievant was paid for the Memorial Day holiday on May 30th and then worked two hours beyond the eight hour work day on May 31st. He also worked ten hours on June 2nd and nine hours on June 3rd. In these weeks, the District paid straight time for all paid hours.

The threshold issue in this case is whether the grievance is arbitrable.

The District asserts that the grievance is not arbitrable because neither the Association or the Grievant filed a timely grievance.

Article 4, Section B.2. states:

> It is understood that the time limits set forth in this article shall be considered as substantive, and failure of the grievant to file and process, the grievance within the time limits set forth in this article shall be deemed a settlement and a waiver of the grievance and not arbitrable.

Article 4, Section B.3. provides:

> A grievant can be either the Association or an individual employee of the District who alleges that there is a dispute involving the interpretation or application of any article in this Agreement as applied to that individual.

Article 4, Section C. Step I indicates:

> The grievant shall file a written grievance with the grievant's immediate supervisor* within 30 days after the occurrence of the alleged violation except that in the event the grievance concerns an alleged violation or dispute involving a paycheck, the grievance shall be filed within 15 days after receipt of the paycheck.

The District claims that in October 2004 it notified the Association and the Grievant about a change in how overtime hours were computed. Both the Association, (Tr. p. 39), and the Grievant admit to receiving this notice. (Tr. pp. 33-34).

The District points out that even though the Association had notice of the District's change in the method of computing overtime in October it chose not to file a grievance. The District also notes that the Grievant admitted that it was too late to file a grievance in October 2004 even though it was discussed because "it was too late at that time, according to our contract." (Tr. p. 34). The Association/grievant missed the deadline to file a grievance because "when you get your paycheck you have 15 days from the time you get your paycheck in order to file a grievance on a financial matter or whatever." *Id*. The District opines that "if it was too late in October to file a grievance, then it is too late in May or June 2005 to file a grievance." The District adds that if the Grievant "is the individual filing the grievance and he admits it [is] too late, the Arbitrator is bound by that admission."

The District submits that the Association's and/or Grievant's failure to file a grievance on a timely basis should result in dismissal of the grievance. The District believes that the aforesaid contractual provisions and arbitral precedent support such an outcome.

The District is correct that if an agreement contains clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003) p. 220. The practical effect of late filing in many instances is that the merits of the

dispute are never decided. Elkouri and Elkouri, *supra*, pp. 220-221. However, time limits may be waived by the parties' actions. Elkouri and Elkouri, *supra*, p. 222. Arbitrators routinely admit evidence of circumstances excusing what would otherwise be an untimely grievance. *Labor and Employment Arbitration*, Volume 1, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 8, "Challenges to Arbitrability" by Harvey A. Nathan and Sara McLaurin Green, s. 8.03[6][a], 3-37 (1998). They do so because of the presumption of arbitrability. *Id*. Even when it appears that the grievance was late, the grievant will be given an opportunity to demonstrate why that lateness should be excused. *Id*.

The District in its letter, (Association Exhibit No. 2), agreeing to proceed to arbitration wrote:

> I have talked to Ms. Thompson, and the New Glarus School District is willing to proceed to arbitration over Mr. Webber's May or June paychecks where he claims he was not paid overtime.
>
> We wish to make it clear that this proceeding to arbitration without a grievance initially filed does not establish a past practice nor does it waive any future right of the District to insist that a grievance be filed before proceeding to arbitration.
>
> Because of the unique circumstances involved in Mr. Webber's prior acceptance and then objection of the agreement to resolve his grievance, the District, in the interest of cost savings and obtaining a resolution, is willing to adopt this unique procedure.
>
> . . .

It is noteworthy that the District did not reserve in this letter a right to raise a timeliness objection to the grievance at hearing. It is also noteworthy that the District asserted in this letter a desire to conserve costs and obtain a resolution to the dispute. The Arbitrator fails to see how raising a timeliness issue for the first time during the middle of the arbitration hearing advances these goals. (Tr. p. 36). This is particularly true where the District initially stipulated at hearing that the grievance was procedurally arbitrable, and properly before the Arbitrator for a decision on its merits. (Tr. p. 4).

