BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN RAPIDS CITY EMPLOYEES UNION, LOCAL 1075, AFSCME, AFL-CIO	
and	Case 88 No. 41810 MA-5468
CITY OF WISCONSIN RAPIDS	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1973 Strongs Avenue, Stevens Point, Wisconsin 54481, appearing on behalf of the Union.

Mr. Kenneth M. Hill, City Attorney, City of Wisconsin Rapids, 444 West Grand Avenue, Wisconsin Rapids, Wisconsin 54494, appearing on behalf of the City.

ARBITRATION AWARD

Wisconsin Rapids City Employees, Local 1075, AFSCME, AFL-CIO, hereinafter the Union, and City of Wisconsin Rapids, hereinafter City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint an Arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of the staff as Arbitrator. Hearing in the matter was held on April 17, 1989 in Wisconsin Rapids, Wisconsin. The hearing was not transcribed. The record was closed upon receipt of post-hearing briefs on June 2, 1989.

ISSUE

The Union frames the issue as follows:

> Did the Employer violate the collective bargaining unit when it issued its letter of November 15, 1988?
>
> If so, what is the appropriate remedy?

The City frames the issue as follows:

> Is the letter of November 15, 1988 redefining unambiguous language of the contract proper?

The Arbitrator frames the issue as follows:

> Is the procedure for computation of overtime enunciated in the City's letter of November 15, 1988 violative of the parties' collective bargaining agreement?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 8
OVERTIME/COMPENSATORY TIME

> A. All employees working in excess of eight (8) hours per day or forty (40) hours per week will receive one and one-half their regular hourly rate for all hours in excess of eight hours or forty hours.

All hours worked on Sunday will be paid at the rate of two (2) times the employee's regular hourly rate.

Overtime will be computed as follows:

1. 0-10 minutes, no overtime
2. 11-15 minutes, 1/4 hour at time and one-half
3. 16-30 minutes, 1/2 hour at time and one-half
4. 31-45 minutes, 3/4 hour at time and one-half
5. 46-60 minutes, one (1) hour at time and one-half
6. 61-75 minutes, one and one-quarter (1-1/4) hours at time and one-half

Employees will not be sent home early and ordered to report at a later hour solely to evade payment of overtime.

All overtime is to be approved by the employee's immediate supervisor or Department Head.

B. Employees will be allowed, if they so desire, to accumulate and maintain a maximum of forty (40) hours of compensatory time, in lieu of receiving pay, for overtime hours worked. Compensatory time will be computed on the basis of the time earned (i.e., time and one-half, double time, etc.). A maximum of forty (40) hours may be carried forward into a new calendar year.

Any hours earned in excess of forty (40) hours must be taken in the pay period following the pay period they were earned, or they will be automatically paid.

Compensatory time taken as time off is to be scheduled through the immediate supervisor and mutually agreed upon between the employee and the Department Head.

ARTICLE 10
VACATION

. . .

F. Any employee called to work while on vacation shall receive time and one-half pay for all time worked in excess of the normal workday and workweek; i.e., vacation shall be considered as time worked in computing overtime.

. . .

The Union and the City are parties to a collective bargaining agreement which, by its terms, is effective from January 1, 1988 through December 31, 1989. In late October, 1988, Linda Cather, the Grievant, was requested to work on Saturday, October 29, 1988. The Grievant worked a total of four hours on Saturday, October 29, 1988. Thereafter, the Grievant submitted an Overtime/Compensatory Time Report for six hours of compensatory time for work performed on Saturday, October 29, 1988. Initially, the Personnel Director amended this report to reflect four hours of compensatory time and notified the Grievant of this amendment. Thereafter, the Personnel Director decided to allow the six hours of compensatory time and communicated this decision to the Grievant in a letter dated November 15, 1988, which states as follows:

> In reference to the interpretation of Article 8, Overtime/Compensatory Time of the current Labor Agreement, I feel the language is very clear.
>
> Time worked on Saturday is compensated at the overtime rate only if the employee has already worked 40 hours or has a combination of 40 hours of work and vacation.
>
> I have recognized that there has been a misinterpretation of the language by some employees who are members of the Clerical Union. Further, I understand the City, through an oversight, may have paid overtime for Saturday work in some cases when the employee may not have been entitled to such overtime premium. In light of this and in an attempt to be fair, the City will pay time and one-half for Saturday work which has been reported through this past Saturday, November 12, 1988. All future time worked on Saturday will be compensated at the overtime rate only when the employee exceeds 40 hours worked, or has a combination of 40 hours between worked hours and vacation.

The basis for the original denial of the Grievant's request for six hours of compensatory time was that she had not worked 40 hours in the preceding week

due to the fact that she had been on sick leave for two and one-half days.

