BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF COLFAX

and

**COLFAX EMPLOYEES ASSOCIATION,
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

Case 2
No. 69983
MA-14826

Appearances:

Ryan J. Steffes, Attorney at Law, Weld, Riley, Prenn, & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Village of Colfax.

Andrew D. Schauer, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of Colfax Employees Association, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division.

ARBITRATION AWARD

Village of Colfax (Village) and Colfax Employees Association, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (Association) are parties to a collective bargaining agreement covering contract years 2010-2011 (2010 Contract). The 2010 Contract provides for final and binding arbitration of grievances arising under the Contract. On July 2, 2010, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) regarding the method by which the Village began calculating overtime in February 2010. The Association further requested a panel of five WERC staff members and commissioners from which the Parties could select an arbitrator. The undersigned was selected from the panel.

Hearing was held on February 11, 2011 in Colfax, Wisconsin. The hearing was transcribed by a court reporter with the stipulation that the transcript, along with admitted exhibits, constitute the official record of the proceeding. The Parties further stipulated that

there are no issues of arbitrability or timeliness related to the grievance and that the undersigned should retain jurisdiction over any remedy issued. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on April 8, 2011, thereby closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

ISSUE

At the hearing, the Parties stipulated to the following formulation of the issue:

> Did the Employer violate Section 10.02 of the collective bargaining agreement and any long-standing past practice defining that section with regard to the calculation of overtime in February 2010 and thereafter? If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISION

ARTICLE 10 – HOURS OF WORK WEEK, HOURS AND OVERTIME

. . .

> Section 10.02: Overtime: All employees who work in excess of forty (40) hours per week shall receive one and one-half (1 1/2) times the straight hourly rate for all such overtime hours worked.

. . .

BACKGROUND

The Association has represented a unit of Village employees since 2003 and has negotiated four collective bargaining agreements on their behalf – one covering contract years 2003-2005 (2003 Contract), one covering contract years 2006-2008 (2006 Contract), one covering contract year 2009 (2009 Contract), and the current agreement covering contract years 2010-2011 (2010 Contract). The first sentence of Section 10.02 in the 2003 Contract and 2006 Contract read as follows:

> All employees who work in excess of their regular scheduled work day or work in excess of their regular work week shall receive one and one-half (1 ½) times the straight hourly rate for all overtime hours worked.

It is undisputed that employees' overtime eligibility was calculated based on hours paid, including benefit hours such as sick leave or vacation. The Association's local representative and a Village trustee who were present at the negotiations for the 2003 Contract testified that the topic was discussed during a joint session of the parties and it was understood that this language meant that benefit hours would count towards work hours for purposes of overtime calculation under Section 10.02 (2003 Understanding). The 2003 Understanding governed overtime calculations until, beginning in February 2010, the Village started calculating overtime based on the number of actual hours worked.

Going into bargaining for the 2009 Contract, the Village decided that changing the method of calculating overtime would be a primary goal and sought legal counsel to represent it in negotiations with the Association. In an October 13, 2008 e-mail to Attorney Steve Weld seeking his firm's representation, Village President Jean Olson described the overtime issue as follows:

> …Also included in the [2006] contract was a provision that entitles an employee to comp time after eight hours of work on any given day, whether the week's total hours worked reached 40 hours or not. That provision has caused a fair amount of heartburn for the Board.

On October 14, 2008, prior to the Village retaining legal representation, the Parties exchanged initial bargaining proposals. In its proposals, the Village's personnel committee outlined a number of changes that the Village was seeking to incorporate into what would become the 2009 Contract. The first item listed was a proposal to change the first sentence of Section 10.02 to read as follows:

> All employees who *physically* work in excess of their regular work week of 40 hours shall receive one and one-half (1-1/2) times the straight hourly rate for all overtime hours worked. (Emphasis added).

The Parties did not discuss their proposals on October 14, 2008, but with the addition of the word "physically," the Association understood the Village's proposal to change the 2003 Understanding in a way that would exclude benefit hours from overtime calculations.

After retaining and conferring with legal counsel, the Village modified this proposal to, as is relevant here, remove the word "physically." Andrea Voelker (Voelker), the Village's attorney during the negotiations, explained at hearing that she advised removing the word because in her view it added nothing to the meaning of the existing language:

> …I eliminated the word physically in front of the word work because in my opinion, physically adds nothing to the verb work. You either work it or you don't work it. … [T]he more typical way that you differentiate how you calculate overtime is work versus paid - - work versus hours paid. And physically worked versus not physically worked, that didn't seem like it was needed or needed a distinction of any kind.

