

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**VILLAGE OF ROTHSCHILD EMPLOYEES' UNION,
LOCAL 1287-A, AFSCME, AFL-CIO**

and

VILLAGE OF ROTHSCHILD

Case 22
No. 69070
MA-14465

(Overtime Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin, appearing on behalf of Local 1287-A.

Mr. Phillip Salamone, Labor Consultant, 7111 Wall Street, Schofield, Wisconsin, appearing on behalf of Village of Rothschild.

ARBITRATION AWARD

Village of Rothschild Employees' Union, Local 1287-A, AFSCME, AFL-CIO, hereinafter "Union," and Village of Rothschild, hereinafter "Village," requested that the Wisconsin Employment Relations Commission assign a staff 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 designated to arbitrate the dispute. The hearing was held before the undersigned on October 20, 2009, in Schofield, Wisconsin. The hearing was not transcribed. The parties offered post hearing briefs and reply briefs, the last of which was received by December 15, 2009, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The Village posed multiple procedural challenges to the grievance including:

1. The grievance is not arbitrable because it does not meet the definition of a grievance as defined by the labor agreement.
2. The grievance is not arbitrable because the Arbitrator lacks the authority to insert language from an expired collective bargaining agreement into the current collective bargaining agreement.

The parties were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

Did the Village violate the collective bargaining agreement when it failed to include Article 23, Section 3 of the 2003-2005 collective bargaining agreement into the 2006-2007 successor collective bargaining agreement and all subsequent agreements? If so, what is the appropriate remedy?

The Village frames the substantive issues as:

Did the Employer violate the collective bargaining agreement by its conduct as reflected by the filing of the grievance dated February 26, 2009? Is so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the issues as:

1. Is the grievance arbitrable?
2. Was there a mutual mistake with regard to the elimination of Article 23-Section 3 from the 2003-2005 collective bargaining agreement?
3. Is so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 2 – REPRESENTATION

Section 1. The Union shall be represented in all such bargaining or negotiations with the Village by such representatives as the Union shall designate.

Section 2. The Village shall be represented in all such bargaining or negotiations with the Union by such representatives as the Village shall designate.

ARTICLE 3 – MANAGEMENT RIGHTS

Section 1. The management of the business of the Village and the determination and direction of the working force including the right to plan, direct and control Village functions; to schedule and assign work to employees; to determine the means, methods, processes, materials and schedules; to maintain the efficiency of employees; to establish and require employees to observe Village rules and regulations; to hire, lay-off, or relieve employees from duties; to maintain order, suspend, demote, discipline, and discharge employees for just cause; and the rights solely of the Village, its Board of Trustees, and President.

Section 2. The foregoing enumeration of management rights of the Village shall not be deemed to exclude the other rights not specifically set forth and, therefore, (sic) retains all rights not otherwise specifically provided in this Agreement.

Section 3. The Village agrees there shall be no infringement on any employees' rights provided in this Agreement and will adhere to the provision of this Agreement.

Section 4. The Union has the right to appeal through the grievance procedure for any or all of the foregoing.

...

ARTICLE 6 – GRIEVANCE PROCEDURE

ARTICLE 6 – GRIEVANCE PROCEDURE

Should differences, grievances, or complaints concerning the effect, interpretation, application, claim of breach or violation of this Agreement and the health, safety, or working conditions be charged by the employees or Union, this procedure shall be followed.

. . .

Section 3. If the matter remains unsettled, it shall then be submitted to arbitration. Either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator who shall be a member of the Commission staff. The arbitrator appointed shall set a meeting date to hear the dispute and his/her finding and decision shall be submitted in writing to the parties and it shall be final and binding upon the parties. The costs of the arbitrator, if any, shall be divided equally between the Union and the Employer.

. . .

ARTICLE 20 – OVERTIME

ARTICLE 20 – OVERTIME

Section 1. Time and one-half (1 1/2) the employees regular straight time rate shall be paid for all hours worked over forty (40) in a scheduled workweek.