On November 21, 1988, the Grievant filed a grievance alleging that the Personnel Director's letter of November 15, 1988 enunciated a change in the past practice regarding the computation of overtime and compensatory time, in violation of Article 8, Sections A and B, of the parties' collective bargaining agreement. In a letter dated December 14, 1988, which was a response to the grievance, the Personnel Director stated as follows:

> In reference to the above grievance, I feel that the contract language (Article 8, A) is clear in that overtime is compensated on the basis of time worked, not time paid. Article 10, Section F further emphasizes this method of computing overtime.
>
> In reference to your argument that past practice is to calculate overtime on the basis of time paid, you should be aware that our failure to protest past violation of the language by our employees does not bar us from insisting upon compliance with the clear contract language in the future.
>
> The failure of the City to exercise its rights to the clear contract language does not mean we have surrendered our rights to compute overtime on the basis of time worked.
>
> As a solution to this grievance, we will calculate time worked and vacation as provided in the current agreement and we will also use the eight designated holidays in the calculation. We, however, will not include compensatory time, personal time, sick leave, or other time paid and not worked.

The grievance contesting the overtime procedure enunciated in the Personnel Director's letter of November 15, 1988 was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Contrary to the argument of the City, the provisions of Article 8 are not clear and unambiguous. Rather, the language permits more than one rational interpretation, among which is the Union's. The language is silent on the issue of what hours will count toward the eight hours in a day and the 40 hours in a week for the purpose of calculating overtime/compensatory premium compensation. Clearly, the language does not require an interpretation that all hours paid count toward the eight-hour or 40-hour threshold, but neither does it provide any basis for concluding that such interpretation is contrary to the language. The Union's interpretation, i.e., that all hours paid are to be counted toward the eight-hour and the 40-hour thresholds, is a rational interpretation that was shared by the parties prior to the incidents which gave rise to this grievance. Since the language is ambiguous, the Union's reliance on past practice is appropriate.

There has been a binding practice of counting time paid as time worked for the purposes of calculating overtime/compensatory time premium compensation. The testimony of the Grievant, of Ms. Rustad, and Union Exhibit 1 stand undisputed that in each and every instance that could be found, all hours paid were considered hours worked for calculating the eight-hour and the 40-hour thresholds. The practice, therefore, is unequivocal. As a supervisor signs the Overtime/Compensatory Time Report and as the report is ultimately approved by the City's Personnel Office, there can be no question that the practice has been clearly enunciated and acted upon. Finally, evidence and testimony demonstrate that the practice has been in existence for as many years as anyone can remember.

If the parties had intended the language to mean that overtime premium is to be paid only when an employe actually works in excess of eight hours of actual work in a day or 40 hours of actual work in a week, the parties could have written such a limitation into the contract. Since the parties did not provide such a limitation, one must conclude that the parties did not intend a limitation. The reason for receiving paid time off, whether it be vacation, holidays, sick leave, funeral leave, compensatory time, etc., is that the employe will be paid for such time as if she or he had actually worked the time. Therefore, any additional time should be paid (and always has been paid) at an overtime rate.

The City misquotes the Grievant as having testified that "no one has come forward and told her they have received an overtime premium when working extra hours after taking paid time off". The Grievant, in fact, stated that no one had told her that he or she had not received the premium under these circumstances. The City disputes the contents of Union Exhibit 1, claiming that the payroll records are the "official document which confirms pay and

hours". There is, however, nothing in the record to support the statement. If there were facts that could have been placed before the Arbitrator to dispute the Union's evidence, the City had an opportunity to produce such evidence. The City, however, did not rebut the Union's evidence and, therefore, has effectively admitted the existence of a consistent, unequivocal, long-standing, and well-known practice.

The City has questioned the relevance of Union Exhibit 1 since the language which governs the overtime for the dispatchers is contained in Article 27, Paragraphs C and D, rather than Article 8, Paragraph A. However, the overtime provisions of Article 27, Paragraph D, are identical to the provisions in Article 8, Paragraph A. Therefore, the evidence regarding the dispatcher overtime is relevant. In arguing that the Union has made no claim that the "long-standing practice is intended to be a modification of the Collective Bargaining Agreement", the City cites Buchholz Mortuary, Inc., 69 LA 623. Assuming arguendo, that the language of the contract is clear and unambiguous, the conditions set by Arbitrator Roberts in Buchholz Mortuary to support a finding that the contract has been modified, have been met in this case.

The practice relied upon by the Union does not fit the description of what Arbitrator Roberts termed "an additional benefit voluntarily granted by an Employer with no thought to a mutually binding past practice or contract modification", the reason being that the parties have always operated this way with the full knowledge of the supervisors and the Personnel Director. According to the testimony of the Grievant, when she mentioned to the Mayor that she was originally denied the overtime/compensatory premium payment, he informed her that if he knew she would be denied this premium, he would not have asked her to do the work. Certainly, the City intended to be bound by the practice.

The City has failed to refute the Union's assertion that there is a long-standing, unequivocal past practice requiring that all time paid is to be considered time worked for the purposes of determining eligibility for overtime/compensatory time premium payments. This practice is a binding practice. The City knew and understood the practice, and there has not been any deviation from this practice. Since the contract language is not clear and unambiguous, the practice is entitled to be given effect herein. Assuming arguendo, that the language was clearly and unambiguously supportive of the City's interpretation, all of the conditions identified by Arbitrator Roberts in Buchholz Mortuary, supporting a finding that an agreement has been modified, are met in this case. The grievance should be sustained. The City should be required to continue the practice under which all hours paid are considered hours worked for the purpose of overtime.

City

The City has the right to insist upon compliance with a clear and unambiguous requirement of the collective bargaining agreement. The language contained in Article 8, A, of the Agreement is clear in describing the requirements for entitlement to premium pay. The first paragraph of the Article states, "All employees working in excess of eight (8) hours per day or forty (40) hours per week will receive one and one-half their regular hourly rate for all hours in excess of eight (8) hours or forty (40) hours". The second paragraph of the Article describes premium pay for working on a Sunday. Article 10, Section F, indicates, ". . . vacation shall be considered as time worked in computing overtime". A review of the language in the Agreement clearly reflects overtime/compensatory time is earned by working in excess of a certain number of hours or working on Sunday. The Agreement does not state that overtime/compensatory time is paid simply for working on a Saturday. If the parties intended the Overtime/Compensatory Time premium to apply to any time worked on Saturday, regardless of other hours worked during the week, the Agreement would have stated such arrangement in the same manner as it does for Sunday work.

If the parties had intended, as the Union contends, that all time paid, regardless of whether or not it is worked, is to be considered when computing overtime, the parties would have included the same language in the Agreement to provide that vacation hours are to be included in the overtime calculations.

It is not the function of an Arbitrator to rewrite the parties' Agreement. Rather, the Arbitrator's function is limited to giving effect to the intent of the parties. The intent of the parties is to be found in the words which they, themselves, employ. When these words are clear and explicit, the Arbitrator is constrained to give effect to the thoughts expressed by these words.

The City disputes the validity of Union Exhibit 1, which was prepared by Carol Rustad, in that it is a selective listing which was first presented to the City at the hearing. Due to the amount of shift trading and other schedule changes which take place within that particular department, we question the accuracy of the report from which the information was taken. The payroll records are the official documents which confirm pay and hours. Ms. Rustad testified that she had knowledge that some employes completed time sheets ahead of the actual time worked or taken off. All employes in Union Exhibit 1 are

employed in our Dispatch Unit which works 24 hours a day and 365 days per year. Their normal work schedule includes Saturday and Sunday for which they do not receive premium pay. Their overtime/compensatory provisions are contained in Article 27, Section C and D. The City questions the validity of the Exhibit and the Union's contention of a consistent and long-standing practice.

Assuming arguendo, that the record confirms the past practice relied upon by the Union, Arbitrators have ruled that past practice can be used only to clarify the meaning of ambiguous contractual terms or to establish the intent of the parties where the contract is silent. (Cites omitted.) Arbitrators have found that the past practice, even a well-established one, will not prevent a change by management if the practice conflicts with an unambiguous provision of the contract. There is no claim by the Union that the alleged long-standing practice was intended to be a modification of the collective bargaining agreement. If such a claim is being made, the burden of the proof rests upon the proponent of contract modification. The Grievant testified that when she worked overtime, she reported the additional hours on an Overtime/Compensatory Time Report and submitted the form to her supervisor. The purpose of the supervisor's review was to assign and authorize the time charged to the particular project account, not to authorize payment of time. In Buchholz Mortuary, Inc., Arbitrator Roberts stated that "A modification of a collective bargaining agreement must clearly evidence a mutuality of intent by which both parties reasonably understand that the practice or understanding is binding in the future and not merely a present way of doing things. . . . To vary the clear written mandates of the contract, the understanding or past practice must be evidenced by substantially stronger evidence than when utilized to interpret ambiguous language or to fill in areas where the contract is silent". Arbitrator Killingsworth, in Bethlehem Steel Company, indicated that reliance on a past practice is appropriate if the parties have "evidenced a positive acceptance or endorsement of that interpretation". The Union has not demonstrated that the parties have expressed a mutual consent to modify the clear and unambiguous contract language, nor did they even suggest it was the parties' intent, at any time, to modify the language. The Grievant merely stated that she reported time she felt she was entitled to on a form and submitted it to her supervisor. Since the time was reported on a separate form and was not reported on the time sheet, or submitted with the time sheet, the supervisor would not necessarily know the employe was not entitled to the overtime/compensatory time. The language of the current Agreement is clear and explicit regarding the entitlement to the overtime/compensatory premium. Thus, even if a contrary practice is established, the practice is not binding and cannot be used to change the terms of the Agreement. The City has the right, upon proper notice, to regain its entitlement to the clear and unambiguous contract language. This notice was given to the Union as evidenced in Joint Exhibit No. 3. To accept the Union's argument and ignore clear and explicit contract language, would, in effect, modify or change the Agreement and, therefore, exceed the jurisdiction of the Arbitrator.

