

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MADISON AREA TECHNICAL COLLEGE PSRP
UNION, LOCAL 3872, WFT/AFT, AFL-CIO

and

MADISON AREA TECHNICAL COLLEGE

Case 85
No. 52560
MA-9022

Appearances:

Mr. Steve Kowalsky, Staff Representative, Wisconsin Federation of Teachers, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon Anderson, appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and College or Employer, respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on August 1, 1995, in Madison, Wisconsin. The hearing was not transcribed. Afterwards the parties filed briefs whereupon the record was closed on September 1, 1995. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the statement of the issue. The Union proposed the following issue:

Did the College violate Article VI, Section C, 2 when it denied salary payment for scheduled hours of work to the four employees in question when school closed due to a weather emergency on January 19, 1995?

If so, what is the appropriate remedy?

The Employer proposed the following issue:

Did the College violate Article VI, Section C, 2 when it denied payment of overtime to the four employees in question when school closed due to a weather emergency on January 19, 1995?

If so, what is the appropriate remedy?

The parties requested that the arbitrator frame the issue in the award. The arbitrator hereby adopts the Employer's suggested framing of the issue as his own.

PERTINENT CONTRACT PROVISIONS

The parties' 1993-95 collective bargaining agreement contained the following pertinent provisions:

ARTICLE VI WORKING CONDITIONS

. . .

Section C-Weather Conditions

1. Employees shall not have their salary penalized for being absent because of inclement weather provided they make up the time, or wish to have it charged against their vacation or sick leave.
2. In the event of circumstances beyond its control (such as: a fuel shortage caused by an energy crisis, superior governmental mandate, a disaster caused by civil disturbances, fire or explosion, or acts of God), the Board shall have the right to close the school or reduce hours for a period of time. The Union and Board agree that any such closing or reduction in hours will not penalize any employee's salary.

. . .

Section E-Overtime

1. Overtime is defined as assigned work performed in excess of the employee's normal work schedule. The supervisor will offer overtime assignments as equally as possible to all employees under his/her supervision. A record of overtime performed by each employee shall be maintained, on an annual basis, by each supervisor.

2. An employee who works scheduled overtime shall be paid at the rate of 1 1/2 times the employee's regular hourly rate. An employee who works unscheduled overtime shall be paid at the rate of two (2) times the employee's regular hourly rate. Unscheduled overtime is defined as not receiving notice of the necessity for overtime during the preceding working day.

...

APPENDIX G

PSRP SALARY SCHEDULES

(Schedules omitted)

FACTS

The bookstore at the Employer's Truax Campus is very busy at the start of each school semester as students purchase books and supplies for their classes. In order to accommodate this additional activity, bookstore employees work extended hours in addition to their regular hours. Their regular hours are 7:45 a.m. to 4:00 p.m. During the first couple of weeks of each semester, bookstore employees work till about 9:00 p.m. The pay status for hours beyond 4:00 p.m. is overtime.

Four bargaining unit employees at the Truax Campus (Stephanie Dean, Patricia Prihoda, Patty Keena-Brigson and Scott Heiman) were scheduled in advance to work overtime the evening of January 19, 1995, because that date was during the first week of the second semester. All four employees were scheduled to work till about 9:00 p.m. However, a snowstorm interrupted their scheduled overtime. The school closed at 4:30 p.m. that day due to a snowstorm and all employees then working were sent home. As a result of the school's closing, the four above-noted employees did not work all their scheduled overtime that night. The four employees were paid for their regular shift and for any overtime hours they actually worked, but they were not paid for overtime

hours not worked. The employees grieved same and their grievance was processed to arbitration.

The record indicates that grievant Keena-Brigson has been sick on days where she was scheduled to work overtime. When that happened, she was paid only for the 7 3/4 hours of regular time missed (i.e. her regular shift); she did not receive additional sick leave compensation for the overtime hours that she missed.

The record further indicates that on November 22, 1994, the main building at the Employer's Truax Campus was closed due to a bomb threat between 3:30 and 5:30 p.m. Although the main building at Truax was closed, the school itself was not closed and the Administration Building and other Madison locations (i.e. the Commercial Avenue building and the downtown building) remained open. Employees at the main building did not work while the building was being searched. Employees were told to check with their supervisors and return to work after the danger from the bomb threat had passed. Employees did as directed and returned to work after the all-clear was given. Employees were paid for the time not worked while the building was being searched. Grievant Keena-Brigson was one of the employees who returned to work after the building was searched. She was paid for the two hours missed. Specifically, she was paid 1/2 hour at her regular rate of pay and 1 1/2 hours of pay at time and one half (i.e. overtime).