Section 2. Worked holiday hours shall be compensated at double the employees' regular straight time rate plus holiday pay.

Section 3. Time worked on Sundays shall be compensated at time and one-half (1 1/2) the employee's regular straight time rate.

Section 4. Overtime shall be divided as equally as possible among employees. Part-time and seasonal employees shall not work overtime unless all regular employees are on overtime or unavailable for work.

Section 5. The Department Supervisor shall refrain from performing work or operating equipment normally operated by qualified workers or operators, except when two or more qualified workers or operators are unavailable.

Section 6. Employees required to check and/or maintain the pumps on any weekend shall receive four (4) hours pay at the appropriate rate for each day this work is performed.

BACKGROUND

The Village and the Union are parties to a series of collective bargaining agreements including a 2003-2005 agreement, a 2006-2007 agreement and a 2008-2009 agreement.

This case arises from the negotiations over the 2003-2005 successor agreement. The Village's initial proposals included the deletion of Section 3 contained in Article 23-Overtime. The language of Article 23-Overtime from the 2003-2005 agreement read as follows:

Section 1. Time and one-half (1-1/2) shall be paid for all hours worked over forty (40) in a scheduled work week.

Section 2. Worked holiday hours shall be compensated for at double time the regular straight time rate and holiday pay.

Section 3. Time and one-half (1-1/2) shall be paid for all hours worked outside of the employee's regular scheduled hours.

Section 4. Time worked on Sundays shall be compensated for at one and one-half (1-1/2) times the employee's regular rate of pay.

The record is silent as to when and how often this proposed deletion was discussed during the bargaining process.

The parties utilized an unconventional bargaining process during this bargaining series. They met initially to exchange initial proposals and reached an understanding with regard to language items, but did not conduct any further face-to-face bargaining sessions opposite the opposing bargaining team. The Village did not retain legal counsel or bargaining assistance and the AFSCME Staff Representative was not present. Instead, Union President Debra Ehster and Village Personnel Committee Chair Arlene Paulson exchanged written communication and modified the labor agreement consistent with those written communications. One such communication, undated although written after December 15, 2005, was directed to Ehster from Paulson addressing the removal of Section 3 and read:

Deb – I think these are right according to what you had put down or we agreed to on 12/15/05. Let me know.
Arlene

...

p. 7, Article 23

We had agreed Sec. 3 was a repetition since Sec. 1 says basically the same thing.

...

The parties did not follow a formal ratification process. They did not prepare a listing of tentative agreements and therefore there is no evidence as to what exactly each side agreed to add, modify or delete from the prior agreement.

The parties executed the successor 2003-2005 collective bargaining agreement on February 8, 2006. The Overtime provisions moved from Article 23 to Article 20. Neal C. Torney and Arlene Paulson signed the document on behalf of the Village. Debra Ehster, Christian Erickson, Kathryn Mason and John Spiegelhoff signed for Local 1287-A. The overtime language contained in the 2006-2007 agreement remained the same in the 2008-2009 labor agreement.

FACTS

On or about January 26, 2009, Staff Representative John Spiegelhoff sent the Village a letter with a grievance form attached. The letter read as follows:

RE: Missing Contractual Language

Dear Mr. Torney:

I am writing to you about contractual language that was inadvertently removed from the contract between Local 1287-A and the Village of Rothschild. In preparation for the grievance arbitration involving the Village and the Union involving the subcontracting issue, the Union found that the language involving overtime after eight hours in one day was not located in the 2008-2009 contract. The article in question is Article 20 - Overtime.

Upon further investigation, the Union discovered language in Article 23 in the 2003-2005 contract which gave employees overtime after working eight hours in one day. The Union extensively reviewed the bargaining notes from

this negotiation and found that the parties never agreed to remove this overtime language. However, the language pertaining to overtime after eight hours was removed inadvertently from the successor contract. The Union considers this to be simply an error and desires to again add this language to the existing contract. Further, the Village has always paid overtime for those employees working more than eight hours since the omission of this language beginning with the 2006 contract and beyond.

Please contact me further to discuss this matter at your convenience.

Sincerely,

/s/

John Spiegelhoff

Labor Consultant Phil Salamone responded to the grievance on February 26, 2009 as follows:

Dear Mr. Spiegelhoff,

I have been asked by Village officials to formally respond to your letter dated January 26, 2009 where you indicate the Union's belief that there may have been an inadvertent clerical omission of contract language (Overtime) in both the 2008-9 and 2006-7 Agreements.

In careful review of the matter, the Village has found no reference in the 2003-05 Agreement to paying premiums to employees for "overtime after working eight hours in one day" as you assert. We did however discover a similar provision providing time and one half (1 ½) being required for all "all hours worked outside the employee's regular scheduled hours" which was omitted in subsequent contracts.

It is the Village's firm belief that this item was intentionally omitted (or exchanged for) language which was first instituted in the 2006-7 Agreement and provides for similar (but at all identical (sic) pay premiums for employees called to work outside his/her regular work day.

You indicate a belief that the omission was a clerical error. We believe the only clerical error has been an ongoing application of the former language by payroll staff in current day operations.

While the Village believes it could immediately review its payroll records and obtain re-imburements for the erroneous overpayments, it has decided to not do so. Instead, it will immediately correct the practice going forward, and no further premiums will be provided for work outside the normal workday of for (sic) more than 8 hours in a single day unless it comports to other overtime premium provisions (after 40 hours, holiday, etc.).

Please be further advised that in our review we have decided that in the future when employees are called in to Work early for emergencies, unforeseen, or otherwise irregular events, they will be subject to early release (without pay -- of course). We believe that while the "normal" workday may be defined in the agreement, it does not encompass out-of-the-ordinary events which sometimes arise.

We are sorry for the delay in responding to your inquiry, and hope the above fully explains the position of the Village. If you have any further questions or concerns, please feel free to give me a call.

Sincerely,

/s/

Phil Salamone
Labor Consultant

Village Administrator of Public Works, Tim Vergara, responded to Spiegelhoff's letter on March 3, 2009, and advised the Union that it would "continue to conduct business without change to payment premiums" and that the "Missing Contract Language" would be "addressed at the next contract negotiation for the 2010-2011 contract."

Two days later, Salamone clarified the Village's position to Spiegelhoff:

Dear Mr. Spiegelhoff:

I have been asked by the Village to follow up on Tim Vergara's letter dated March 3, 2009 relating to the above referenced matter.

In my letter dated February 26, 2009, I indicated that the Village had reviewed overtime contract language and would begin reversing its practice of paying overtime premiums after employees worked 8 hours in a single day.

As Mr. Vergara's March 3 letter indicates, the Village has given more consideration to the matter and decided to continue premium payments until the matter can be addressed in this fall's negotiations.

The Village has decided to take this course of action in order to help promote better employer/employee relations. Please be advised however, that the Village fully considers its decision to continue the practice to be non-precedential. Essentially, we believe both sides should not be able to consider this decision as evidence of any sort of concurrence with regard to your allegation of "missing contract language", or mutuality of a 'past practice' in any grievance dispute.

Furthermore, when we address this matter in the upcoming negotiations, our decision to continue what we believe to be erroneous payments cannot be used as evidence by either side in any contract arbitration proceeding relating to this matter.

Please contact me if you have any comments or concerns with the above.

Sincerely,

/s/
Phil Salamone
Labor Consultant

Salamone then modified the Village's position on April 14, 2009 writing:

Dear Mr. Spiegelhoff:

I have been asked by Village officials to respond to the above referenced matters on their behalf. Enclosed please find copies of all materials originally requested at the end of January. Included are all relevant documents we possess relating to the negotiations leading to the completion of the 2006-7 Agreement. We do not believe there to be any further relevant documents, and apologize

for the delay in processing the request. Research, review, and my vacation resulted in more delay than should have been the case.