The modified proposal was presented to the Association at a December 8, 2008 bargaining session. The Association noted that the word "physically" had been removed from the proposal and interpreted the change to mean that the Village was no longer proposing to change overtime calculations to exclude benefit hours. The Association's bargaining representative, Al Bitz (Bitz), brought the topic up during a joint bargaining session and recalled Voelker stating that "the only changes they [the Village] were proposing in this section were in their offer." The end result of this conversation left Bitz with the belief "that the current status quo of benefit hours being counted towards hours worked for purposes of overtime calculation continued to be in effect."

Voelker testified to a different recollection of the discussion related to the modified proposal on December 8, 2008. She acknowledges making the comment that the only intended changes were reflected in the offer, however, she also recalled that she "specifically said we considered the worked time to be worked, not paid. That it wasn't - - and if there was any practice contrary to that, then we would be applying the language as it exists, which is who worked in excess as compared again to paid" and that "[w]e said it's our intent to comply with the language as written, which was work as compared to pay."

Village President Jean Olson was present during the discussion and testified that the Board's intentions regarding changing the way overtime was calculated were "represented correctly" by Voelker. She testified that those intentions were "to change the system for calculating overtime to hours worked in excess of 40 hours in a week rather than eight hours in a day."

Following the conversation, the Association went into caucus and there was no further discussion of the issue. The language as proposed by the Village was subsequently incorporated into the 2009 Contract and remains the same in the 2010 Contract and reads as follows:

> All employees who work in excess of forty (40) hours per week shall receive one and one-half (1 1/2) times the straight hourly rate for all such overtime hours worked.

Following ratification of the 2009 Contract, the Village clerk that handled payroll calculations and was a signatory to the 2009 Contract continued to approve overtime calculations in accordance with the 2003 Understanding. These calculations continued until February 2010 when a Village trustee audited timesheets and discovered the calculations. The Village instructed the clerk to calculate overtime on a weekly basis without taking into account benefit hours. The Village further issued a memorandum defining "hours worked" as those hours "physically worked." Grievant Mike Boyd's timesheet for the week of February 14, 2010 was then recalculated so that he did not receive overtime when under the 2003 Understanding he would have received overtime. This action forms the basis of the instant grievance.

DISCUSSION

I conclude that the Village violated the Contract when it stopped including benefit hours in overtime calculations beginning in February 2010. The record evidence convinces me that 1) the Parties reached an understanding in 2003 that the "hours worked" language in Section 10.02 included benefit hours for the purpose of determining overtime eligibility, 2) the Parties consistently applied the 2003 Understanding of that language from 2003 until February 2010, 3) the Village's actions when bargaining the 2009 Contract were insufficient to put the Association on notice of the full extent of the Village's intended changes to Section 10.02, and 4) the amended Section 10.02 language, incorporated into the 2009 Contract, does not alter the contractual language related to the 2003 Understanding. Therefore, the Village's action in ceasing to count benefit hours towards overtime eligibility violates the Contract.

The Village first argues that the language of Section 10.02 of the Contract is clear and unambiguous and can only be interpreted as including hours actually worked as counting towards overtime eligibility. In the context of this record, I find that the opposite is true. Entering into bargaining for the 2009 Contract, it was clear and unambiguous to the Parties that the "hours worked" language included benefit hours when determining overtime eligibility. A village trustee and the local representative for the Union testified that the Parties discussed the meaning of this language in 2003 and reached the 2003 Understanding that benefit hours would count toward overtime eligibility.[1] The Village then consistently applied the 2003 Understanding when calculating overtime until February 2010.

It is because of the 2003 Understanding that I conclude that the Parties must reach a "meeting of the minds" regarding changes to the understood meaning of "hours worked." In this case, I find that there was no meeting of the minds regarding the change in the meaning of "hours worked" in the 2009 Contract. The "hours worked" contractual language remained unchanged and the record evidence convinces me that Village took insufficient steps to communicate the changes it was seeking in the meaning of the contractual term and the Association did not understand the extent of the change to overtime calculations that the Village was proposing.