Contrary to the argument of the Union, the Grievant's supervisor did not ask the Grievant if she would work on Saturday, rather, the Grievant's testimony demonstrates that she requested to come in and her supervisor approved this request. The Union, in its brief, states that the Grievant testified that "it has always been the practice of the parties that all time paid was considered time worked for overtime purposes". The City's notes reflect that the question asked by Mr. White was, "Are you aware of others who have taken time off and got paid?", to which the Grievant responded, "No one has come forward and told me they have".

The City did challenge Union Exhibit 1 with its cross-examination of Ms. Rustad. The City felt that her response that she had knowledge of employes completing time sheets prior to actually working was sufficient to question the credibility of the report. Contrary to the argument of the Union, the City does not consider the Union to have established that there was a long-standing past practice of paying an employe overtime premium, when the employe has worked fewer hours than specified in the Agreement. In response to its argument that supervisors have approved the overtime and, therefore, validated the employes' pay to premium pay, the City responds that the supervisor approved the work, not the premium pay. Even if the premium pay had been authorized by the supervisor, it would not effectuate a change in the clear contract language.

The Union argues that the contract language is ambiguous because the parties disagree on the interpretation of the language. As recognized in Elkouri, the fact that language is subject to more than one interpretation does not mean that the language is, therefore, unclear.

Contract provisions are not disjoined, but rather must be read together so that there is a meaning to the whole. Accordingly, Article 10, Section F, must be given consideration. This Article states, ". . . vacation shall be considered as time worked in computing overtime". To expressly include some guarantees in an agreement is to exclude other guarantees. The fact that the Agreement specifically allows credit for vacation, indicates that other paid time off is not to be credited. The grievance should be denied and dismissed.

DISCUSSION

Article 8, A, provides that "All employes working in excess of eight (8) hours per day or forty (40) hours per week will receive one and one-half their regular hourly rate for all hours in excess of eight hours or forty hours". At issue is whether the eight-hour and forty-hour base for the computation of overtime includes time paid, but not worked, e.g., compensatory time, personal time and sick leave.

Inasmuch as the term "working" is not defined in the provision, it is reasonable to conclude that the parties intended the term to be given its common and ordinarily accepted meaning. Commonly and ordinarily, "working" means performing the duties of one's job. An employe who is on compensatory time, personal time, sick leave, etc., is not performing the duties of the employe's job. Thus, the most reasonable construction of the language of Article 8, A, is that time paid but not worked is not included in either the eight-hour or the forty-hour base used to compute overtime. That is, it is only "time worked" which is included in the eight-hour or forty-hour base used to compute overtime.

As the City argues, Article 10, F, provides an exception to the "time worked" requirement of Article 8, A. In this provision, the parties have addressed the issue of the payment of overtime to an employe who is on vacation. Specifically, the parties have agreed that "vacation shall be considered as time worked in computing overtime". Not only does the language of Article 10, F, expressly affirm that "time worked" is the basis for the computation of overtime, but it also indicates that where the parties intended an exception to the "time worked" basis for the computation of overtime, such an exception will be expressed in the contract language. The parties do not argue and the undersigned does not find that there is any other expressed exception in the contract language.

In conclusion, the undersigned is persuaded that the provisions of the parties' labor contract clearly and unambiguously provide that, except for the vacation time exception addressed in Article 10, F, the overtime provided for in the first sentence of Article 8, A, is to be computed on the basis of time worked. The undersigned is persuaded that between June, 1985 and the issuance of the City's letter of November 15, 1988, Dispatchers were consistently paid overtime in situations where the forty-hour base has included such time paid, but not worked as compensatory time, sick leave, and personal time. While the evidence of this practice would be relevant to the construction of ambiguous contract language, it cannot be used to alter the terms of clear and unambiguous contract language. Contrary to the argument of the Union, the procedure for the computation of overtime enunciated in the City's letter of November 15, 1988 is not violative of the parties' collective bargaining agreement.1/

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 1st day of September, 1989.

By ____
Coleen A. Burns, Arbitrator

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1 At issue is the construction of Article 8. The parties have not addressed and the Arbitrator has not considered situations where work may fall under the call-time or call-in provisions of the parties' collective bargaining agreement.