In your letter dated April 6, 2009, you indicate that the Union president “relied upon the assertion of Board member Paulson” in her agreement to remove from the draft of the 2006-7 Agreement certain language relating to premium pay for work performed outside the normal workday. Our review of the enclosed documents, as well as discussions with Ms. Paulson, have resulted in the Village believing the modifications were in fact, the result of full and complete “meeting of the minds” of all parties at the negotiation table.

Despite the inconsistency between the current practice and previous language modifications, the Village offered (March 5, 2009) to continue to play the premiums on a non-precedential basis. In your letter advancing the Zemke grievance (March 26, 2009), you advised that the Union had rejected that proposal. That being the case, the Village will heretofore discontinue the pay practice which is wholly incompatible with the agreed upon contract modification. (However, at this point the Village has made a preliminary decision to exercise its right to review past records to secure reimbursement of incidents where premiums were incorrectly paid.)

Your March 26, 2009 letter indicates that the Union wishes to advance the Zemke grievance to the Personnel Committee Step of the Grievance Procedure. In addition, since this will be a matter of discussion at that meeting, the Village hereby requests that the *Union* also forward in advance any/all documents that will be helpful in this inquiry. After receipt and review of these documents, the Village will schedule a meeting with the Personnel Committee.

Again, sorry for the delay on the information requests.

Sincerely,

/s/

Phil Salamone
Labor Consultant

Two Village correspondences followed. The first, drafted on May 27, 2009, informed the Union that:

...

The Village Board met in a Special Meeting on May 18, 2009 on Grievance #1 which originally alleged that the Village “inadvertently removed” (Per letter 1/26/09) contractual language in the 2006 contract and continued the error through another contract cycle. The Village continues to believe that the language was omitted as the result of a mutual meeting of the minds between Union and Village representatives as part of the 2006 agreement. It was this grievance which was presented and discussed at the meeting. The Village disputes the Union’s contention that the removal of the language was anything other than jointly agreed to and thus hereby denies any grievance(s) to the contrary.

...

The Village has decided to agree to continue the practice through this contract (or until a successor is reached) effectively sustaining any such grievance(s) relating to the discontinued practice. In addition, all impacted employees will thus be reimbursed for all overtime premiums accrued in such instances.

While we sincerely hope and expect this to address most issues, the Village continues to dispute the Union’s contention that the removal of the language was anything but mutually agreed to.

...

The second informed the Union that the Village would continue to pay overtime premiums as had been due to a clerical error but that the Village was “not acting upon any recognition of current contract language” because the language providing for the overtime benefit was deleted from the labor agreement two contract cycles ago.

ARGUMENTS OF THE PARTIES

Union

The Union maintains that the grievance is arbitrable and that the Village violated the collective bargaining agreement when it failed to include Article 23-Overtime, Section 3 from the 2003-2005 collective bargaining agreement into the successor and all other subsequent agreements.

This grievance is substantively arbitrable. The definition of a grievance in the parties' agreement is broad and the presumption of arbitrability has long been the standard applied by courts and arbitrators. The issue before the arbitrator relates to the effect and application of the overtime provision contained in Article 20 of the current labor agreement. Under the analysis of the Steelworkers trilogy, the Village must show that the contract explicitly excludes this subject from arbitration. STEELWORKERS V. ENTERPRISE WHEEL & CAR CO., 363 U.S. 593, 46, LRRM 2423 (1960). The Village cannot do this. Moreover, should the grievance be barred, the Village would gain an advantage to which they never bargained.

