

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**TAYLOR COUNTY HIGHWAY EMPLOYEES
LOCAL 617, AFSCME, AFL-CIO**

and

TAYLOR COUNTY

Case 106
No. 67319
MA-13831

Appearances:

John Spiegelhoff, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, appears on behalf of the Union.

John Prentice, Simandl & Murray S.C., Attorneys at Law, 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, appears on behalf of the Employer.

ARBITRATION AWARD

Taylor County Highway Employees Local 617, AFSCME, AFL-CIO (herein the Union) and Taylor County (herein the County or Employer) are parties to a collective bargaining agreement providing for final and binding arbitration of certain disputes between the parties. On September 24, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration and to appoint a WERC Commissioner or staff member as arbitrator on an overtime and seniority grievance. The undersigned was so appointed and a hearing was held on November 20, 2007 in Medford, Wisconsin. The hearing was not transcribed and the parties filed post-hearing briefs, the last of which was received on March 14, 2008.

ISSUE

The parties were unable to stipulate to a statement of the issues. At hearing, the Union framed the issues as follows:

Did the County violate the collective bargaining agreement and the intent of the letter of December 10, 2003 when it offered overtime on the County Highway M paving project to the Purchasing/Machinery Clerk and not the Machinist/Welder Grievant?

If so, what is the appropriate remedy?

The County framed the issues as follows:

Did the County violate the collective bargaining agreement when it did not assign the Grievant to work on a paving project between July 25, 2007 and July 30, 2007?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 4 - WORKWEEK AND PREMIUM PAY

...

Section 3. Time and one-half (1-1/2) of regular pay shall be paid for all work performed over eight (8) hours in any one (1) day or forty (40) hours in any one (1) workweek.

...

Section 7. When inclement weather prevents outside work and additional mechanics' helpers are needed in the shops, qualified personnel will be assigned such mechanics' helpers' duties according to seniority.

Section 8. Every reasonable effort will be made to assign overtime to the employee with the assigned beat, or if that employee refuses, to another employee on a seniority/geographical basis.

Overtime in the shop will be offered first to the employees who are regularly assigned to shop classifications (Mechanic and Machinist/Welder). This does not preclude assignment of additional employees to overtime work in the shop when deemed necessary by the Commissioner.

...

ARTICLE 9 – SENIORITY

Section 1. Seniority shall begin at the time of the original employment and shall not be diminished by temporary layoffs due to lack of work or funds.

. . .

ADDENDUM TO AGREEMENT

RE: TEN-HOUR, FOUR-DAY WORKWEEK

- 1) The parties agree that in 2005 and 2006 beginning Memorial Day and continuing through Friday preceding Labor Day, the regular workweek shall be forty (40) hours, and the regular work day shall be ten (10) hours per day, Monday through Thursday, except for two (2) patrolmen whose regular work day schedule shall be ten (10) hours per day, Tuesday through Friday.
- 2) Working hours shall be 6:30 a.m. to 4:30 p.m., with a ten (10) minute morning break, and a fifteen (15) minute lunch period, without loss of pay.
- 3) Upon two (2) weeks' notice to the Union, the County may begin the ten (10) hour day, four (4) day week work period one (1) month prior to Memorial Day, and continue this work period for one (1) month after Labor Day.
- 4) Pay for a vacation day, holiday or sick day taken during the ten (10) hour day, four (4) day week work period shall be at ten (10) hours per day.
- 5) Hours worked over ten (10), or over forty (40), during the ten (10) hour day, four (4) day week work period, will be compensated at the rate of time and one-half (1-1/2) regular pay.
- 6) The ten (10) hour day, four (4) day week work period will be scheduled in 2005-2006 on the same basis as in 1990, unless either party notifies the other party, in writing, prior to January 1, 2005 or January 1, 2006, that it wishes to discontinue the schedule.