POSITIONS OF THE PARTIES

The Union contends the Employer violated Article VI, Section C, 2 when it denied salary payment for scheduled hours of work for the four employees in question when school closed on January 19, 1995, due to a weather emergency. As background, the Union notes that the employees in question were previously scheduled to work overtime that night because it was the first week of classes for the second semester and the bookstore (where they worked) was very busy. The Union asserts that since the overtime was scheduled well in advance, the employees' extended hours were part of their regular work schedule for that particular day. Additionally, the Union notes that the employees expected to work till 9:00 p.m. that night and made arrangements to work those hours for the Employer. It is the Union's position that while the employees were precluded from working the scheduled overtime because the District closed at 4:30 p.m. due to the weather, the employees should nevertheless have been paid for the hours they were scheduled and expected to work. In the Union's view, it was callous of the District to expect employees to work overtime but not to pay them for those very same hours. The Union's contractual argument is that the employees in question had their salary penalized (i.e. reduced) in contravention of Article VI, C, 2. The premise for this contention is that the employees' salary for the day in question included their scheduled overtime, not just their regular hours. The Union argues that the Employer's reliance on the biweekly pay rates contained in Appendix G is misguided because those rates are not fixed, but rather only reflect what an employee would earn in a two-week period if the employee worked full time. The Union responds to the Employer's argument that employees have to work (or perform services) for an hour to get paid for it by contending that contract clauses can mitigate

this requirement. According to the Union, the weather conditions clause (Article VI, C, 2) mitigates that requirement here. Thus, the Union argues that an employe does not have to actually perform services to get paid. The Union believes that the pay status an employe might be in (such as regular time or overtime) is irrelevant. As further support for its position here, the Union cites the fact that several weeks before the instant situation arose, grievant Keena-Brigson did not work some of her scheduled overtime hours due to a bomb threat but was nevertheless paid for them. The Union rhetorically asks why her "salary" was not penalized in that instance, yet it was here. The Union therefore requests that the grievance be sustained and the four employes paid their unpaid overtime from January 19, 1995.

The Employer contends it did not violate Article VI, C, 2 when it denied payment of overtime to the four employes in question when school closed due to a weather emergency on January 19, 1995. According to the District, the employes in question are not entitled to be paid for scheduled overtime that was not worked because of a snow emergency. The Employer argues that under the contract, specifically the overtime provision (Article VI, E) overtime is assigned work performed in excess of an employe's normal work schedule and payment for same is premised on an employe actually working the assigned overtime. Thus, in the Employer's view, an employe must actually work the scheduled overtime in order to be paid for it. The Employer asserts that the overtime provision does not entitle an employe to overtime pay where the employe is assigned such work, but does not complete the task. The Employer argues that the word "salary" in Article VI, C, 2 can be defined by referring to Article VI, Salaries and Appendix G. According to the Employer, the amounts listed in Appendix G reflect biweekly rates for work performed by an employe. In the Employer's view, the work performed by an employe, in exchange for the salary, is the regular work expected of the employe. The Employer contends that overtime work is not compensated through Appendix G, but rather is handled under a separate section, namely Article VI, E. The Employer believes that in order for the Union to prevail here, the arbitrator has to accept the premise that overtime pay is included in an employe's salary. The Employer asserts that overtime is not included within salary. To further support this contention, the Employer cites the fact that grievant Keena-Brigson has been sick on days where she was scheduled to work overtime and was not paid additional sick leave compensation for the overtime hours she missed; rather, she was paid only for her regular work time. According to the Employer, this establishes that employes have not historically been able to collect an hourly rate for overtime hours not worked. Finally, the District submits that the November 22, 1994 closing of one building is easily distinguishable from the current situation on the grounds that school was not closed that day and employes were directed to return to work after the building was searched. In conclusion, the Employer submits that no employe had their "salary," as that term is used in the contract, "penalized" as a result of school being closed on January 19, 1995, because of inclement weather. It therefore asks that the grievance be denied.

DISCUSSION

My discussion begins with an overview of the factual context. Four bargaining unit employees were scheduled in advance to work overtime on the evening of January 19, 1995. However, a snowstorm interrupted their scheduled overtime. The snowstorm caused the school to close at 4:30 p.m. that day. This closing obviously precluded the four employees from working all their scheduled overtime. The four employees were paid for their regular hours of work for the day and for any overtime they actually worked, but they were not paid for overtime not worked (specifically the 4 1/2 hours between 4:30 and 9:00 p.m.). A dispute subsequently arose over whether the four employees should be paid for the 4 1/2 hours of overtime which they would have worked if the school had remained open that day. The Union contends they should be paid for the unworked overtime, while the Employer disputes that assertion.

The parties agree that the contract provision applicable here is Article VI, C, 2. It provides as follows:

In the event of circumstances beyond its control (such as: a fuel shortage caused by an energy crisis, superior governmental mandate, a disaster caused by civil disturbances, fire or explosion, or acts of God), the Board shall have the right to close the school or reduce hours for a period of time. The Union and Board agree that any such closing or reduction in hours will not penalize any employee's salary.

