BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

WINNEBAGO COUNTY DEPUTIES' ASSOCIATION

Case 440
No. 71193
MA-15102

(Daniels/Borowitz OT Grievance)

Appearances:

John A. Bodnar, Corporation Counsel for Winnebago County, 448 Algoma Boulevard, Oshkosh, Wisconsin 54903-2808, appearing on behalf of Winnebago County.

Benjamin M. Barth, Labor Consultant, Labor Association of Wisconsin, N116 W16033 Main Street, Germantown, Wisconsin 53022 appearing on behalf of Winnebago County Deputies' Association.

ARBITRATION AWARD

Winnebago County (County) and Winnebago County Deputies' Association (Association) are parties to a collective bargaining agreement (Contract) providing for final and binding arbitration of grievances arising under the Contract. On October 25, 2011, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) requesting a panel of five Commission staff members and commissioners from which the parties could select an arbitrator. The undersigned was selected. Hearing was held on the grievance on May 8, 2012 in Oshkosh, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing written arguments in support of their positions, the last of which was received on June 11, 2012, closing the record in the matter.

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

ISSUES

At the hearing, the parties were unable to agree on a statement of the issues to be decided and stipulated that I may frame the issues in the award.

In its brief, the Association proposes the issues as:

> Did the Employer violate the terms and conditions of the collective bargaining agreement when it failed to compensate the grievant at the rate of time and one-half for working in excess of his regularly scheduled workday?
>
> If so, what is the correct remedy?

In its brief, the County proposes the issues as:

> Did Winnebago County violate the collective bargaining agreement when it compensated Grievant Daniels in the matter in which it did regarding his workday on August 4, 2011; and
>
> Did Winnebago County violate the collective bargaining agreement when it compensated Grievant Borowitz in the matter in which it did regarding her workday on August 3, 2011?
>
> If so, what is the appropriate remedy?

I frame the issues as follows:

> Did the County violate the Contract by not paying overtime for all hours worked outside the timeframe of Grievant's regularly scheduled workday?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7
WORK WEEK

The regular workweek for all employees shall consist of an average of 38.2 hours.

. . .

All other employees of the Department shall work a schedule consisting of six (6) consecutive duty days of eight (8) hours and ten (10) minutes each followed by three (3) consecutive days off.

ARTICLE 8
EXTRA TIME

Time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half. To the extent permissible by law, time worked in excess of the regularly scheduled workday or workweek involving in-service training, schooling, departmental and shift meetings shall be paid at the rate of straight time, or time off at the same rate at the employee's option, however, no accumulation of compensatory time shall be carried over from one year to the next. Paid vacation, paid holidays, paid compensatory time off shall be considered as hours worked for purposes of computing overtime.

Overtime rate shall be computed on base pay, plus school credits. Overtime shall be paid in quarter-hour increments with the last increment worked rounded to the nearest quarter hour.

BACKGROUND

The relevant background facts are largely undisputed.[1] On August 4, 2011 Grievant was scheduled to work his normal shift from 6:00 AM through 2:10 PM. In addition to his normal shift hours on that day, Grievant signed up for and was approved to work four extra hours from 2:00 AM through 6:00 AM.

On August 4, 2011, Grievant worked the extra hours, from 2:00 AM through 6:00 AM, and then worked the first six hours of his regular shift, from 6:00 AM through 12:00 Noon, before going home and taking sick leave for the last two hours and ten minutes of his shift. The County subsequently paid Grievant eight hours at his straight hourly rate of pay for the hours worked from 2:00 AM through 10:00 AM, two hours at Grievant's overtime rate of pay for the hours worked from 10:00 AM through 12:00 Noon, and two hours at Grievant's straight hourly rate of pay which was deducted from his sick leave bank.

The Association filed a grievance contending that Grievant should have been paid four hours at his overtime rate of pay for all of the extra shift he worked from 2:00 AM through 6:00 AM, four hours at his straight hourly rate of pay for the hours he worked during his regular shift and two hours at his straight hourly rate of pay to be deducted from his sick leave

[1] Although the parties stipulated that this award will control the outcome of a grievance involving another employee named Borowitz, the facts produced at hearing were specific to Daniels. Only those facts will be presented here.

bank. The County denied the grievance at the earlier steps of the grievance procedure, resulting in these proceedings.

DISCUSSION

The issue of whether Grievant is entitled to two or four hours of overtime pay for the extra shift he worked on August 4, 2011 turns on the interpretation of the first sentence of the first paragraph of Article 8:

> Time worked by employees in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half.

The Association argues that this language is clear and unambiguous in support of its position that Grievant is entitled to overtime for all four hours of the extra shift on October 4, 2011. However, I find that the phrase "regularly scheduled workday" in the first sentence of the paragraph is ambiguous in that it could be interpreted in at least two different ways. First, there is the interpretation put forth by the Association that the language requires overtime pay for any "excess" hours worked outside the timeframe of Grievant's regularly scheduled workday, i.e., 6 AM – 2:10 PM. A second interpretation, consistent with the County's position, would provide overtime pay to Grievant if he worked time in "excess" of the number of hours in his "regularly scheduled workday," i.e., more than 8 hours and 10 minutes. In my view, looking solely at the first sentence of Article 8, either of these interpretations is plausible. However, looking at the Contract as a whole, I conclude that the second interpretation is more persuasive.

There is little guidance in Article 8 to help me interpret what the parties meant by "regularly scheduled workday." I therefore turn to other provisions of the Contract for guidance. Both Parties cite Article 7 as being relevant to this Grievance. It provides that a "regular workweek" consists of an average of 38.2 hours. And, as is relevant to Grievant, Article 7 further provides that employees "shall work a schedule consisting of six (6) consecutive duty days of eight (8) hours and ten (10) minutes each.…"

It is notable that the Contract establishes the workweek and day in terms of a quantity of hours and without reference, even in general terms, to a timeframe. I find this omission persuasive in concluding that, within the meaning of the Contract, a "regularly scheduled workday" consists of a number of hours and not a timeframe. Therefore, Grievant would be entitled to four hours of overtime only if his "time worked" on August 4, 2011 was four hours in excess of his regularly scheduled workday of eight hours and ten minutes.

The last sentence of the first paragraph of Article 8 provides that "time worked" is not limited to time spent actually performing work duties:

> …. Paid vacation, paid holidays, paid compensatory time off shall be considered as hours worked for purposes of computing overtime.

This sentence specifically lists the types of leave that count towards the overtime calculation. However, the list does not include sick time as one of those leave types. Applying *expressio unius est exclusio alterius*, a tool of contractual interpretation meaning that to include specific items in a list indicates the exclusion of other specific items not included on the list, I conclude that the Parties did not intend to include sick time in overtime calculations because they did not include it in the list of leave categories that count as towards overtime. Therefore, I must also conclude that Grievant's "time worked in excess of his regularly scheduled workday" on August 4, 2011 was two hours. That is the amount of overtime he is entitled to receive for that day.

CONCLUSION

For the foregoing reasons, the Grievance is denied.

Dated this 25th day of October, 2012.

Matthew Greer /s/
Matthew Greer, Arbitrator

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