BACKGROUND

Joe Obenhoffer, hereafter Grievant, is an employee of the Taylor County Highway Department. The Grievant occupies the position of Machinist/Welder and has a seniority date of May, 5, 1980. On or about August 12, 2007, a written grievance was filed alleging that the Grievant “was passed over for overtime.” This grievance further stated:

Although the employee had seniority, the County gave overtime to less senior employees while paving. County was aware of overtime prior to paving. Article 4, Section 8.

This grievance requested, as remedy: “Employee should be paid for lost overtime.”

At the time of the alleged violation of the collective bargaining agreement, Richard Dowden occupied the position of “Purchasing/Machinery Clerk”, hereafter “Purchasing Clerk.” The “Purchasing Clerk,” who has a seniority date of January 2, 2004, worked the overtime claimed by the Grievant; which overtime involved flagging on the County Highway M paving project.

Highway Commissioner Thomas R. Toepfer responded to this grievance as follows:

I am in receipt of your grievance 3-07.

By all definitions, Mr. Obenhoffer’s position, machinist/welder, is first and foremost a shop position.

The grievance is without merit and is denied.

After denying the grievance at all steps, the grievance was submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

The Grievant, who is one of the more senior employees in the Highway Department, was denied access to overtime opportunities outside the confines of the Medford shop.

Highway paving projects are primarily the domain of patrolman within the highway department and, in the highway M paving project, all of the working and available patrolman were assigned to the project. This satisfies the Section 8 requirement of “every reasonable effort will be made to assign overtime to the employee with the assigned beat.” For arguments sake, the assigned beat was the paving project.

Inasmuch as no employee refused assignment of overtime outside of the primary domain of the patrolman, overtime is required to be on a seniority/geographical basis. Geographical basis has not relevance in this case because the Grievant and the “Purchasing Clerk” work primarily at the Medford Highway shop.

During the paving project, the “Purchasing Clerk” easily could have been used in the same form and function as the Grievant and such use would not have hampered the operations of the highway department. The County did not make a reasonable effort to assign overtime to the most senior employee at the highway shop; but rather ignored any element of seniority as defined by Article 9. The parties have agreed to use seniority as a basis to determine who is entitled to overtime when all available employees outside the confines of the shop are being used. (Article 8-Section 4; Jt. Ex. #1)

The Commissioner conceded that the County’s asserted intent to have the “Purchasing Clerk” work outside the confines of the shop without any consideration for seniority when overtime is involved was never made clear to the Union when this position was posted in 2003. It is not evident that the “Purchasing Clerk” has ever been offered overtime outside the confines of the Medford shop. The history of the “Purchasing Clerk” coupled with the job description leaves no doubt that this is a “utility” position primarily in the shop.

The Grievant has performed patrolman type duties such as paving projects, snow plowing and bridge shaping, which duties included overtime, even though “patrolman duties” is not identified in his job description. The mere fact that the Grievant has turned down overtime in the past does not give the County *carte blanche* to pass over the Grievant when offering overtime.

When all patrolmen are busy, the history has been to offer available overtime to shop employees on the basis of seniority. Neither the County’s argument that the “Purchasing Clerk” is entitled to perform the disputed overtime based upon “patrolman duties,” nor its argument that snowplowing overtime is distinguishable holds water.

The general issue in the December 2003 incident was seniority and overtime; not just snow plowing overtime. The Grievant believed, by virtue of the statement “Obenhoffer did have the right to the overtime,” that he would be offered additional overtime outside the confines of the Medford shop in the future. The Highway Commissioner did not make it clear to the Grievant that he would only receive snow plowing overtime. The principles of promissory estoppel provide further support to the Union’s position.

The Grievant approached the County’s Operations Manager on July 25, 2007 to inquire why he was not placed on the paving crew as he was more senior than Dowden. The Grievant filed a grievance in a timely manner under the contract. The Grievant has not slept on his rights and the Grievant’s claim of laches is without merit.