The Village argues that the Association was aware during bargaining leading up to the 2009 Contract that the Village was proposing to change the understood meaning of "hours worked" to exclude benefit hours. The first action that the Village believes put the Association on notice of the intended change was the Village's proposal of October 14, 2008 to add the word "physically" to Section 10.02. Although the Parties did not discuss this proposal, the Association understood that if they agreed to this proposal, benefit hours would no longer

[1] The fact that the Parties reached an understanding as to the meaning of "hours worked" distinguishes this case from the situation in NICOLET HIGH SCHOOL DISTRICT, MA-10243 (GRATZ, 1999) where the union sought to enforce the employer's unilateral practice of including benefit hours in overtime calculations contrary to language that the arbitrator in that case found clear and unambiguous. Here, benefit hours were included in overtime calculations pursuant to the Parties' understood meaning of "hours worked."

count towards overtime. However, again without discussions with the Association, the Village amended its proposal on December 8, 2008 to remove the word "physically" from its proposal, leaving the relevant "hours worked" language unchanged. I find it credible that the Association would interpret these actions to mean that the Village had withdrawn its proposal to change the understood meaning of "hours worked." I conclude therefore that these actions were not sufficient to put the Association on notice that the Village intended to alter the understood contractual meaning of "hours worked."

The Village also argues that a conversation held during a joint bargaining session on December 8, 2008 between Voelker and Bitz made clear the full extent of the Village's proposal regarding "hours worked." During that conversation, Bitz inquired as to the meaning of the new Section 10.02 language on overtime calculations in light of the changes made in the Village's proposals. The record is unclear exactly how that inquiry was answered. Bitz recollection was that Voelker's response was simply that the only changes the Village was proposing were in its December 8, 2010 proposal. He interpreted this to mean that the proposal to change the agreement regarding benefit hours was withdrawn because the Village's updated proposal did not change any "hours worked" language. Voelker testified that she specifically responded that the Village intended to change overtime calculations to include only those hours worked, as opposed to including benefit hours. Village President Jean Olson testified that she could not recall the specific content of Voelker's response but that in her view it accurately represented the position of the Village.

The bargaining notes made by Bitz during the December 8, 2008 session do not help resolve the issue. Topic number 1 was identified by Bitz as "Physically worked – sick time out" with the relevant notation for the Village response being "hours worked." The note is consistent with both versions of the conversation. The "hours worked" language remained the same in the Village's proposal as in the previous contract, so when Voelker made the comment that the only intended changes were reflected in the offer, his "hours worked" note only indicates that Bitz understood that the language was not changing to include the word "physically." However, these notes do not establish the nature of any additional statements that Voelker might have made on the issue.

I am not able to make a definitive conclusion as to the extent of the December 8, 2008 conversation based on this record. However, even if Voelker's comments were exactly as she described, I do not find they were sufficient to put the Association on notice that the Village's proposal amended, in a significant way, the previous understanding of "hours worked". One brief conversation is not enough to change the Parties' longstanding understanding regarding the meaning of a significant contractual term, particularly where there was no proposal to change the language of the contractual term. Further, there is no evidence of any further discussions on the issue. Nor is there evidence that indicates that the Association attempted to obtain a corresponding benefit in exchange for the change in overtime compensation. It seems unlikely that the Association would have relinquished a significant economic benefit with little discussion and without seeking a benefit in another area.

The Village also argues that it intended the changed language to result in substantive savings in overtime, but that if given the Association's interpretation, there are only two situations where the Village might obtain a benefit from the language changes in Section 10.02: 1) when employment terminates midweek and 2) when an employee exhausts their benefit leave banks. The Village concludes that because these two situations only rarely occur the language changes are essentially meaningless. I am not convinced that just because a change in contractual language does not result in the significant or constant benefit that the Party seeking the change expects, that it follows that the change is essentially meaningless. Further, there have been two employee terminations since August 2007 (a significant number given the small unit) and, as the Village's long-term employees retire or otherwise leave employment, new employees will presumably be hired who will have less accumulated benefit leave banks available.

I also note that the change to Section 10.02 that was incorporated into the 2009 Contract is consistent with the Village President's communication to Steve Weld regarding the Board's concerns going into bargaining for the 2009 Contract. Under the new language, employees are no longer entitled to receive "comp time after eight hours of work on any given day, whether the week's total hours worked reached 40 hours or not."

CONCLUSION

For the foregoing reasons, I conclude that the Village violated the Contract when it stopped including benefit hours when calculating overtime. The grievance is sustained and, as remedy, the affected employees shall be made whole. Per the Parties' stipulation, I will retain jurisdiction over this remedy for 60 days.

Dated at Madison, Wisconsin, this 27th day of June, 2011.

Matthew Greer /s/
Matthew Greer, Arbitrator

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