The parties' course of conduct subsequent to the removal of Article 23, Section 3 embeds the overtime provision in the 2006-2007 and all other successor agreements. The stipulation of the parties and the testimony of both Paulson and Ehster establish that the Village continued to pay overtime premium both before and after the normal working hours even after the language was removed. Since the course of conduct never changed after the language was removed, it is evident that the intent of the parties was to continue to abide by the removed language of Article 23, Section 3 thus embedding that language in the current agreement.

The Village will likely attempt to argue the arbitrator has no power in the collective bargaining agreement to reform the contract. The arbitrator is allowed to reform the written agreement if the one seeking reformation can substantiate that an oral agreement was reached and that the language of the contract is contrary to or does not accurately express the terms of the oral agreement. The Union points to the Wisconsin Supreme Court decision in FRANTL INDUSTRIES V. MAIER CONSTRUCTION, INC., 68 WIS.2S 590 (1975) in support of the proposition that reformation can occur when there are mutual mistakes or mistakes by one party fraudulently advanced by the other party.

The Village should not be able to gain an advantage through adverse reliance. The Village claims that the paying of overtime is a practice which is subject to repudiation. The Village desires for the arbitrator to issue an award ordering a forfeiture or it will claim the practice can now repudiated. Either way, the Village is attempting to capitalize based on the Union's reliance.

The Village went to great lengths to characterize the interaction between Ehster and Paulson as a "meeting of the minds." There was one issue which can be found to be a "meeting of the minds," that being the removal of the contract language calling for overtime both before and after normal work hours. At no time was there a "meeting of the minds" on the issue of no longer paying overtime both before and after the normal working hours. Had there been, why would the Village have continued to pay overtime as if the language had never been removed.

Village

The Village first challenges the arbitrability of the grievance. The contractual definition of a “grievance” as contained in Article 4 clearly sets forth the types of disputes that may be submitted to arbitration. This dispute does not comport with the definition since it does not allege any sort of breach or violation of the current labor agreement. Instead, this grievance seeks to modify the express terms of the current labor agreement.

The arbitrator does not have the authority to require alteration of mutually agreed upon contract language. The remedy the Union seeks, reformation of the collective bargaining agreement, is well beyond what the vast majority of arbitrators have traditionally been willing to do. This is a contract interpretation case, thus the arbitrator’s role is to interpret that contract. The Supreme Court’s decision in STEELWORKERS V. ENTERPRISE WHEEL & CAR CO., Id., is controlling and limits the arbitrator to construing the meaning of the express terms of the labor agreement

Moving to the merits, the grievance document is mistaken and inaccurate. The grievance asserts that language was “inadvertently removed from the contract” and that “the parties never agreed to remove” the language. Village brief p. 5. This is incorrect. The Village’s initial proposal sought the removal of Article 23, Section 3. The testimony of both Union President Deb Ehster and Personnel Committee Chair Irene Paulson confirmed that there was agreement between the two to delete the clause from the 2003-2005 labor agreement.

The parties’ collective bargaining agreement should not be reformed or rescinded through the grievance procedure. Reformation is appropriate when one side misconstrues the meaning of adopted language. Citing OCCIDENTAL CHEM. CO., 114 LA 1660 (BRUNNER, 2000), the Village asserts that the terms of an agreement “will not be subject to reformation merely because at the time of the signing of the agreement, one party did not understand the implications of the provision proposed by the other.” Village Br. p. 6. Both Ehster and Paulson erroneously understood the impact of deleting the language and therefore reformation and/or rescission may not occur.

After the Village discovered its clerical/administrative error, it could have enforced the express terms of Article 20. It did not do so. The Village maintains that the Union’s filing of the grievance was illogical because no employee has suffered a single instance of overtime premium loss.

The Village requests that the grievance be dismissed.

Union in Reply

The Union challenges the Village's framing of the issue in as much as it does not accurately encompass the nature and scope of the dispute. The Village goes to great lengths to try and convince the arbitrator that the nature of the dispute should be based solely on the wording of the grievance. The Union sought reformation of the contract when it first filed the grievance and learned of additional contract violations as the facts become clearer. The Village's attempt to hold the grievance hostage is inappropriate and the arbitrator should determine the nature of the dispute from the record evidence.

