

the discretion of the City with regard to matters affecting the public health, safety, or general welfare.

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ARTICLE 4 -- MAINTENANCE OF STANDARDS

- 4.01 The City agrees that all conditions of employment in the unit of bargaining covered by this agreement relating to wages, hours work, overtime, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this agreement. As to any item not covered by this agreement, reference may be made by either party to past procedure, departmental policy, City Ordinances or Resolutions, and State Statutes as guidelines in attempting to settle a particular dispute.

ARTICLE 6 -- OVERTIME

- 6.01 All overtime worked must be authorized by the commanding officer.
- 6.02 "56 hour" employees shall be paid at the rate of time and one-half for all overtime hours worked, regardless of the day of the week the overtime is worked.

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ARTICLE 7 -- CALL-IN PAY

- 7.01 Any "56 hour" employee called in for emergency work shall be guaranteed a minimum of three hours pay at time and one-half, regardless of the day of the week the call-in occurs. This section shall not apply to Paramedics and Hazardous Incident Response Team (HIRT) members when training or re-training for certification for those special assignments.

BACKGROUND:

The Grievant is Brook Lagerwall, a firefighter with the City. While on duty on September 13, 1989, the Grievant was on a squad call and took a patient into St. Catherine's Hospital. He went in a vacant hospital room to get some supplies for restocking the squad. The hospital later notified Rich Meeker, the Emergency Medical Services Coordinator for the Fire Department, that the Grievant had been exposed to an individual with measles who had previously been in the vacant room. The hospital informed Meeker that the Grievant should get an MMR, an injection against obtaining measles, within 72 hours of exposure.

Meeker notified the City Health Department and asked them to arrange for a vaccination. He also notified Mary Miller, the secretary to the Fire Chief, to contact the Grievant and tell him to get an injection of MMR in 72 hours and that the Health Department was available to do so. Miller called the Grievant on September 14, 1989, and told him to get the vaccination within 72 hours of his exposure. The Grievant got the vaccination from the Health Department on September 15, 1989, a day he was scheduled off duty.

On the Grievant's next regularly scheduled work day, September 16, he filed an accident report. The Grievant also submitted an application for three hours of overtime, which was denied by Jerome Wamboldt, Assistant Fire Chief in charge of personnel. The denial of the overtime is the basis of this grievance, which was processed to arbitration.

When the Grievant received the phone call from Miller, he assumed that he was being ordered to get the measles vaccination, and he further assumed that he would be paid overtime if he reported for the vaccination while off duty. In order to get the shot within 72 hours, he had to report for the vaccination while still off duty. Wamboldt and Meeker stated that the Department policy is that they cannot order anyone to get medical treatment and can only encourage them to do so.

The Grievant -- and several other firefighters -- were involved in an incident in 1988 where the City paid overtime for medical attention received while off duty for exposure to PCB's while on duty. On September 12, 1988, firefighters responded to a transformer fire at the American Brass Company, a local manufacturing plant. Wamboldt was informed the next day that the firefighters were exposed to PCB's. Wamboldt met with Union President John Celebre and one or two doctors, and issued a notice to the Grievant and 10 other firefighters regarding the procedure to follow for the possible PCB exposure. The notice, dated September 13, 1988, informed them, among other

things, to report to the American Brass Company for a blood test and a liver function base line test.

The Grievant was notified by telephone to go to the fire station to identify his turn-out gear and to report to American Brass for the blood test.

The Grievant did not receive the notice from Wamboldt to get the blood test until after he had already done so in response to the telephone notification. While he was not told anything on the phone about receiving overtime for either identifying his turn-out gear or getting the blood test, he submitted a total of six hours of overtime, three for identifying the turn-out gear and three for the blood test, and was paid six hours of overtime.

The incident at American Brass was the only time that the Fire Department paid for overtime for medical treatment for off duty employees for an injury or contamination while on duty. Wamboldt noted that the basis for paying overtime under this incident is that the Department was concerned about the people potentially exposed to PCB's, and they wanted employees to get the blood work done. American Brass paid for all costs involved, including all turn-out gear that was replaced. When Wamboldt himself went to the nurse's office at American Brass for the tests, he waited up to 45 minutes while there was a lot of confusion in the office. He ended up leaving and returning later, as did a couple of other firefighters.

THE PARTIES' POSITIONS:

The Union:

The Union points out that this incident was in the line of duty, that the vaccination was time limited and needed to be administered in 72 hours, that the accident report was filed in accordance with departmental policy, and that Section 4.01 of the labor agreement allows for reference to past practice of issues not covered. While overtime is covered in the contract, the reasons for overtime are not, especially medical follow up for incidents. Therefore, one must refer to the past practice.

