STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant, vs. CITY OF ALGOMA, Respondent.	Case 31 No. 51478 MP-2930 Decision No. 28217-A

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Gordon E. McQuillen, appearing on behalf of Complainant.

Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, P. O. Box 1278, Oshkosh, Wisconsin 54902, by Mr. John E. Thiel, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 31, 1994, the Union filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission alleging that Respondent, City of Algoma, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Wis. Stats., by failing to make Police Officer Cheryl Sauer whole as directed by grievance arbitrator Honeyman in his Award dated September 3, 1993. Hearing on the complaint was initially held in abeyance pending the parties' efforts to voluntarily resolve the dispute. Thereafter, on November 4, 1994, the Commission appointed Thomas L. Yaeger, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. A hearing in the matter was held in Algoma, Wisconsin, on January 18, 1995, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed post-hearing briefs and reply briefs, the last of which was received on May 26, 1995. By letter dated May 26, 1995, and received by the Examiner on May 31, 1995, the

Respondent wrote to the Examiner to point out an alleged factual error in Complainant's reply brief relative to monies paid to the Wisconsin Retirement Fund on Police Officer Sauer's behalf. The Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, referred to below as the Union, is a labor organization, which at all times material herein was the exclusive collective bargaining representative for the police officers employed by the City of Algoma, including Police Officer Cheryl Sauer.

2. The City of Algoma, referred to herein as Employer or City, is a municipal employer within the State of Wisconsin and was at all times material herein an employer of Cheryl Sauer.

3. The Complainant and Respondent were parties to collective bargaining agreements containing provisions relating to employes' discipline and discharge, and grievance arbitration. On November 30, 1992, the City discharged Police Officer Cheryl Sauer for, among other things, not living within the City of Algoma in violation of City Ordinance. Sauer's discharge was grieved and ultimately submitted to arbitration before Arbitrator Christopher Honeyman of the Wisconsin Employment Relations Commission. On September 3, 1993, Arbitrator Honeyman issued his Award wherein he found the City "lacked just cause for the discharge of Grievant Cheryl Sauer," and ordered the City to "forthwith upon receipt of a copy of this Award, offer Cheryl Sauer reinstatement to her position or a substantially equivalent position with her full seniority, and shall make the Grievant whole, less a thirty day suspension, for any loss of wages and/or benefits by payment to the Grievant of a sum of money equal to such losses less interim earnings, if any; and shall correct its records accordingly." September 3, 1993, was a Friday, and the following Monday, September 6 was a Labor Day holiday. The Respondent City received a copy of the Arbitrator's Award, but not before September 4, 1993.

4. On Tuesday, September 21, 1993, Respondent City Council met and "decided to accept the decision of Arbitrator Christopher Honeyman" and ordered the Police Chief to place Cheryl Sauer into the rotation after reasonable notice. Subsequent to that decision of Respondent City Council, the City's Chief of Police scheduled Sauer to report for work on Saturday, September 25, 1993. Sauer did not report for work on September 25, but called in sick because her back had gone out a few days earlier and she was being treated by a chiropractor.

5. On October 7, 1993, Attorney McQuillen, on behalf of Police Officer Sauer, advised the City's attorney, Thiel,

> Consistent with our earlier telephone conversations, I am writing to confirm that effective September 25, 1993, Cheryl Sauer resigns her position with the City of Algoma Police Department. You and I will need to work out her back pay issue from the date of termination until September 25, 1993, less the thirty days' suspension.

On October 7 and 29, 1993, Attorney Thiel wrote to Attorney McQuillen requesting copies of medical bills and pay stubs, as well as affidavits from Cheryl Sauer. On December 13, 1993, Attorney McQuillen sent the following letter to Attorney Thiel:

> Dear John:
>
> I enclose herewith two final documents. The first is an affidavit from Cheryl Sauer which reflects her tips and gratuities. Ms. Sauer notes to me that her payroll slips already reflected these amounts, but I enclose at your request, regardless.
>
> Next is a set of medical bills for Ms. Sauer and her children. These include a total of $261.23 for medical and $115 for dental. With respect to the medical, I have obscured those portions of the printout from Ms. Sauer's health care provider that are not encompassed within the time frame of the back pay award. I believe that there are issues of confidentiality that indicate that the material need not be shared with the employer. Should you disagree for any reason, please call me immediately. I have the dates intact so that you can identify the dates of service.
>
> Please contact me at your earliest opportunity if you have additional questions. Otherwise, I would appreciate a check being sent to me on Ms. Sauer's behalf as soon as possible.