The Union is not seeking to gain something in arbitration which it should have addressed in bargaining. Rather, the Village is trying to take advantage of something they never lawfully gained in negotiations.

The Union recognizes that it is presenting the arbitrator with an unusual situation. The record establishes that the parties never intended to materially affect the condition of the labor agreement by the removal of Section 3 and they behaved as if nothing had changed. The payment of overtime for work performed both before and after the work day is embedded in the collective bargaining agreement and the Village should not be able to discontinue paying it. The Union seeks reformation of the contract.

DISCUSSION

I start with the procedural challenges presented by the Village. The Village presents two; first, that the issue presented does not conform to the definition of a grievance and second, that the arbitrator lacks the authority to award the remedy that the Union seeks. The Village's second challenge is not procedural and will be substantively addressed.

The Village challenges procedural arbitrability arguing that the issue herein relates not to any "effect, interpretation, application or claim of breach of violation" since the language in contention existed two contract cycles prior and therefore the grievance is not arbitrable. (Village reply brief p. 4. Underline in original.) The factual history in this case establishes that while it is true that the actual language in question was removed from the 2003-2005 successor labor agreement, the impact of that removal was identified by happenstance by the Union during the processing of a separate grievance. The Union's discovery in January 2009 and the Village's inability to definitively determine and announce the course of action it would create a question of "effect, interpretation or application" that falls squarely within the scope of the grievance definition. The grievance is arbitrable. I now move to the merits.

The parties' dispute arises out of the meaning of their labor agreement. Contract interpretation is the ascertainment of meaning. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 6TH ED. P. 430 (2006). Language is clear when it is susceptible to one convincing interpretation, but may be deemed ambiguous if there is more than one plausible interpretation. Id. at 434. If the plain meaning of the language is clear, it is unnecessary to resort to extrinsic evidence. Id.

The Union argues that the language in dispute, specifically Section 3 of the overtime provision, should never have been removed from the 2003-2005 collective bargaining agreement. The Union maintains that the parties never intended to materially affect the manner in which overtime was earned and paid for work performed before and after the work day as evidenced by both their testimony and the parties' behavior. Essentially, the Union is arguing mutual mistake.

As Arbitrator Jonathon Dworkin stated in NOBLE BOARD OF EDUCATION, 99 LA 438, (DWORKIN, 5/26/92)

Most often, the language of a collective bargaining agreement adequately spells out the intended meaning. But language is an imperfect tool. Sometimes it fails to communicate, or even obscures, the meeting of minds which forms the substantive reality of the agreement. In such instance, an arbitrator is empowered to implement contractual substance; s/he is not constrained by language which is contradictory of true bargaining intent. But these comments should not be misinterpreted. It is only in an extraordinary case that an arbitrator can elevate contractual intent over inconsistent contractual language. The language of a governing agreement is entitled to the strongest presumption of mutuality; a presumption which cannot be refuted except by the clearest, most convincing evidence.

Mutual mistake which may invalidate a contract or a portion of a contract refers generally to "a misimpression shared by the parties about a fact, condition or legal principal central to the contract, and which induced the parties (or one of them) to enter into the contract." CONTINENTAL MARITIME OF SAN FRANCISCO, 91 LA 1115, 1117 (KOVEN, 12/19/88). The party seeking to revise a contract has the burden of proving the express language of the labor agreement is not binding due to mistake. Id. That burden is an "extremely high one." Id. Arbitrators should be loathe to alter or amend a written agreement especially when "experienced and sophisticated contract negotiators" were involved. VOCA CORP. 99 LA 345, 348 (MODJESKA, 1/1/92).