An overview of this language follows. The first sentence gives the Employer the right to close the school or reduce hours in the event of circumstances beyond its control. The second sentence goes on to provide that if this happens, and the school is closed or hours reduced, the closing "will not penalize any employee's salary." Although the record does not contain any bargaining history concerning the parties' intent in including this provision, the undersigned surmises that it was intended to protect an employee's "salary" against loss when the employee was unable to work when the school was closed.

The school's closing on January 19 resulted in the four affected employees being paid less than they had originally expected to be paid for the day. Each originally expected to be paid for about 13 hours that day, and each ended up being paid for just 8 1/2 hours. Since each of the four affected employees received less total income for the day than they would have received but for the school's closing, each suffered a loss in income as a result of the school's closing. In that sense, then, each of the four employees had their total income for the day penalized.

That said, it is specifically noted that Section 2 of the weather conditions provision does not protect an employee's income from loss; rather it protects an employee's salary from loss. The distinction between income and salary is important in the context of this case because Article VI,

C, 2 only protects an employe's "salary" from being penalized by a school closing. Consequently, the question to be answered here is whether the four employes had the "salary" referenced in Article VI, C, 2 "penalized" when school closed because of a snowstorm.

Based on the rationale which follows, I find that the employes in question did not have the "salary" referenced in Article VI, C, 2 "penalized" when school closed on January 19, 1995. I begin my analysis by noting that the term "salary" is not defined in that particular provision. Thus, it (i.e. that particular provision) does not indicate whether overtime is or is not part of an employe's "salary." That being so, the undersigned has looked elsewhere in the contract for guidance in determining whether overtime is or is not part of an employe's "salary." The undersigned concludes there are two contractual provisions which, when read together, definitively answer this question. The two provisions are Appendix G and the overtime provision. Appendix G contains the "PSRP Salary Schedules." The salary schedules contained therein list the biweekly rates employes receive for working their normal work schedule. The salary listed therein includes longevity but nothing else. Overtime is not mentioned or referenced anywhere in Appendix G. The logical inference of same is that overtime is not part of the base salary listed in Appendix G, but rather is handled under a separate section of the contract. A review of the agreement indicates that the contractual overtime provision is Article VI, E. Thus, overtime is paid pursuant to that provision. Since overtime is not part of the "salary" listed in Appendix G, it follows that overtime is not part of the "salary" referenced in Article VI, C, 2 either. In this case, the employes in question were paid for their regular shift on January 19, 1995. As a result, their "salary" contemplated by Article VI, C, 2 was not "penalized" when school closed because of a snowstorm.

It is also noted that the overtime provision provides in pertinent part that "Overtime is defined as assigned work performed in excess of the employee's normal work schedule." It goes on to provide that "An employee who works scheduled overtime shall be paid at the rate of 1 1/2 times the employee's regular hourly rate." The overtime language just quoted envisions that in order to receive overtime pay, employes must actually work the (overtime) hours. This is because the provision specifically uses the word "work" (i.e. "work performed in excess . . ."). The plain meaning of this provision is that employes must actually work overtime hours in order to be paid for same. Simply having overtime scheduled or assigned will not suffice; the employe has to actually do the work. What happened here is that the employes in question did not work all of their scheduled overtime because school closed due to a snowstorm. Their being paid overtime though was premised on their actually working overtime. Since the affected employes did not, in fact, work the scheduled overtime, the Employer did not have to pay them for their unworked scheduled overtime hours.

This conclusion is buttressed by the record evidence concerning sick leave. Generally speaking, sick leave protects employes from economic loss when they are absent from work because of illness. The economic protection provided by sick leave is therefore similar to that provided by the weather conditions clause (Article VI, C) which, as previously noted, protects an employe's salary from being penalized if, among other things, school closes down. The record indicates that when employes are sick on the days they are scheduled to work overtime, they are paid only for the regular shift missed and do not receive additional compensation for the overtime hours missed. Since the economic loss protected by sick leave is the regular shift, and not

unworked overtime, it logically follows that the result should be the same under instances covered by the weather conditions provision.

Finally, the undersigned is aware that on one previous instance (i.e. the bomb threat), the Employer paid employees for their unworked overtime hours. Be that as it may, I believe that situation is factually distinguishable from what occurred here for the following reasons. First, in the bomb threat situation the entire College was not closed--just one building was closed. Here, though, the entire College was closed because of the snowstorm. Second, in the bomb threat situation the employees were told to return to work after the threat had passed. Here, though, no one was directed to return to work after 4:30 p.m.; instead, all were sent home for the day. In my view, these factual differences distinguish the bomb threat situation from that involved here. It is therefore held that while the Employer paid employees for unworked overtime hours following the bomb threat, the fact that it did so on that one occasion did not obligate it to do so when school closed down on January 19, 1995, due to a snowstorm.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the College did not violate Article VI, C, 2 when it denied payment of overtime to the four employees in question when school closed due to a weather emergency on January 19, 1995. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of November, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator