STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1310/ED MCGEORGE, PRESIDENT, Complainant,

vs.

CITY OF EAU CLAIRE, Respondent.

Case 233
No. 55519
MP-3333

Decision No. 29346-D

Appearances:

Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the City of Eau Claire.

James G. Birnbaum, Birnbaum, Seymour, Kirchner & Birnbaum, Attorneys at Law, 300 North Second Street, Suite 300, P.O. Box 308, LaCrosse, Wisconsin 54602-0308, appearing on behalf of Amalgamated Transit Union, Local 1310 and Ed McGeorge.

ORDER

On December 17, 2002, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Order concluding that the City of Eau Claire (City or Respondent) had violated its duty to bargain with the Amalgamated Transit Union, Local 1310 (Union or Complainant) by failing to maintain the *status quo* as to hours worked by part-time employees and the work schedules of shop employees during the hiatus that followed expiration of the parties' 1995-1997 contract.

To remedy that violation, the Commission ordered the City to make employees whole with interest "for any losses in wages and benefits incurred during the contract hiatus" as a result of the *status quo* violations. In our Memorandum, we stated:

> It is appropriate that affected employees be made whole for losses suffered as a consequence of the Respondent's illegal conduct. However, we acknowledge

> that it may be difficult to verify what those losses were. Further, as argued by Respondent, it is conceivable that the result produced by the interest arbitration process (in this instance the parties' voluntary settlement of their successor contract) has some relevance to the level of monetary remedy that is appropriate.
>
> It is our hope that the parties will reach a voluntary agreement on the loss of wages and benefits caused by Respondent's illegal conduct. If such an agreement does not occur, then supplemental hearing will be needed as to remedy.

After extensive but unsuccessful efforts to reach agreement on a remedy, the parties met with Commission General Counsel Peter Davis on March 3, 2004 for the purpose of conducting a remedial hearing. Prior to the commencement of the hearing, the parties concluded that it was not possible to recreate all of the factual components needed to precisely resolve the remedial issues and thus that the best course was to file written argument seeking remedial direction from the Commission using facts that are not in dispute.

The parties proceeded to file such argument and the record was closed on October 24, 2005.

Having considered the matter, we reach the following remedial conclusions.

ATTORNEY FEES

Complainant seeks attorney fees for what it argues are the City's repeated bad faith violations of the *status quo*. We did not award attorney fees in our December 2002 decision and that decision reflects our resolution of a good faith disagreement between the parties as to the City's *status quo* obligations. Thus, it is clear to us that we are not confronted with a circumstance in which the extraordinary remedy of awarding attorney fees is appropriate. UW HOSPITALS, DEC. NO. 29093-B (WERC, 11/98).

SHOP EMPLOYEES-CHANGE IN SCHEDULE

On August 25, 1997, following the expiration of the July 1, 1995-June 30, 1997 contract, the City changed the weekday work schedule of two shop employees from 1:00 p.m. to 9:00 p.m. to 4:00 p.m. to midnight.

The parties disagree as to: (1) whether the duration of the make whole portion of the Commission's order is ongoing or ended when the parties' reached agreement on a new contract in June 2001; (2) the level of compensation, if any, that should be paid per hour worked outside the *status quo* schedule; (3) how to calculate the number of hours worked outside the *status quo* work schedule; and (4) whether interest should be paid on any make whole obligation.

Duration of Make Whole Portion of Commission's Order

The City asserts that any obligation to make employees whole for the *status quo* violation found by the Commission ended when the parties reached agreement on a new contract. The Union contends the obligation is ongoing.

As reflected in the text of the Order itself, the duration of the make whole portion thereof is limited to the duration of the contract hiatus. Thus, contrary to the argument of the Union, the City's make whole exposure is limited to the period August 25, 1997 to June 1, 2001 when the successor to the 1995-1997 agreement became effective and the hiatus ended.[1]

Compensation for Hours Worked Outside the Status Quo Schedule

The City asserts that because the two employees in question did not work more hours as a consequence of the schedule change found by WERC to have violated the *status quo*, any payment to employees unjustly enriches them and thus is inappropriate. In the alternative, the City proposes $0.30 per hour or, at most, half the applicable hourly wage rate for each hour worked outside the *status quo* schedule. The City opposes the time and one half payment proposed by the Union asserting that the *status quo* (as defined by the expired 1995-1997 contract and the 1990 grievance settlement) did not provide for overtime for hours worked outside the normal work schedule. The Union contends that time and one half for each hour worked outside the schedule is the appropriate level of compensation.