The Union asserts that practices change, and contends that the American Brass incident set the benchmark for all future practices. The only difference between the American Brass case and this one is that the City was reimbursed by American Brass, and that it was a large scale incident. Wamboldt denied that the City paid overtime in the American Brass incident because of the number of people involved.

While the City raises the question of whether prior notice that overtime will be paid is essential, that was not the case in the American Brass incident. The Grievant was not informed during either of two telephone calls that he would get overtime, and Wamboldt's memo does not indicate that overtime would be paid. Yet overtime was paid in that incident.

While the City says that the vaccination was not work and thus the Grievant was not eligible for overtime, it was work, as borne out by the practice of compensating on-duty personnel who receive vaccinations while on duty.

The Union asks that the Grievant be paid a minimum of three hours of overtime.

The City:

The City submits that the Grievant's off duty vaccination is not work which is to be reimbursed under the contract. The contract defines what is not work, as Section 7.06, for court testimony. Getting medical attention has not been and should not be considered work. The Grievant was not told he would get overtime, and his assumption that he would get overtime does not constitute a basis for overtime.

The City notes that employees are covered by Workers' Compensation and a liberal sick leave policy. But to hold that receipt of medical attention while off duty requires payment of overtime would be an expansive extension of the labor agreement.

The City denies the existence of any past practice. The one incident in 1988 at American Brass was an unusual incident and the City treated it as unusual. While overtime was authorized in that incident, the City was reimbursed for it. There has been no uniform past practice before or since the American Brass incident. The City submits that a past practice has to be consistent, and that is not the case here. Others have received medical treatment off duty for incidents in the line of duty, but overtime has not been paid in any of the incidents except for the American Brass case.

The City asks that the grievance be denied.

DISCUSSION:

This case properly falls under Article 4, Maintenance of Standards, of

the labor contract. While the Union attempts to characterize the receipt of medical attention while off duty for a line of duty incident as work, this is not work within the terms of the contract. Although on-duty personnel may receive medical attention as part of their work, that is a matter of circumstance and convenience that goes to the benefit of the bargaining unit. It would be possible to consider the off duty medical situation work if indeed the Grievant had been ordered to receive such medical attention while off duty. And although the Grievant assumed that he was being ordered to get a measles vaccination, the Department cannot order anyone to get medical attention. Therefore, this situation does not constitute work under the contract but may be considered in terms of the past practices of the parties.

The past experience of this Grievant was that he was paid overtime for getting medical attention off duty for exposure to PBC's in the line of duty. The only other time the Grievant needed medical attention for an incident in the line of duty, he was paid overtime for both coming into the station to identify his turn out gear and for going to the American Brass Company for blood tests. In the American Brass incident, he received two phone calls during which non one mentioned overtime payment. The memo from Wamboldt regarding procedure to follow did not mention overtime. Yet the City paid the overtime submitted, a total of six hours for this Grievant.

The next time the Grievant was involved in an incident -- the exposure to measles while in the line of duty -- he was again called and told to get a vaccination within 72 hours of exposure. Because the 72 hour limitation came within the Grievant's off duty hours, he received the medical attention while off duty. It was logical for him, based on his own past experience, to believe that he would be paid overtime for getting the vaccination at the minimum of three hours of overtime.

However, one incident -- the American Brass incident -- cannot establish a past practice. While the Union urges that the 1988 incident at American Brass established a new benchmark to measure other incidents, the Arbitrator cannot find that this one incident -- which the City considered and treated as unusual -- provides the basis for a past practice.

It is generally accepted by arbitrators that, in the absence of written contractual language, a binding past practice -- one that cannot be unilaterally discontinued during the term of the contract -- must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

This case lacks all the elements of a binding past practice. With the one exception of the American Brass incident, the City has never paid overtime to anyone receiving medical treatment while off duty for an injury or health problem incurred while on duty. The past experience for this Grievant may have been the payment of overtime in a like circumstance, but in order for a past practice to acquire a binding effect, must be consistent to other members of the bargaining unit or consistently followed over a period of time.

The terms of the collective bargaining agreement do not apply to this situation, and the evidence fails to show that there is a past practice of reimbursing employees for overtime for medical attention received off duty for injuries or contamination received in the line of duty. Accordingly, I find that the City did not violate the bargaining agreement when it denied the Grievant the minimum of three hours of overtime pay for receiving a measles vaccination at the City Health Department on his regularly scheduled day off.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 13th day of March, 1990.

By _____
Karen J. Mawhinney, Arbitrator