

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**VILLAGE OF PULASKI PUBLIC WORKS EMPLOYEES' UNION**  
**AFSCME LOCAL #3055-E**

and

**VILLAGE OF PULASKI**

Case 28  
No. 67130  
MA-13767

(Berna Grievance)

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**Appearances:**

**Mr. Mark DeLorme**, Staff Representative, AFSCME Council 40, 65 Webster Heights Drive, Green Bay Wisconsin 54301, on behalf of the Union.

Davis & Kuelthau, S.C., **Attorney Robert W. Burns**, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, on behalf of the Village.

**ARBITRATION AWARD**

The Village of Pulaski Public Works Employees' Union (herein the Union) and the Village of Pulaski (herein the Village) are parties to a collective bargaining agreement covering the period from January 1, 2005 to December 31, 2007, which provides for binding arbitration of certain disputes between the parties, and which was in effect at the time of the events at issue herein. On July 19, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a written warning issued to Dean Berna (the Grievant herein). At the request of the parties, the undersigned was appointed to hear the dispute and a hearing was conducted on March 26, 2008. The proceedings were not transcribed. The parties requested an expedited award and filed letter briefs by April 10, 2008, whereupon the record was closed.

**ISSUES**

The parties stipulated to the following statement of the issues:

Whether the Village had just cause to issue a written warning to Dean Berna on March 6, 2007?

If not, what is the appropriate remedy?

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE XIX**

**WORK WEEK - CALL TIME**

A. The typical work week for the employees shall be forty (40) hours per week. Employees shall be paid overtime pay at time and one-half (1½) times the regular hourly rate after forty (40) hours each week or after eight (8) hours a day. There shall be no pyramiding of overtime. All overtime must receive prior approval from the Village through its designee.

**DISCUSSION**

Dean Berna (the Grievant) worked for the Village of Pulaski Department of Public Works and was a member of Local #3055-E from 1998 until his separation from Village employment in May 2007. In 2006, Berna's relationship with the other employees in the bargaining unit began to deteriorate, largely due to his efforts to have two members removed from the unit. In Berna's opinion, the two members, Thomas Holewinski and Thomas Rodgers, who were working foremen, were exercising management authority, such as issuing disciplines and denying grievances. This caused tension between Berna and his co-workers and a morale problem in the shop. On May 11, 2006, the other members of the unit informed Village President Keith Chambers that Berna was creating a stressful and hostile work environment. At about the same time, Berna's attitude and behavior in the workplace began to suffer, resulting in conflicts with management. In January 2006, he received an oral warning for a timecard violation. On December 7, 2006, Chambers sent Berna a letter admonishing him for his poor attitude and behavior toward co-workers. He informed Berna that from now on he would be under scrutiny and that any future behavior or attitude problems detrimental to the work environment would result in progressive discipline.

On December 6, 2006, Berna was working along with Holewinski and two other employees, Bryan Lauritzen and Craig Mayotte, at the end of the normal workday, which ends at 3:30 p.m. At 3:30, Holewinski told the employees to punch out and go home. All three asked to stay over on overtime in order to prepare for an expected snow storm, but Holewinski refused. Lauritzen and Mayotte punched out and completed their work off the clock. Berna also completed his work, then punched out and requested ¼ hour of overtime. Holewinski denied the overtime and adjusted Berna's timecard to reflect eight hours at straight time. Berna grieved the action on December 20. Chambers denied the grievance on December 21 because the overtime was not authorized by Berna's supervisor. In response, on December 26 Berna asked for information identifying who his supervisor was and what his duties were. On December 28, Chambers replied that Holewinski was Berna's supervisor, and issued Berna a written warning because his request for information was deemed "detrimental to the efficient

and cohesive operation of the Village.” The discipline was reduced to an oral warning on March 2, 2007.

Also, on March 2, the Personnel Committee addressed the overtime grievance and determined that, under the Fair Labor Standards Act, Berna was legally entitled to the overtime and so the grievance was sustained. Four days later, on March 6, Chambers issued Berna a written warning for working unauthorized overtime on December 6. No discipline was issued to either Lauritzen or Mayotte because, as Chambers acknowledged, the discipline was not for working past 3:30 p.m. on December 6, which they did, but for requesting overtime pay for it, which they did not. It is this warning that is the subject of this arbitration. At the hearing, testimony was provided by Village President Chambers and the Grievant.