The County's argument that there is no provision awarding overtime on the basis of seniority is untrue. Article 4-Section 7 gives seniority preference to qualified patrolman to work in the shop if there is inclement weather. Section 8 then follows; giving preference to any employees based on seniority (shop employees included) for overtime involving patrolmen type duties such as working on a paving crew, including flagging. The County's speculative argument of whether the Grievant wanted the work or ever performed the work is irrelevant to the instant dispute.

The County seeks to rewrite the overtime and seniority provisions of the parties' collective bargaining agreement. The remedy for the County's violation of the parties' collective bargaining agreement is to pay the Grievant his 2007-08 overtime rate of \$26.97/hour for 15.5 hours, or \$418.03.

The Grievant believes that he has lost wages due to the time spent in the grievance procedure as well as the arbitration procedure relating to this dispute. The Grievant requests 6 ½ hours in uncompensated lost time at \$17.98 per hour for a total of \$116.87 in addition to the \$418.03 discussed above.

County

The issue to be decided is whether or not the County violated the collective bargaining agreement when it assigned an employee with less seniority than the Grievant to flag on a paving project between July 25, 2007 and July 31, 2007. As a review of the 2005-2006 collective bargaining agreement reveals, there is no general requirement that overtime be awarded on a seniority basis.

Article IV (Work Week and Premium Pay), Sections 7 and 8, has limited language linking seniority to overtime in very specific situations; which situations are not present in this case. Section 7 provides a seniority right to work as a mechanics' helper under specified circumstances. Section 8 restricts overtime assignments by seniority to situations where overtime is available on an assigned beat and the employee assigned to that beat refuses the overtime.

Neither Section 7, nor Section 8, provides the Grievant with a right to perform the disputed overtime work. As the Highway Commissioner testified, the "Purchasing Clerk" was assigned the overtime work because the Grievant typically turned down overtime work and the other shop employee was on vacation.

The word "beat" refers to a section of the road for winter maintenance and not to a patrolman position. The most reasonable construction of this language is that the overtime assigned under this section will be assigned to the employee with the beat that is most proximate to that of the employee refusing the overtime. The language of Article 4, Section 8, does provide a basis to differentiate snowplowing and paving overtime.

The Grievant's assertion that highway paving projects are primarily the domain of Highway Department patrolmen is not supported by the evidence. Nor did the Grievant submit testimony or other evidence regarding construction, interpretation or history of Article 4, Section 8. The Grievant's interpretation of Article 4, Section 8, is based upon bald assertions.

There being no duty to utilize seniority for job assignments outside the shop, other than overtime involving highway maintenance, the County had no duty to convey to the Union management's intent regarding overtime assignment outside the shop.

Promissory estoppel is an equitable relief available only where there is no written contract. Additionally, the "Incident Report" relied upon by the Grievant contains no promise; but rather, is a reflection upon the Grievant's right to overtime in that instance. Management may not make individual promises regarding mandatory subjects of bargaining.

As the Highway Commissioner testified at hearing, this position was structured to operate as a "utility position" to fill a variety of needs within and outside of the shop and this was the function intended by the Highway Committee and the County Board when it expanded the position from part-time to full-time. This testimony is consistent with the "Purchasing Clerk" job description; which job description indicates that this position was specifically designed to perform the work in dispute.

The Grievant's job description does not include patrolman duties. Prior to 2007, limited term summer help always provided flagging duties on paving projects. In 2007, the County could not afford summer help so the Purchasing and Parts Supply Clerk was assigned.

Other than shaping bridges, which the Grievant testified is part of his regular duties, the Grievant only worked overtime twice on paving projects; with the most recent assignment being twenty years ago. As the Highway Commissioner testified, the August 2007 offer of overtime was made to appease the Grievant and not because the County had a duty to do so. The prior assignment of overtime to the Grievant did not establish a binding practice or right to the disputed overtime.

