

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

LOCAL 70, AFSCME, AFL-CIO

Case 277

No. 68718

MA-14325

(Employee J.Z. Termination)

Appearances:

Ms. Lorette M. Mitchell, Senior Assistant Corporation Counsel, Kenosha County, 912 – 56th Street, Kenosha, Wisconsin 53140, appeared on behalf of the County

Mr. Nick Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8450 82nd Street, #308, Pleasant Prairie, Wisconsin 53158, appeared on behalf of the Union

SUPPLEMENTAL ARBITRATION AWARD

On March 3, 2009 Local 70, AFSCME, AFL-CIO and Kenosha County filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on June 25, and July 17, 2009 in Kenosha, Wisconsin. No formal record of the proceedings was taken. Briefs and reply briefs were filed and exchanged by October 5, 2009.

I issued an Award on November 23, 2009 sustaining the grievance, and reinstating the grievant with backpay. I also retained jurisdiction for a period of 60 days to resolve any dispute as to backpay. By agreement of the parties jurisdiction was extended for an additional 30 days, to February 21, 2010 and then terminated. The parties had a dispute over backpay, which they could not resolve.

On November 22, 2010 the Union filed a prohibited practice ¹, which alleged that the County had not implemented the arbitration award. The parties subsequently agreed to submit

¹ KENOSHA COUNTY, Case 295, No. 70355, MP-4635

their backpay dispute to me for final and binding resolution. On January 24, 2012 they stipulated that I have jurisdiction to hear the matter and that the complaint case referenced above should be dismissed, with prejudice.

Submissions and argument as to the backpay were provided by January 24, 2012.

DISCUSSION

Upon receipt of the Arbitration Award, the Kenosha County Highway Department calculated the grievant's backpay to be \$56,001.88. The department calculation took the period where the grievant was off work and applied the then current rate(s) of pay. The department projected the overtime earnings of the grievant for the missed time period by averaging the overtime hours of Highway Department employees, and assigning the average of those overtime hours to the grievant.

The County determined the calculation to be high. It was the view of the County that the grievant rarely worked a full year. The County believed that the grievant historically took time off to work on his farm. The County also believed that the overtime calculation was unrealistically high. Rather than accept the Highway Department calculation, the County looked back at the preceding three years. In those years the grievant was paid:

<u>Year</u>	<u>Earnings</u>
2006	\$51,751.60
2007	\$57,239.11
2008	\$48,861.91

The County averaged the three years and came to an average earnings of \$52,617.54. On, or about February 5, 2010 the County paid the grievant \$52,617.54. The Union believes the departmental calculation to be the better projection of income.

I believe the departmental calculation to be the best projection of the lost wages of the grievant. The departmental calculation used the wage rates in effect (which ranged from \$25.12 – 25.88/hour) during the time the grievant was off work. The grievant's overtime was calculated by applying the departmental average. It is not possible to know exactly how many overtime hours the grievant would have worked. The department average seems to be a reasonable projection. There is nothing in the record to suggest that the grievant historically worked a particularly high or low number of overtime hours relative to his co-workers.

The County would discount the departmental calculation. It was the view of the County that the grievant did not typically work a full year. That is not supported by the record. The County's calculation of straight time pay includes 2,074 hours for 2006, 2076 hours for 2007, and 2026 hours for 2008. There is little to no lost time for 2006 or 2007, if the numbers are measured against the traditional 2080 hour standard for a full time job. The record indicates

that the grievant missed approximately 4 months of work in 2008 due to surgery. During a significant portion of the missed work time, the grievant was paid at 2/3 of his normal rate of pay. Nothing in the record suggests that the grievant missed this much work in the past. I regard the year 2008 as an anomaly in this regard.

The County does not claim that there was a failure to mitigate damages on the part of the grievant. Neither party claims that there should be earnings offsets to the backpay ordered.

A portion of this dispute centers on the overtime projections of the Highway Department calculation. As noted above, we cannot know how much overtime the grievant would have worked. I regard the department average as reasonable. The grievant worked 72.5 hours of overtime in 2006 and earned \$2,688.74. In 2007 he worked 163 hours of overtime and earned \$6509.95. In 2008, his injury shortened year, he worked 105.5 hours of overtime and earned 4,250.49. Over the three years he averaged 113.67 hours of overtime and \$4,483 overtime earnings per year. The Highway Department calculation projected 123.78 hours of overtime and \$4,342.17. That calculation does not appear to be out of line.

I believe the County's look back approach is flawed. 2008 was a year in which the grievant missed a good deal of work due to surgery. During a considerable portion of this time he was paid \$16.58/hour. That is approximately \$9/hour below the applicable 2009 pay rate. By factoring that into the three year average, the County has artificially depressed the calculation. Similarly, the very act of looking back bases the calculation of backpay on rates of pay well below those in effect in 2009, the backpay year.

The pay rates in effect for the years that form the County's 3 year base are:

1/1/06	\$23.55
7/1/06	\$23.79
1/1/07	\$24.27
4/1/07	\$24.51
1/1/08	\$25.12

These numbers average well over \$1/hour below the 2009 rates of pay, and account for a great deal of the disputed monies in this proceeding. The Arbitration Award directed the County to make the grievant whole. This make whole is based on what the grievant would have earned had he not been terminated. He would have earned at the 2009 rates of pay.

SUPPLEMENTAL AWARD

I direct the County to pay the grievant \$3,384.34. This is my calculation as to the difference between what the Highway Department calculated and what the County paid.

Dated at Madison, Wisconsin, this 24th day of February, 2012.

William C. Houlihan /s/

William C. Houlihan, Arbitrator