The Municipal Employment Relations Act (MERA) gives us broad discretion to determine the "affirmative action . . . the commission deems proper" to remedy violations thereof. See Secs. 111.07(4) and 111.70(4)(a), Stats. So long as the remedy seeks to achieve ends contemplated by MERA, is within our remedial authority, and is based on findings supported by sufficient evidence, we have discretion to determine the scope of the remedy. CITY OF EVANSVILLE, 69 Wis. 2D 140 (1975). Here, we exercised that remedial discretion by ordering that employees be made whole "for any losses in wages and benefits." As reflected above by the parties' positions, the dispute now before us is whether there were any "losses" in wages and benefits and, if so, how those "losses" should be calculated.

The City's *status quo* violation did not change the number of hours worked by the employees or the hourly rate they were paid. Thus, as general matter, there were no wages lost by the employees.

However, the City's *status quo* violation did change the timing of the hours the employees worked. If we were to conclude that no monies were due the affected employees who worked hours outside the *status quo* schedule, there would be no disincentive for such

[1] Any dispute as to whether the City has the right under the new contract to have employees work a 4:00 p.m. to midnight schedule is a violation of contract dispute that is beyond the scope of the duty to bargain/status quo matter before us.

violations to be committed. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84). Thus, we are satisfied that some level of compensation for those hours is appropriate. However, contrary to the Union's argument herein, the change in schedule did not generate "losses" in overtime for the employees in question. As the City correctly notes, there was no provision in the expired 1995-1997 contract or the 1990 settlement agreement for overtime payments when an employee works outside the normal schedule. Thus, the *status quo* itself did not provide for overtime payments for such hours and therefore in our remedial order we did not direct the City to pay the employees time and one half for all such hours.[2]

Exercising our remedial discretion, we conclude that the City is obligated to pay the affected employees one half of their hourly rate for all hours worked outside the *status quo* work schedules established by the 1990 settlement agreement.

Calculation of Hours Worked Outside Status Quo Schedule

The 1990 settlement agreement defines the schedule employees would have worked if the *status quo* had been maintained. Monies are owed for all hours worked outside that schedule between August 27, 1997 to the date on which the successor agreement became effective and the contract hiatus ended. As the City correctly argues, no *status quo* violation occurred and thus no monies are owed for days when the affected employees did not work outside the schedule because they were using leave or compensatory time.

Interest

Our 2002 remedial order directed the City to "Make employees . . . whole with interest . . . ." for losses due to the City's status quo violation. In our decision accompanying that order, we acknowledged that " . . . it may be difficult to verify what those losses were" and that supplemental hearing would be necessary if the parties could not reach a remedial agreement. The parties had not litigated the question of whether interest was appropriate but we nonetheless included the award of interest in our order consistent with our routine practice following WILMOT UNION HIGH SCHOOL, DEC. NO. 18820-B (WERC, 12/83) wherein we concluded that interest is generally owed on back pay amounts as a matter of law because they are "fixed and determinable claims" or there is a "reasonably certain standard of measuring damages."

Now that the matter of interest has been litigated before us, we conclude that no interest is presently owed.

As is evident from our discussion above, the rate of pay applicable to the hours of *status quo* violation was not established by the *status quo* itself (i.e. there was no established

[2] In contrast, in CITY OF BROOKFIELD, *supra*., the expired contract provided for overtime when hours were worked outside the normal schedule and the Commission remedied a status quo hours violation by ordering time and one-half payment for all such hours.

rate for hours worked outside the normal schedule) and thus was not known until we established same through this Order. Because the applicable rate of pay was not known until now, there is neither a "fixed and determinable claim" nor a "reasonably certain standard for measuring damages." See MADISON TEACHERS, INC., V. ERC, 115 Wis. 2D 623 (Ct. App. 1983) Thus, no interest is presently owed on the remedial monies to be paid to the shop employees.[3] Interest does begin accruing from the date of this decision now that the applicable rate of pay has been established.

BUS DRIVERS-EXCESSIVE USE OF PART-TIME DRIVERS

We concluded that the City violated the *status quo* as to allowable use of part-time bus drivers whenever it employed such drivers during the contract hiatus for a total of more than 80 hours per week in circumstances other than those where the *status quo* itself allowed the City to exceed the 80 hour limit.

The hiatus period in question stretches from July 1, 1997 to June 1, 2001 when the parties reached agreement on a successor to the 1995-1997 agreement,

Both parties agree that for the purpose of constructing any appropriate remedy, it is not possible to precisely reconstruct the additional number of hours which full-time bus drivers would have worked on an overtime basis if the City had honored its *status quo* obligations. This is primarily so because one of the circumstances in which use of part-time drivers in excess of 80 hours is appropriate is when full-time drivers decline overtime hours. Because it is impossible to determine on each hiatus day whether any full-time drivers would have been available and willing to work any or all of the hours worked by part-time employees in violation of the *status quo*, the number of remedial hours is at best an approximation.

This same inability to replicate the choices individual full-time drivers would have made makes it impossible to precisely determine the share each full-time driver should receive of the remedial hours ultimately determined to be appropriate.

The parties agree that the *status quo* allowed for part-time driver work in excess of 80 hours per week for the following reasons and that any such hours are not part of any remedial calculation:

1. Up to 136 hours of training time per part-time driver.
2. Some portion of the hours worked when filling in for full-time drivers who are using compensatory time or vacation leave.
3. All hours worked after all full-time drivers decline the work.

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[3] This determination should not be understood as a departure from the general availability of interest on Commission ordered back pay remedies. While issues such as mitigation etc. often inject a level of uncertainty into back pay calculations, it is nonetheless clear under WILMOT that interest is generally owed. See BROWN COUNTY, DEC. NO. 20857-D (WERC, 5/83) However, in the unique circumstances of this case, we conclude that there is such a fundamental level of uncertainty that interest is not presently owed.

The parties also agree that an analysis of those weeks during the hiatus when the City only employed four part-time drivers (Complainant Exhibit F and Employer Exhibit C) is a reasonable predictor of the percentage of hours that full-time drivers would have worked as overtime if the City had maintained the *status quo*.

The parties disagree at to whether: (1) the total number of hours worked by part-time employees during the hiatus or the total number of hours assigned to part-time employees is the best starting point for any remedial analysis; (2) "extra board" hours should be excluded or included in a remedial calculation; (3) full-time drivers hired as a result of the same route/service expansion that prompted increase use of part-time employees are entitled to a portion of the remedy; (4) the overall increase in the hours of overtime for full-time drivers after 1998 warrants limiting the remedy to 1997 and 1998; (5) any remedy should be reduced because the improper use of part-time drivers allowed for greater use of compensatory time by full-time drivers; and (6) interest should be paid.

Hours Worked versus Hours Assigned

The Complainant argues that all hours worked by part-time drivers during the hiatus is the appropriate starting point for any remedial calculation while the City contends it is only all assigned hours. We conclude the Complainant's position is more persuasive.

The City argues that using all hours worked is a flawed approach because it does not account for the various circumstances in which work in excess of 80 hours was permitted under the *status quo*. However, because our calculations will deduct such permitted hours (training hours, compensatory time/vacation fill-in hours, and hours worked after full-time drivers declined work) we conclude use of actual hours worked in the best approach.

Exclusion of Some Full-time Drivers from Remedy

The City asserts that full-time drivers hired as a result of the same service expansion that led to increased part-time hours are unjustly enriched if they receive remedial monies. We disagree. We are remedying the City's failure to honor the *status quo* limit on use of part-time employees. If the City had honored its *status quo* obligations, there would have been more work available for all full-time employees who worked during the hiatus. Thus, all full-time employees are eligible for remedial monies.

Increase in Full-time Employees' Overtime Hours

The City contends that because overtime hours for full-time employees increased after 1998, the remedy for its violation should not extend beyond 1998. We disagree. If the City had honored its status quo obligations, even more overtime opportunities would have been present for full-time employees. In addition, had the City hired more full-time employees instead of improperly using part-time employees, the City would not have experienced the

increase in overtime hours on which it now relies. Thus, the overall increase in overtime hours for full-time employees is irrelevant for the purposes of our remedial calculation.

Offset for Increased Compensatory Time Use

The City argues that its violation of the *status quo* benefited full-time employees because they could now use more compensatory time due to the increased availability of part-time employees working at straight time. The City contends that this benefit should be offset against the remedy. We disagree. There are too many factors that could have played a role in the increased ability to use compensatory time-including the hiring of the additional full-time drivers. Thus, any offset is too speculative to include in our remedial calculations.

"Extra Board" Hours

When attempting to determine the percentage of available hours the full-time employees would have worked on an overtime basis if the City had honored its *status quo* obligations, the City, contrary to Complainant, contends that the percentage of hours assigned to "extra board" staff should be excluded because such hours are not assigned on an overtime basis but instead are part of the "extra board" operators regular assignment. Because the "extra board" hours are not overtime assignments, we find the City's argument persuasive and have excluded the percentage of hours assigned to "extra board" staff. Using this conclusion, both parties otherwise agree that 47.8% of the hours worked by part-time employees in violation of the *status quo* would have been worked as overtime by full-time drivers.

Vacation/Compensatory Fill-in Hours

Both the City and Complainant agree that hours worked by part-time employees filling in for full-time employees on vacation or using compensatory time are not part of the remedy because such hours in excess of 80 are allowable under the *status quo*. They disagree on whether all such hours should be excluded (an average of 108.2 hours per week) or only some portion thereof. Complainant's argument that only a portion (50%) should be deducted is premised on an assertion that some of those hours would likely have been part of the 80 hours allowed by the *status quo*. The City counters by contending that the 80 hours were consumed by regular runs/assignments and thus all vacation/compensatory hours are excludable. We conclude that the City has the better of this argument and thus the average of 108.2 hours will be excluded from remedial calculations but only on a pay period by pay period basis. Thus,

the City does not and should not benefit from the full or partial 108.2 hours deduction during those pay periods when no *status quo* violation was present.[4]

Interest

Consistent with the previously discussed make whole remedy applicable to shop employees, we conclude that interest is not presently owed.

Here, it is not the rate of pay but the inability to recreate the number of hours of lost work that makes the payment of interest inappropriate. While we have of necessity established a formula for calculating the number of such hours, that formula was obviously unknown until now and remains an approximation-albeit a necessary one. In such circumstances, we conclude there was neither a "fixed and determinable claim" nor a "reasonably certain standard for measuring damages" prior to this decision. Thus, interest is not presently owed. However, as was true for the shop employee remedy, interest is now accruing from the date of this decision.

Allocation of Remedial Overtime

As noted above, the parties agree that the uncertainty as to which full-time employee would have worked the overtime on any given day makes allocation of the overtime among the full-time drivers an imprecise matter. We are persuaded that the best allocation of overtime monies is to pay each full-time driver a share of the hours proportionate to the number of

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[4] By way of examples:

Pay period of 1/4/99 to 1/17/99:

319.3 Total hours worked by Part-time Drivers
-160 Allowable Hours
159.3
-108.2 Vac/comp fill-in Hours
51.1
x .478 % of hours Full-time drivers would have worked as overtime
24.43 hours of remedial overtime

Pay Period of 1/1/01 to 1/14/01:

252.2 Total Hours worked by Part-time Drivers
-160 Allowable Hours
92.2
-108.2 Vac/comp fill-in Hours
0 hours of remedial overtime but no carryover of the 16 hours of excess Vac/comp fill-in Hours

months they worked during the hiatus period. The hourly rate to be used for each full-time driver is the rate they were paid during the months in question.[5]

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[5] By way of example, assume 100 hours of overtime to be split among three drivers. One driver worked the entire hiatus (47 months), one driver worked 30 months and one driver worked 23 months. The driver who worked 47 months would receive 47 hours of overtime, the driver who worked 30 months would receive 30 hours of overtime and the driver who worked 23 months would receive 23 hours of overtime.

If a driver received the same hourly rate during all the months he/she worked, that hourly rate will be utilized when calculating the wage amount. If a driver received differing hourly rates, then those differing rates will be utilized. Thus, if the 30 month driver was paid $12.00 per hour for the first 10 months he/she worked and $15.00 per hour for the remaining 20 months, the driver would receive $18.00 per hour for 10 hours of overtime and $22.50 per hour for 20 hours of overtime.

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