As the Highway Commissioner testified at hearing, shop personnel, with the exception of the "Purchasing Clerk," remain in the shop and on-call in case they are needed. As the Highway Commissioner further testified, the Grievant needed to remain at the shop in case repairs were necessary because the Mechanic was on vacation. Putting aside the issues of who defines "core duties" and what those "core duties" may be, the Grievant admits that he performed "core duties" on each of the days in question.

The Grievant testified that, on July 25, 2007, he asked Jess Sockman why Richard Dowden was out on the paving job and Sockman replied that the flagging duties were "Tom's deal (referring to Taylor County Highway Commissioner Toepfer); you got to talk to him." The Grievant never talked to the Highway Commissioner; but rather waited until the paving project was completed and filed this grievance. By not talking to the Highway Commissioner,

the Grievant was responsible for his own loss and deprived the County of the opportunity to give the Grievant overtime and mitigate the County's damages.

The Grievant is not contractually entitled to the work and would not have performed the work if it had been offered to the Grievant. The Grievant seeks an unjustified windfall. The grievance should be denied.

DISCUSSION

The parties were unable to stipulate to a statement of the issues. Upon review of the grievance, as filed and processed through the grievance procedure, the undersigned is persuaded that the issues are most appropriately framed as follows:

Did the County violate the parties' collective bargaining agreement when it did not offer the Grievant the opportunity to perform the flagging work performed by the "Purchasing Clerk" between July 25 and July 31, 2007?

If so, what is the appropriate remedy?

Article 9, Seniority, Section 1 describes how seniority is earned. This Section of Article 9 does not provide an employee with a seniority right to overtime or any specific type of work. Indeed, it is silent with respect to the application of seniority.

The remaining sections of Article 9 address the application of seniority in layoff and specific machinery assignments. None of these rights have a bearing on the instant dispute; except to support the inference that, when the parties intend the application of a seniority right, this intent is expressed in contract language.

Article 4-Workweek and Premium Pay, Section 8, states:

Section 8. Every reasonable effort will be made to assign overtime to the employee with the assigned beat, or if that employee refuses, to another employee on a seniority/geographical basis.

Overtime in the shop will be offered first to the employees who are regularly assigned to shop classifications (Mechanic and Machinist/Welder). This does not preclude assignment of additional employees to overtime work in the shop when deemed necessary by the Commissioner.

The first sentence of Article 4, Section 8, is the contract language primarily relied upon by the Union to argue that the County violated the contract when it offered the flagging work in dispute to the "Purchasing Clerk" and not the more senior Grievant.

The term “beat” is not defined in the contract and the parties offered no evidence of bargaining history with respect to the negotiation of this language. Absent such evidence and within the context of a County highway department, a “beat” is most reasonably defined as the route that is assigned to a patrolman. Given the use of the term “beat,” the most reasonable construction of the plain language of the first sentence of Article 4, Section 8, is that the provided seniority rights are to overtime that is attached to a patrolman’s “beat.”

Paving work is not normally considered to be work that is attached to a patrolman’s “beat.” Thus, it would not be reasonable to assume for argument’s sake, as the Union urges, that, in the instant case, the “assigned beat was the paving project.”

Snowplowing work is normally considered to be work that is attached to a patrolman’s “beat.” Contrary to the argument of the Union, the contract language does provide a reasonable basis to distinguish overtime involving paving work from overtime involving snowplowing.

Given the conclusion that the overtime referenced in the first sentence of Article 4, Section 8, is work that is attached to a patrolman’s “beat,” it is more reasonable to construe “another employee on a seniority/geographical basis” as referring to other patrolmen. The resulting conclusion that the parties intended to distinguish patrolman overtime rights from those of shop employees is supported by the second sentence of Article 4, Section 8. As is recognized in the second sentence of Article 4, Section 8, the Grievant, as a Machinist/Welder, is a shop employee.