As pointed out by the District, this dispute is before the Arbitrator as a result of the Grievant's "prior acceptance and then objection of the agreement to resolve his grievance." (District Brief, p. 1) There is no written grievance. There are "no documents, conversations or other means of communication between the parties over the respective merits or positions" regarding the grievance. *Id*. This dispute is before the Arbitrator because the parties voluntarily agreed to submit it, (Association Exhibit No. 2), without following the normal grievance procedure contained in the parties' collective bargaining agreement.

The District argues that it needed to raise the timeliness objection when it did because it was not aware of the Association's rationale for its grievance until then. However, the District was aware of the basis for the grievance prior to arbitration. (Tr. pp. 40-44, 48). Therefore, the Arbitrator rejects this claim of the District.

The parties by their actions noted above have waived enforcement of the contractual time limits. Consequently, the Arbitrator turns his attention to the merits of the dispute.

At issue is whether the District is required to pay the Grievant time and one half pay for hours worked beyond forty hours when the forty hour work week contained paid leave.

The Association argues for such a requirement while the District takes the opposite position.

Article 16, Section B.1., provides: "The standard workweek shall not exceed five (5) consecutive days, including holidays, and leave days under this contract."

Article 19, Section B., states: "Time and one-half (1 and ½) will be paid for all hours worked in excess of forty (40) hours per week."

The Association argues that the above contract language is clear and concise. In this regard, the Association states that the contract defines the standard work week as not exceeding "five (5) consecutive days, **including holidays, and leave days** under this contract." (Emphasis in the Original). The Association adds that contract provides for overtime to be paid for **all hours worked** in excess of forty hours per week. (Emphasis in the Original). The Association opines that the inclusion of holidays and leave days solidifies the concept that holidays and leave days are calculated as hours counted for a 40 hour week. Consequently, the hours paid for a leave day or holiday must be counted when calculating time and one-half for overtime.

The District, on the other hand, argues that a better interpretation of Article 16, Section B.1. is that it is a definition of a standardized work week, and must be considered separately from Article 19, Section B. Article 19, Section B, according to the District, provides that time and a half is paid for all hours <u>worked</u> in excess of 40 hours per week. (Emphasis in the Original). "If the parties thought that these provisions should be interpreted together it would have made more sense to place them in the same article or even closer in proximity."

Another reason to pay overtime only for hours actually worked during the work week, according to the District, is that Article 19 uses the word "worked" and Article 16 makes no reference to hours worked. Instead, it just defines a work week.

One of the principles utilized by arbitrators to ascertain the meaning of contract language is the so-called "plain meaning rule," which states that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their

meaning is to be derived entirely from the nature of the language used. Elkouri and Elkouri, *supra*, p. 434.

Applying that standard to the instant dispute, the Arbitrator first turns his attention to Article 16, Section B.1. This provision clearly provides that holidays and leave days are included in the definition of the standard work week consisting of five consecutive days. In other words, as pointed out by the Association, leave days are included as hours counted for a forty hour work week. However, Article 16, Section B.1. does not address the question of whether leave days count as hours worked for purposes of overtime. It certainly does not explicitly state that holidays and other leave days count as time worked for purposes of computing overtime.