On December 15, 1993, Attorney Thiel mailed to Attorney McQuillen a check payable to Cheryl Sauer in the amount of $8,978.03 which was the net amount due based upon the City's calculation of a gross salary plus benefits due of $15,980.13.

6. The City in its internal conversations regarding implementation of Honeyman's Award, participated in by Clerk-Treasurer Romdenne, decided that in calculating the amount of back pay owing under that Award that because they had "found out" Sauer had started working full time for Wackenhut Corporation as of September 4, 1993, that their back pay liability terminated as of September 3, 1993, the date of Arbitrator Honeyman's Award. In computing the amount of back

pay owing, the City used the new contractual rate which went in affect on January 1, 1993, and for Sauer was $2,454.13 per month. The City treated Sauer as being on a thirty-day suspension from December 1, 1993, the day after the City made its decision to discharge her, through December 30, 1993. The City calculated the total wages that would have been earned during the period December 31, 1992 through September 3, 1993, by Sauer to be $20,595.79. From that amount the City deducted $5,557 it paid to the Unemployment Compensation Fund for claims made by Sauer. In addition, the City also deducted the eight weeks of training she received from Wackenhut in the amount of $1,920, as well $137.45 which she was paid while working at Dairy Dan's Restaurant during the period of her discharge. After subtracting these offsets, the City arrived at an adjusted gross amount of $12,981.33. The City then added to the adjusted gross total three weeks of vacation pay at $1,472.40, six holidays at $544.80 and twelve days of accrued vacation at $981.60. This resulted in a gross amount of $15,980.13. From that total, federal tax of $4,681.46, state tax of $1,098.16, and social security of $1,222.48 was deducted from Sauer's gross pay, resulting in a net pay amount of $8,978.03 which was the amount of the check mailed to Attorney McQuillen for Sauer on December 15, 1993. The City's calculations did not include any monies for overtime, night shift premium, health care or dental claims.

7. In calculating daily rates of pay for determining the value of vacation and holiday pay, the City took the contractual monthly salary for Sauer and divided it by 30 days and arrived at a daily rate. This was an incorrect method of calculating daily rate of pay inasmuch as no City police officer worked, nor is there any evidence that Sauer ever previously worked, thirty days out of each month. Police officers worked a 6-3 (6 days on, 3 days off) schedule resulting in 1,946 hours worked per year. The correct method for calculating daily rate of pay is to divide the contractual monthly salary, which for 1992 was $2,354.08 and for calendar year 1993 was $2,454.13, by the hours worked in a month by police officers, which is 162.167 (1,946 divided by 12). The City, in calculating all overtime payments to officers, uses the 1,946 hour figure to calculate the employes' hourly rate for time and one-half calculations. There is no contractual basis for using two different calculation methods to determine an officer's hourly versus daily rate of pay.

8. The appropriate daily rate of pay that should have been used in calculating the value of the thirty days of vacation, twelve days accrued vacation and six days of holiday that Sauer would have been entitled to, but for her discharge, is arrived at by dividing the monthly rate in effect in calendar year 1993 of $2,454.13 by 162.167 hours which equals an hourly rate of $15.13. The $15.13 multiplied by 8 equals $121.07 per eight-hour day. Thus, multiplying the 48 days times $121.07 per day equals $5,811.36. By calculating the daily rate of pay as it did, rather than using the methodology set forth in this paragraph, in calculating monies due Sauer for holiday pay and vacation pay, the City failed to make Sauer whole as ordered by Arbitrator Honeyman, and therefore failed to accept the terms of Arbitrator Honeyman's Award.

9. The City's calculations of monies owed Sauer pursuant to Arbitrator Honeyman's Award included no night shift premium reimbursement. Prior to her discharge, Sauer was assigned to the 11:00 p.m. to 7:00 a.m. shift (midnight shift), and for all hours worked on said shift the applicable 1993-95 collective bargaining agreement at Article X, Hours, called for a 30 cent per

hour premium to be paid. At the time of her discharge officers were allowed to pick their shift by seniority. There were two officers, Magno and Haltaufderheid, who were more senior than Sauer, but neither officer had ever exercised their seniority to select the 11:00 p.m. to 7:00 a.m. shift over the grievant. There was no record evidence establishing or even suggesting either of those more senior officers intended to exercise their seniority rights to bump Sauer from the 11:00 p.m. to 7:00 a.m. shift for calendar year 1993. Consequently, a rebuttable presumption existed that Sauer would have worked the 11:00 p.m. to 7:00 a.m. shift but for her discharge. That presumption was not rebutted, and therefore the City, in order to be in compliance with Arbitrator Honeyman's Award had to calculate the shift premium grievant would have earned, but for her discharge. By not doing so the City failed to accept the terms of Arbitrator Honeyman's Award. Because Sauer would have worked a 6-3 work schedule like other officers she would have worked 180 days between December 31, 1992 (the day after the conclusion of her 30-day suspension) and September 24, 1993. This calculation was done by commencing a 6-3 schedule on December 31, 1992, with that day being Sauer's first day worked after concluding her suspension and that same date being the first of her six days on duty. Based upon the record evidence, this is the only reasonable conclusion to be drawn because her prior work schedule was not put into evidence. Multiplying 180 days times 8 hours per day, times 30 cents per hour (180 x 8 x .30) results in $432.00 that Sauer should have been paid pursuant to Arbitrator Honeyman's Award.

10. The City also did not include any overtime hours in its calculation of back pay owed Sauer. The City disputes the amount of overtime Sauer claims she was entitled to and argued that other officers were working overtime due to her absence and it would be inappropriate to include those hours in any calculation of what, if any, overtime she is entitled to in back pay. This position ignored that in her last year of employment Sauer worked eleven months and was on disciplinary suspension for 30 days. During that period she worked 71.25 hours. By extrapolation, but for her suspension, she would have worked 77.50 hours. There is no record evidence to suggest those overtime hours resulted from other than the normal operational needs of the Police Department. Therefore, the City should have presumed Sauer would have worked at least 57.35 hours of overtime between January 1, 1993 and September 24, 1993 (180 days = 74% of 1,946 hours and .74 x 77.5 hours = 57.35 hours). Multiplying 57.35 hours by grievant's 1993 hourly rate ($15.13) amounts to $867.70. That is the amount of overtime compensation the City owed Sauer pursuant to Arbitrator Honeyman's Award. By not calculating any overtime pay for Sauer, the City failed to accept the terms of Arbitrator Honeyman's Award.

11. Sauer submitted $261.23 for unreimbursed medical bills and $115.00 in dental bills that were services received by her and her children during the period of her discharge. Respondent refused to include any of her dental or medical expenses in its calculations. There were only $340.23 in unreimbursed charges for medical and dental services incurred by Sauer between December 31, 1992 and September 25, 1993 ($115.00 dental and $235.23 medical). She did include $36.00 in medical services rendered on September 27, 1993, on which date she was no longer an employe of the City by virtue of her resignation effective September 25, 1993. Thus, she was not entitled to be reimbursed by the City for those out-of-pocket medical expenses. However, the City was obligated by Arbitrator Honeyman's Award to reimburse her for other medical and

dental expenses incurred by her for services provided to her and her children until her resignation effective September 25, 1993. That amounted to $340.23. By failing to reimburse grievant that amount the City failed to accept the terms of Arbitrator Honeyman's Award.

12. The grievant also was not paid any uniform allowance for calendar year 1993. The parties' 1993-95 collective bargaining agreement at Article XI, Section 11.01 provided:

> 11.01 Clothing Allowance: The Employer shall pay an annual clothing allowance of three hundred sixty dollars ($360) per officer. Effective 1-1-1992 the Employer shall pay an annual clothing allowance of four hundred dollars ($400). Said sum to be paid on a calendar year basis and only if the employee works the entire calendar year, except as provided in Section 12.05.

It is undisputed that Sauer resigned effective September 25, 1993, and did not and could not have worked the "entire calendar year." Not working the entire calendar year was a voluntary decision of Sauer's. Therefore, Sauer was not entitled to be reimbursed for the uniform allowance pursuant to Arbitrator Honeyman's Award. Thus, the Respondent by failing to include any monies for uniform allowance in its calculation of back pay due Sauer did not fail to accept Arbitrator Honeyman's Award.

13. As noted in Finding 6 above, the City calculated that the total wage Sauer would have earned, but for her discharge, was $20,595.79, assuming her last day worked would have been September 4, 1993. However, as noted in Finding 9 above, Sauer would have worked 180 days prior to her resignation effective September 25, 1993, and at her daily rate of pay of $121.07 the correct amount of wages due Sauer was $21,792.60 and not $20,595.79 as calculated by Respondent. Sauer resigned effective September 25, 1993, not September 3, 1993. Consequently, the City, by failing to use $21,792.60 as the figure representing the straight time wages, exclusive of overtime and shift premium, Sauer would have earned but for her discharge failed to accept Arbitrator Honeyman's Award.

14. In determining the monies owed Sauer under Honeyman's Award, Respondent offset her earnings from Dairy Dan's of $137.45 and $1,920 received from The Wackenhut Corporation as well as stopping the calculation as of September 3, 1993, the day before she commenced full-time employment with Wackenhut, and also the date of Arbitrator Honeyman's Award. Arbitrator Honeyman's Award provided:

. . .

AWARD

. . .

> 2. That as remedy the City shall, forthwith upon receipt of a copy of this Award, offer Cheryl Sauer reinstatement to her position or a substantially equivalent position with her full seniority, and shall make the grievant whole, less a 30-day suspension, for any loss of wages and/or benefits, by payment to the grievant of a sum of money equal to such losses less interim earnings, if any; and shall correct its records accordingly.

. . .

His Award, on its face, allowed Respondent to offset "interim earnings." There is no basis in this record to conclude he meant anything other than what he wrote. Thus, the Respondent did not fail to accept said Award when it offset all wages earned by Sauer at Dairy Dan's and Wackenhut Corporation between December 31, 1992 and September 25, 1993.

15. Thus, the Respondent owed Sauer a gross amount of $25,858.04 pursuant to Arbitrator Honeyman's Award. That sum is arrived at through the following calculation that implements the aforesaid findings:

Wages from 12/31/92 thru 9/24/93	$ 21,792.60
Night Shift Premium from 12/31/92 thru 9/24/93	432.00
Overtime Premium from 12/31/92 thru 9/24/93	867.70
3 Weeks Vacation Pay (30 days)	3,632.10
12 Days Accrued Vacation	1,452.84
6 Holidays	726.42
	$ 28,903.66
Less:	
Wackenhut Corporation Earnings 9/4/93 thru 9/24/93 (120 hours at $11.07/hour)	1,328.40
Wackenhut Corporation Earnings (training)	1,920.00
Dairy Dan's Earnings	137.45
	25,517.81

Plus:

Medical and Dental Expenses from 12/31/92 thru 9/24/93	340.23
Gross Amount	$ 25,858.04

This compares with the Respondent's calculation of gross amount due of $15,980.13.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The City of Algoma is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The City of Algoma's refusal to include overtime, shift premium and medical and dental bills incurred prior to September 25, 1993, in its calculations of what monies were due Cheryl Sauer pursuant to Arbitrator Honeyman's Award of make whole relief constituted a refusal to accept said Award in violation of Sec. 111.70(3)(a)5, Stats.

4. The City of Algoma's erroneous determination of Cheryl Sauer's daily rate of pay which it used to calculate the amount of vacation and holiday pay it owed Sauer, pursuant to Arbitrator Honeyman's Award of make whole relief constituted a refusal to accept said award in violation of Sec. 111.70(3)(a)5, Stats.

5. The City of Algoma's determination that Sauer's last day worked was September 3, 1993, for purposes of calculating her back-pay entitlement pursuant to Arbitrator Honeyman's Award, constituted a refusal to accept said Award in violation of Sec. 111.70(3)(a)5, Stats.

6. The City of Algoma's refusal to include any payment for uniform allowance in its calculation of back pay owed Sauer pursuant to Arbitrator Honeyman's Award did not constitute a refusal to accept said Award in violation of Sec. 111.70(3)(a)5, Stats.

7. The City of Algoma's offset of monies earned by Sauer during the period of her discharge was permissible pursuant to Arbitrator Honeyman's Award and did not constitute a refusal to accept said Award in violation of Sec. 111.70(3)(a)5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

1. Allegations of violation of Sec. 111.70(3)(a)5, Stats., by the City of Algoma for refusing to reimburse Cheryl Sauer for medical and dental bills for services rendered after September 25, 1993, and a uniform allowance, as well as the City's offset against back pay due of monies earned by Sauer during the period of her discharge are dismissed.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

2. The City of Algoma, its officers and agents, shall immediately cease and desist from refusing to accept the Honeyman Arbitration Award in the Cheryl Sauer discharge case in violation of Sec. 111.70(3)(a)5, Stats.

3. The City of Algoma, its officers and agents, shall take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act.

a. Immediately recalculate the monies owed Cheryl Sauer pursuant to Arbitrator Honeyman's Award consistent with the aforesaid Examiner's Findings and pay her the difference between what it has previously paid her and what it should have paid her with interest. 2/

b. Notify all employes in the law enforcement bargaining unit represented by the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by an authorized representative of the Board and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Board to insure that said Notice is not altered, defaced or covered by other material.

c. Advise the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to the steps it has taken to comply therewith.

Dated at Madison, Wisconsin, this 8th day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on August 31, 1994, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann. (1986). See generally Wilmot Union High School District, Dec. No. 18820-B, (WERC, 12/83) cites Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employes that:

> WE WILL immediately recalculate the monies owed Cheryl Sauer pursuant to Arbitrator Honeyman's Award consistent with the Commission Examiner's Findings and pay her the difference between what we have previously paid her and what we should have paid her with interest, on the monies owed her.

CITY OF ALGOMA

By _____

Dated this ____ day of _____, 1996.

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Position of the Complainant

The Union contends that the amount of money paid by the City was not sufficient to satisfy the arbitrator's award. Sauer was off work from November 30, 1992 through September 25, 1993, for a total of 300 days. Subtracting the 30-day unpaid suspension results in a net loss of 270 days, which is 74% of a work year. Sauer should be paid for 13 days of vacation for 1992 at a daily rate of $116.41 and for 18 days of vacation and 7 holidays in 1993 at a daily rate of $121.07. The daily rate should be calculated by multiplying Sauer's monthly rate by 12 and dividing that result by 1,946 hours. Sauer was entitled to the night shift differential since she would have continued to work the night shift if she had not been terminated. Sauer should receive at least 74% of the uniform allowance for 1993, since that is an annual benefit. In the past, Sauer has worked a considerable amount of overtime. At a minimum, Sauer should be paid for 74% of the hours she would have worked in 1992 as compensation for the overtime she would have worked in 1993. The City should not be allowed to use Sauer's earnings either at Wackenhut or at Dairy Dan's as an offset to reduce the back pay due to Sauer. Sauer worked those jobs during daytime hours which would not have conflicted with the night shift hours which she normally worked for the City. Other officers hold other jobs while drawing their full salaries from the City. Further, Sauer worked 40 hours per week at Wackenhut, whereas her employment with the City was 37.5 hours per week. Therefore, 2.5 hours per week of her work at Wackenhut should not be used as an offset under any circumstances. Finally, the City should reimburse Sauer for unpaid medical bills for which Sauer would have been reimbursed under the health and dental insurance plans which she held as a City employe. By refusing to pay the disputed amounts, the City has committed a prohibited practice within the meaning of Secs. 111.70(3)(a)1 and 5, Wis. Stats. Even if Sauer had decided not to return to her position with the City, until the City offered her a position, it was obligated to make her whole for all lost wages and benefits.

Position of the Respondent

The City argues that, after September 3, 1993, Sauer did not intend to come back to work for the City because she had accepted full-time employment with Wackenhut. Therefore, any medical or dental expenses incurred after said date should not be the responsibility of the City. Since employes pay the dental insurance premium, Sauer's failure to continue those payments after her termination make any subsequent dental expenses her responsibility. The record does not support Sauer's claim for additional wages. Sauer was in a full-time job as of September 4, 1993,

so the City is not responsible for any wage differential after that date. Sauer's daily wage rate for back pay purposes was computed by dividing her monthly rate by 30, which is the method the City has followed for at least the past 13 years. The officers remaining on staff in 1993 worked more hours than they would have worked if Sauer had been in the rotation. Therefore, those hours are inflated and should not be relied on when determining how much overtime would have been available to Sauer if she had been working. Sauer did not work the night shift hours in 1993, so she has no basis to include payment for the night shift differential in her request for additional compensation. Since Sauer did not work for the City in 1993, she had no need for a uniform allowance. The City concludes that it accurately computed the back pay due to Sauer and, therefore, the complaint should be dismissed.

Discussion

The Respondent argues that its liability under Arbitrator Honeyman's Award terminated on September 4, 1993, because it had found out Sauer started full-time employment with Wackenhut Corporation that day. The Examiner rejects that argument. It is clear from the timing of the award and Sauer's commencement of full-time employment with Wackenhut Corporation that common sense dictates she would have had to advise Wackenhut prior to the 4th that she could start full-time on that date. There is no evidence she received the award on the date of its issuance, and that would have been impossible unless the award was hand delivered to Sauer or her attorney. There is no record evidence the award was so delivered. Consequently, it must be concluded she accepted full-time employment under her duty to mitigate her damages resulting from her discharge. Accepting full-time employment under those circumstances is not evidence of an intent to relinquish her right to return to full-time employment with the City which she was seeking to obtain through the arbitration procedure that resulted in Honeyman's award. Thus, the Respondent's reliance on Sauer's acceptance of full-time employment with Wackenhut Corporation as evidencing intent to sever any employment rights is misplaced. Furthermore, as noted in Finding of Fact 15, and as discussed later herein, earnings from that full-time employment have been offset against Respondent's liability.

Thus, because Honeyman found Respondent had wrongfully discharged Sauer, she continued to be Respondent's employee until she was offered reinstatement by Respondent and declined. She was offered reinstatement effective September 25, 1993. The delay that occurred between the Respondent's receipt of the award and September 25 is clearly the responsibility of Respondent. It wasn't until McQuillen's October 7, 1993 letter to Respondent's attorney that Sauer relinquished her reemployment rights with the City. By virtue of that letter she resigned her employment effective September 25, and that is the date upon which she ceased being a City employee entitled to any rights associated with that employment.

Because she continued as a City employee through September 25, 1993, and because the City terminated her medical and dental insurance coverage due to her discharge, the City itself was

liable for her dental and medical bills, as though she had continued to be employed through September 25, 1993. The City claims that Sauer should have paid the premiums and continued the insurance at her own expense. However, she had no job and it was never proven she had the independent financial ability to incur those costs. Thus, it was not proven that she failed to mitigate. Furthermore, had she done as the City argues, it would be liable for those premium payments, and they surely would have exceeded the $340.23 in medical bills which the City must now absorb. Obviously, it rolled the dice by not paying her premiums, and came out ahead of where it might have found itself.

The Respondent also miscalculated Sauer's daily rate of pay which it then used in determining the amount owed Sauer for vacation and holiday pay. The City, claiming it had done it so for the prior thirteen (13) years, divided Sauer's monthly contractual rate by thirty (30) days to arrive at a daily rate. The fact that it had done it that way for 13 years merely established that it had inappropriately paid any other employee whose entitlement was calculated in that manner. In the first place, City police officers' normal 6-3 work schedule obviously does not require them to work 30 days per month. Rather, the record evidence established the normal yearly hours worked was 1,946. Furthermore, the City's assumption is absurd on its face. Obviously the correct methodology for determining daily rate is to divide the contractual monthly salary by the agreed-upon hours in the contractual work month (1,946 divided by 12) and multiply the result by eight (8) hours. That resulting hourly rate, $15.13, was the figure used by the City in calculating time and one-half pay. Why it chose to deviate from that formula in calculating daily rate was never explained, other than to state it had been done that way for the past 13 years.

The Respondent also refused to reimburse the grievant for night shift premium she would have earned, but for her discharge. Respondent argues Sauer did not work any night shift hours in 1993, and therefore was not entitled to the premium. That argument ignores the essential ingredient of a "make whole" remedy, like that in this case. Under a "make whole remedy," the City is being directed to put the grievant, financially at least, in the position she would have enjoyed, but for the City's wrongful discharge of her. In this case, that means she would have continued working the night shift (11:00 p.m. - 7:00 a.m.) in 1993, but for her discharge. While officers were allowed to pick shift by seniority on a calendar year basis, and even though there were two (2) officers more senior than Sauer, in the past they had never exercised their seniority to select the 11:00 p.m. - 7:00 a.m. shift. More importantly, there was no record evidence even suggesting they had expressed an intent to, or in fact did, exercise those rights to pick that shift for calendar year 1993. Thus, it is reasonable to find that a rebuttable presumption existed that Sauer would have worked the 11:00 p.m. - 7:00 a.m. shift in calendar 1993, but for her discharge. That presumption was not rebutted by Respondent, and therefore as a point of the make-whole relief awarded by Honeyman, Sauer was entitled to the shift premium which Respondent omitted from its back pay calculations.

The Respondent also did not include any money for lost overtime in its calculation of back pay owed Sauer. The Respondent argues that the officers remaining on staff in 1993 after Sauer's discharge worked more overtime than they would have if Sauer had been in the rotation. That,

however, is not the same as stating she would not have worked any overtime hours in 1993, had she not been discharged. The Examiner agrees with the Respondent's contention that the measure of overtime owed Sauer is not the average of what the remaining officers worked in 1993. What then is the appropriate figure? There was no record evidence to establish that the overtime hours worked by Sauer in 1992, resulted from anything other than normal departmental operations. It was not established that the 1992 overtime hours were the result of abnormal events or circumstances that did not or would not reoccur in 1993. Thus, it is reasonable to presume for this calculation that she would have worked the same or similar number of hours in 1993, until her resignation. That figure amounts to 57.35 hours and the calculation is set forth in Finding of Fact 10. Thus, $867.70 is the amount that the Respondent should have included as overtime premium in its calculation of back pay due Sauer.

The Respondent also did not include any monies in its back pay calculation for Sauer's uniform allowance. Complainant argued Sauer was entitled to 74 percent of the $400.00 annual allowance. Complainant's argument, however, ignores the uniform allowance language in the applicable collective bargaining agreement. The contract states "Said sum to be paid on a calendar year basis and only if the employee works the entire calendar year, except as provided in Section 12.05." (emphasis added) Here, Sauer resigned effective September 25, 1993. Because her discharge was set aside she is deemed to have worked in calendar year 1993, up until her resignation. However, she voluntarily relinquished her employment with the City in September and obviously did not work "the entire calendar year." There is no language in Article 11.01 speaking to proration, and no evidence to conclude the parties had interpreted the clause to provide for proration. Consequently, it must be concluded that Sauer did not fulfill the eligibility requirements to be entitled to a uniform allowance in 1993.

Finally, Complainant argued that Respondent should not be permitted to offset Sauer's Dairy Dan's or Wackenhut Corporation earnings because she worked those jobs during daytime hours which would not have conflicted with her night shift hours she would have worked for the City. This argument, however, ignores the language of the award wherein it provides:

> forthwith upon receipt of a copy of this Award, offer Cheryl Sauer reinstatement to her position or a substantially equivalent position with her full seniority, and shall make the Grievant whole, less a thirty day suspension, for any loss of wages and/or benefits by payment to the Grievant of a sum of money equal to such losses less interim earnings, if any; and shall correct its records accordingly.

The arbitrator's award provides for the Respondent to draft "interim earnings, if any." The Examiner believes that language is clear and does not preclude offsetting those interim earnings that Sauer arguably could have earned even if she had continued in the City's employ. Had the award

stated "less interim earnings, if any, that Sauer would not have received, but for her discharge" then Complainant's argument would have to be answered. But, the hours she worked

to produce those interim earnings is an irrelevant consideration in light of the explicit language of the award. They were "interim earnings" and they were to be offset against the Company's liability.

Dated at Madison, Wisconsin, this 8th day of March, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Examiner