Assuming *arguendo*, that the Grievant and the “Purchasing Clerk” have the same “geographical basis” for the purposes of Article 4, Section 8, because each has, as his primary worksite, the main shop, under the plain language of Article 4, Section 8, the “seniority/geographical basis” claim to overtime do not come into play unless the employee with the assigned beat refuses the overtime. In the present case, there is no evidence that the flagging work in dispute became available because any employee with the assigned beat refused overtime.

The County’s Article 4, Section 8, duty to assign overtime on “a seniority/geographical basis” is a qualified duty, *i.e.*, to make “every reasonable effort.” With respect to the second sentence of Article 4, Section 8, the County’s duty to assign overtime to “additional employees” is not limited by any seniority criteria. Thus, the plain language of Article 4, Section 8, does not establish a strict application of a seniority right to work overtime.

The County may be correct when it argues that, that prior to 2007, limited term summer help provided the flagging duties on paving projects. Such a fact, however, is not established in this record.

The Grievant recalls that, in the past, less senior employees were assigned to paving crew overtime when he was not. According to the Grievant, he did not grieve this use of less

senior employees because they were not shop employees. It is not evident that the County ever concurred with the Grievant's analysis that, if these less senior employees had been shop employees, then the Grievant would have a seniority right to the paving crew overtime. This evidence of prior practice does not indicate a strict application of a seniority right to work overtime.

The Grievant recalls that, in the past, there were several instances in which he performed overtime work involving non-shop duties, such as working on the paving crew and driving a truck. The Highway Commissioner states that he reviewed the last seven years of records and that, during these seven years, the Grievant was not on the paving crew; although the Grievant may have done shaving. The record is insufficient to establish that this assignment of non-shop overtime was due to an Article 8, Section 4, seniority right, or any other seniority right, to perform this work, rather than a management right to assign work to employees.

The record indicates that the "Purchasing Clerk" has not had a prior assignment to the paving crew. The record provides no reasonable basis to conclude that the "Purchasing Clerk" had not been offered overtime outside of the shop because he was less senior than the Grievant.

As described in the December 10, 2003 "Incident Report," there was an incident in which the Grievant claimed a right to patrolman snowplowing overtime on December 9, 2003 and Highway Commissioner Toepfer confirmed that the Grievant had a right to this overtime. (U Ex. #1) According to the Highway Commissioner, his rationale in deciding that the Grievant had a right to overtime was that the disputed snowplowing work was at the end of the day and, thus, was like a call-in. The Highway Commissioner does not recall any discussion that shop employees had a right to perform other types of overtime.

The Grievant states that he assumed that the December 10, 2003 document provided the Grievant with a general right to overtime on all projects and that he would be treated fairly and equally when overtime became available. The Grievant confirms that, when the "Incident Report" was issued, he was not envisioning the situation that was the subject of this dispute.

The evidence of the December 10, 2003 "Incident Report" does not provide a reasonable basis to conclude, as the Grievant apparently concluded, that the Highway Commissioner had promised, or otherwise confirmed, that the Grievant had a seniority right to perform other types of non-shop overtime. Nor does it establish any County agreement that the provisions of Article 4, Section 8, provide the Grievant with a seniority right to work the flagging work in dispute. The Union's claim that the principles of promissory estoppel support the Union's position is without merit.

The Highway Commissioner states his primary concern with this grievance is that it would allow any senior guy to pick paving crew work because such work involves overtime. This record offers scant evidence regarding the process used to assign employees to the paving crew. The offered evidence falls far short of establishing any practice of assigning paving crew work on the basis of seniority, in general, or under Article 4, Section 8, in particular.

In summary, neither the contractual language, nor any other record evidence, establishes that the Grievant has a seniority right to be offered the flagging work performed by the "Purchasing Clerk" between July 25 and July 31, 2007. Accordingly, the grievance is denied and dismissed.

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

AWARD

1. The County did not violate the parties' collective bargaining agreement when it did not offer the Grievant the opportunity to perform the flagging work performed by the "Purchasing Clerk" between July 25 and July 31, 2007.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of August, 2008.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