The Arbitrator turns his attention to Article 19, Section B, in the "Overtime" provision of the contract to see what it says about the matter. As noted by the District, Article 19, Section B. expressly states that time and one-half "will be paid for all hours worked in excess of forty (40) hours per week." (Emphasis in the Original). Working ordinarily means performing one's job. *The American Heritage Dictionary of the English Language, New College Edition*, (10th Ed. 1981) p. 1474. Accordingly "hours not worked" on holidays and other leave days cannot be included for overtime computations restricted by the term "hours worked." PERMAN-ROCQUE CO., 80 LA 684, 687 (Kapsch, 3/83)

Contrary to the above interpretation of the disputed contract language, the Association cites the testimony of the Grievant, as head negotiator for the initial contract, that the intent of the language in question is as follows: "We bargained it that both sides understood that's what it meant, that holidays and all your leave days were part of the work week." (Tr. p. 11). The Grievant's testimony on its face supports a finding that Article 16, Section B.1. includes all leave days as part of the standard work week of five consecutive days. Absent bargaining notes, minutes, written proposals, signed agreements or corroborating testimony it doesn't establish whether or not leave time counts for purposes of calculating overtime for hours worked beyond forty hours per week.

The Association also relies on past practice to support its position.

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, *supra*, p. 608. An arbitrator is more likely to find that prior conduct qualifies as a mutually accepted past practice if the alleged past practice spanned a number of collective bargaining agreements. *Labor and Employment Arbitration, supra*, Chapter 10, "Past Practice, Maintenance of Benefits, and Zipper Clauses" by Ira F. Jaffe, s. 10.02[2][d], 10-11.

In the instant case, the Grievant testified to only approximately seventeen instances during the time span of July 2003 and April 2004 where the District paid time and one-half pay to overtime hours obtained as hours worked beyond 40 hours. (Tr. pp. 16-28). In each of

these instances, there was a holiday or leave day calculated as counting toward meeting the threshold of a 40 hour week. (Association Exhibit No. 1). Approximately 17 times over a ten month period of time does not, in the Arbitrator's opinion, constitute a "reasonable period of time" to meet the third test of a binding and established past practice.

The Association did point out that the Grievant testified that the District had provided overtime payment at the rate of time and a half the hourly rate for other employees in the District when they worked beyond 40 hours a week in weeks which included a holiday or leave day. (Tr. p. 28). However, the Grievant did not testify as to how many employees received this overtime payment or over what time period. Consequently, the Association did not meet the third test of a binding and established past practice with this evidence either.

An arbitration award cited by the District, BWXT PANTEX, LLC., 120 LA 69, (Baroni, 08/04), supports such a conclusion. In BWXT, from 1984 to 1988, the Company compensated employees who walked between two buildings. In 1988 the need to walk between the two buildings was eliminated. In 2002 the employees once again had to walk between two buildings. In 2002, the Company did not pay employees for the walking time. The Union grieved claiming that the 1984-1988 payments constituted a past practice. The arbitrator rejected the Union's position.

As part of his rationale, the Arbitrator said, "[t]he single period (1984-1988) 'one time use' of walk time to compensate SPO's 4 minutes for their use of Building 12-01 does not constitute a 'reasonable period' of time to meet the third test of a binding and established past practice." BWXT, *supra, p. 72*.

Parties often establish as a practice or provide in their contract that a paid unworked holiday [or other leave day] will count as time worked for determining weekly overtime. *Labor and Employment Arbitration, supra*, Volume 2, Chapter 33, "Overtime" by Gladys Gershenfeld, s. 33.05[2], 33-15. In the absence of contract language, past practice or bargaining history providing for such a result, arbitrators are cautious about finding that an unworked holiday or leave day counts as time worked for purposes of computing weekly overtime. *Id*.

In addition various cases have addressed this same issue in the light of similar contractual clauses restricting overtime computations to hours worked. PERMAN-ROCQUE CO., *supra*. Arbitrators have ruled that the terms "hours worked" must be given their plain and ordinary meanings and accordingly "hours not worked" on holidays cannot be included for overtime computations restricted by these terms. *Id*.

Based on all of the above, the Arbitrator finds that the answer to the issue as framed by the undersigned is NO, the District did not violate the collective bargaining agreement when it denied overtime payment to the Grievant for the hours in excess of 40 hours during the weeks of May 2nd through May 6th, May 16th through May 20th, and May 30th through June 3rd, 2005.

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

In view of all of the foregoing, it is my

AWARD

That the grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 10th day of January, 2006.

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

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