The parties entered into negotiations for the 2003-2005 successor agreement sometime in 2005. It appears that their relationship was amicable and the bargaining process was very informal. Neither side had representation and both sides vested a high degree of independent authority in their lead negotiators; Debra Ehster for the Union and Arlene Paulson for the Village. Ultimately, the section addressing overtime for work performed before and after the work day was removed from the labor agreement, although the Village continued to pay employees as if the language was not removed. It was not until the Union discovered the removal of the language that the Village even became aware that the removal of then Section 3 impacted on how overtime was to be calculated.

I concur with the Village that “both (Paulson and Ehster) testified independently that they then mutually and intentionally agreed to delete the overtime language”. (Village reply brief p. 6.) But, the evidence further establishes that both testified that they understood and expected that the removal of the language would not result in any change to the way that employees earned overtime. Paulson’s notes, which she gave to Ehster, state that, “[w]e had agreed Sec. 3 was a repetition since Sec. 1 says basically the same thing.” This was reinforced by her explanation at hearing that the Village proposed the elimination of Section 3 because it was “repetitious of section 1” and that the two sections meant the same thing.

Ehster testified that she and Paulson were performing housekeeping tasks – addressing clerical errors, renumbering, fixing misspellings, and removing antiquated language. Ehster explained that, “they all discussed section three. It was redundant language...we always got paid for working outside the normal hours...,” and that at the time they (she and Paulson) believed section 1 and section 3 were one in the same. Paulson characterized section 3 as “repetitious” while Ehster characterized it as “redundant”. These are words that share meaning and establish that both Paulson and Ehster understood/believed that the language of Section 3 was duplicative and its removal was not intended to change any overtime practices.

The evidence in this case is justly compelling to establish that a mutual mistake as to the intended meaning of the removal of Article 23, then Section 3 occurred. The matching testimony from Ehster and Paulson describing the “redundancy” of the language, the continuation of payment as if the language had not been removed, and the lack of collective bargaining experience by the two representatives is persuasive and supports a finding that both sides did not intend for there to be any change or reduction in overtime payment to employees. Having determined that the parties did not intend for the removal of Section 3 to negate employee overtime payment for work performed outside the work day, I find that the grievance is meritorious.

The Village refers the Arbitrator to OCCIDENTAL CHEM. CO., Id., wherein the parties were negotiating a new health insurance plan. After the company increased the premiums, the Union challenged the increases claiming that the language was

misinterpreted by the company and that increases were not bargained. The arbitrator found that not only did the new language include a specific clause for “all future changes”, but the parties discussed the possibility of the premiums increasing during bargaining. This case is distinguishable to the pending case in that neither the Village nor the Union understood the implications of removing the language of Section 3 and at no time did the Village implement the change. Further, at no time did the Village inform the Union that employees would no longer receive overtime for work performed before and after the work day. Instead, both the Village and the Union bargaining representatives believed there would be no change to overtime if Section 3 was removed; a mutual mistake.

The Village argued that the Arbitrator should read an adverse inference from the Union’s failure to turn over bargaining notes as requested by the Village.¹ In this instance where both the Union and Village lead negotiators identically testified as to their recollection and understanding of events, it is unnecessary to draw such an inference.

The Union asserts that the Village’s lead negotiator “misled” the Union. There is no evidence to support this conclusion. The evidence establishes that both sides failed to fully consider the implications of their actions and that both sides similarly misunderstood the consequence of removing the overtime section relating to work performed before and after the work day.

AWARD

1. Yes, the grievance arbitrable.
2. Yes, there a mutual mistake with regard to the elimination of Article 23-Section 3 from the 2003-2005 collective bargaining agreement.
3. The appropriate remedy is to reform the current collective bargaining agreement to include the language of Article 23, Section 3 from the 2003-2005 collective bargaining agreement.

Dated in Rhinelander, Wisconsin, this 15th day of March, 2010.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

¹ Certain sections of the Villages’ briefs have been stricken because they offer new evidence which was not presented at hearing. Specific locations include reply briefs, p. 7-9 regarding settlement discussions.