I have previously observed that a determination of just cause for discipline generally involves two elements – a determination in the first instance of whether the employee committed an act for which discipline is warranted and, if so, a corollary determination of whether the penalty imposed was appropriate in degree to the offense. In this case, it is undisputed that the contract requires that overtime be pre-authorized. It is also undisputed that the Grievant continued to work for fifteen minutes beyond his shift after having been told to leave at 3:30 by the Foreman and claimed the fifteen minutes as overtime. Holewinski knew that Berna, as well as Lauritzen and Mayotte, worked beyond the shift, however, because he later informed Chambers of this and Chambers testified that Berna’s warning was not due to his working past 3:30, but for claiming overtime for it, which Lauritzen and Mayotte did not. There was also testimony from Berna that the language requiring pre-authorization of overtime was not routinely enforced and that he would occasionally work beyond his shift without Holewinski’s or Rodgers’ authorization, would claim the overtime for the extra work, and the Foreman would approve it after the fact. This was the first time that his claim for overtime had been rejected. He was aware that other employees would work after their shifts, as well, but did not know if they claimed overtime for it. For his part, Chambers was unaware of the practices of the Foremen regarding authorizing overtime, or whether other employees were working after hours without claiming the time. The Berna matter resulted in the Village becoming aware of the requirements of the FLSA and informing the employees that in the future the contract language would be strictly enforced.

Arguably, this case is different than those where Berna would work after his regular shift, would claim the overtime, and it would be approved after the fact. The difference is that in this case Berna and the other employees specifically asked if they could work overtime and their requests were denied. Regardless of the practice, therefore, Berna could hardly have expected the overtime to be approved here. Nonetheless, when he claimed the overtime the Village did not immediately discipline him for working unauthorized overtime, Holewinski merely denied the claim. Also, he was not disciplined when he grieved the denial of the overtime. In fact, he was not disciplined until after the Village learned that it was legally required to pay the overtime, over three months after the event. Clearly, then, the discipline was not based on Berna’s violation of the overtime provision, but on the fact that the Village was required to pay him, and Chambers admitted as much.

Further, the Village does not come to this matter with totally clean hands. Clearly Holewinski, who was the on sight supervisor, knew the employees were working after their shifts, assumed that they would not claim the time and had no problem with the employees “volunteering” their time to the Village while not in pay status. Hence, there were no disciplinary consequences for Lauritzen and Mayotte. While the Village has the right to require overtime to be pre-approved, it is inequitable for the Foremen to deny the employees the right to work overtime to finish their projects, but then to let them remain and complete their work on their own time. In this context, the record makes it clear that the Foremen are the gatekeepers for the Village in authorizing overtime. That being the case, the Foreman on duty, in this case Holewinski, if he is not going to pre-authorize overtime, must require the employees to quit work on time. It is unreasonable for the Village to take the position that employees can work after hours on their own time, but if they put in for overtime they will be disciplined. If a project cannot be completed during normal work hours, the alternatives are to authorize overtime, or complete the project at a later time, not expect, or even permit, the employees to stay late for no pay. In so saying, I am aware that prior to this incident the Village President and Board may have been unaware that employees were working after hours for no pay. Nevertheless, by giving authority to the Foremen to manage authorization of overtime, and, after it came to light, by taking no action against Holewinski, Lauritzen, or Mayotte, while disciplining Berna, it tacitly ratified the practice retroactively.

There is also the fact that the record does not indicate any past instance where an employee had been disciplined for claiming unauthorized overtime, nor any indication that the employees were ever put on notice that working unauthorized overtime would have disciplinary consequences. In fact, it appears that prior to this incident the entire issue of authorization of overtime was vague and that there was no cogent policy in effect. Chambers acknowledged that he did not have personal contact with the employees and was unaware of what they were or were not told about the overtime policy by the Foremen. Indeed, Berna’s reprimand seems to have been an afterthought that only was conceived after the Village was confronted with the necessity to pay him and that its initial position was that it could merely deny the claim if it did not want to pay.

Taking all of the above into account, it is my view that the Village did not have just cause to issue a warning to Berna for this infraction of the overtime policy, principally because there was not a practice of disciplining employees for such actions, they were unaware that discipline was a possibility for claiming unauthorized overtime and the Village was previously willing to wink at employees working after hours on their own time as long as it did not have to pay them.

**AWARD**

The Village did not have just cause to issue a written warning to Dean Berna on March 6, 2007. The Village shall, therefore, withdraw the written warning issued on that date and expunge his personnel file of all references to it.

Dated at Fond du Lac, Wisconsin, this 17th day of April, 2008.

John R. Emery /s/

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John R. Emery, Arbitrator

