BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OSHKOSH CITY EMPLOYE UNION, LOCAL 796, AFSCME, AFL-CIO	Case 160 No. 46273 MA-6931
and	
CITY OF OSHKOSH	

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Union.

Mr. John W. Pence, City Attorney, City of Oshkosh, 215 Church Avenue, P.O. Box 1130, Oshkosh, Wisconsin 54902-1130, appearing on behalf of the City.

ARBITRATION AWARD

Oshkosh City Employe Union, Local 796, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Oshkosh, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over call-in for overtime. Hearing on the matter was scheduled for February 11, 1992 and postponed and held on March 13, 1992 in Oshkosh, Wisconsin. Post hearing arguments were submitted to the undersigned by April 20, 1992. Full consideration has been given to the testimony, evidence and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

> "Did the City violate the collective bargaining agreement when it failed to properly call in the grievant for overtime on January 5, 1992?"

At the hearing the parties agreed that should the Union prevail in the instant matter the grievant would be credited with seven and one-half (7 1/2) hours at time and one-half to be taken as compensatory time off.

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE VII

SENIORITY

The employer agrees to the seniority principle.

Seniority shall be established for each employee and shall consist of the total calendar time elapsed since the date of his employment. Seniority rights terminate upon discharge or quitting. A seniority list shall be posted in each department section, listing the seniority of the employes in each section.

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ARTICLE XI

PAY POLICY

Overtime: All work performed outside the above normal work day and/or work week shall be compensated for at the rate of time and one-half (1 1/2) the employees regular rate of pay. Employees shall receive twice their regular rate of pay for all work performed on Easter Sunday. The principal (sic) of seniority may apply on a rotating basis, within a division and the specific classification required to perform overtime work. Transit employees shall be paid overtime for work over 40 hours per week or over 8 hours per day only.

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ARTICLE XXVI

MAINTENANCE OF BENEFITS

The City will not change any benefit or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.

BACKGROUND

The City and the Union have been parties to several successive collective bargaining agreements. Included in the provisions of the collective bargaining agreements is a contract clause which governs the call-in of employes. The parties seniority provision requires that employes be called in the order of their seniority, with the most senior employe being called in first. Amongst its various governmental functions the City operates a Public Works Department with a Street Division. Employes of the Street Division are called in when the City requires snow removal during snow emergencies.

The instant matter arose when on Saturday, January 5, 1991, between 8:00 a.m. and 8:15 a.m., Street Division Foreman Bill Tollard called several employes into work to clear snow from the City's streets. Three (3) Equipment Operator III's reported to work by 8:30 a.m.. The least senior of the

Equipment Operator III's, Bob Baier, was among the employes who reported to work. Thereafter, Rick Bohnert, hereinafter referred to as the grievant, a more senior Equipment Operator III, filed a grievance alleging the City had violated the collective bargaining agreement when it failed to call him into work.

The record demonstrates two (2) other employes filed similar grievances, one being withdraw by the Union because the employe normally declined the type of snow removal being performed by the City and the other was settled voluntarily by the parties with no precedential value. Both of these two (2) employes, as same as the grievant, do not normally perform the type of snow removal being performed on the morning of January 5, 1992.

The record also demonstrates that Tollard did call the grievant's residence on January 5, 1991. The grievant testified at the hearing that he left his residence shortly after 8:00 a.m. to go work at a part-time job. The grievant, as he was driving to the part-time job's location drove past the Street Division's location (city garage) and was aware that the City's streets were having snow removed by City employes. The grievant further testified he did not leave his residence until after 8:00 a.m. because he was aware of the snow fall and was waiting to see if he would be called into work. The grievant also testified that his spouse had a telephone number where he could be reached should he be called by the City to report for snow removal. Tollard testified that he called Equipment Operator III's between 8:00 a.m. and 8:15 a.m., that he called the grievant's residence prior to calling Baier, that he spoke with the grievant's wife, was aware the grievant was not at home, and told the grievant's wife to inform the grievant he was to report to work for snow removal at 10:00 p.m.. This work involved snow removal from the City's parking lots, work which the grievant normally performed and which he did in fact perform. The grievant's wife testified that Tollard did not call until 10:00 a.m..

At the hearing the parties agreed the matter is properly before the undersigned and agreed that should the undersigned rule in the grievant's favor that the remedy shall be to credit the grievant with seven and one-half (7 1/2) hours at time and one-half compensatory time.

UNION'S POSITION

The Union contends the City violated the collective bargaining agreement because it failed to call-in a more senior employe prior to calling a less senior employe. The Union alleges that Tollard did not intend to call the grievant to work the morning of January 5, 1991 because he intended to call the grievant to work the night shift snow removal commencing at 10:00 p.m.. The Union argues that circumstances support the Union's position.

The Union points out that all the Equipment Operator III's called in to work had street routes normally assigned to them which they plowed with graders. These employes plowed their normal routes on January 5th. The three (3) Equipment Operator III's who normally cleared snow from City parking lots using endloaders were not called in. The Union asserts that because the City decided not to plow parking lots during the daylight hours because of cars being parked in the lots, none of the three (3) more senior Equipment Operator III's were called into work. The Union contends the City's position that it is coincidental that none of the more senior employes who normally plow parking lots were available to work the morning of January 5th is not believable. The Union also argues the grievant's spouse's testimony that Tollard did not call until after 10:00 a.m. and then to only have her inform the grievant to report to work at 10:00 p.m. supports this conclusion. The Union also asserts Tollard's testimony is not credible because he first claimed he tried to call

all the Equipment Operator III's yet the City acknowledged one employe had not been called-in and settled that grievance.

The Union would have the undersigned sustain the grievance.

CITY'S POSITION

The City contends the grievant was unavailable for work when Tollard called his residence on January 5, 1991 and therefore there was no violation of the collective bargaining agreement. The City argues Tollard called the grievant's home on the morning of January 5th, between 8:00 a.m. and 8:15 a.m., that the grievant was not at home, that the grievant was not available for street plowing, and that the grievant's spouse was given a message to have the grievant report for work to clear parking lots at 10:00 p.m..

The City contends that all employes needed to work the snow emergency were called in the order of their seniority. The City asserts the grievant was not available when called and so the City called the next person on the seniority list, Baier.

The City also points out that the grievant drove right past the City's garage, that the grievant knew the City was working on snow removal, yet the grievant did not stop or call to find out if his services were needed. The City also points out the grievant was aware of the following work rule:

Emergency Call In:

> 3.1 All employes should make themselves available at any time for emergency operations such as flooding, snow-plowing, etc.

The City concludes the grievant did not make himself available for snow removal duties even though he was aware of a snow emergency and was therefore in violation of this work rule.

The City also argues that the grievant's spouse, when answering Tollard's call around 8:15 a.m., was told by Tollard to tell the grievant to report for work at 10:00 p.m. and because she was unaware of what time it was when Tollard telephoned she has conjectured that the time was 10:00 a.m..

The City argues that Tollard had no motive not to call the grievant for snow removal work. Further, as somebody else did word there was no savings to the City by not having the grievant report to work. The City concludes that this is simply a situation were the grievant was not available for work when the phone call was placed to his home.

The City would have the undersigned deny the grievance.

DISCUSSION

The City's claim that somehow the grievant violated work rule Emergency Call In, 3.1, because he failed to call the City or to stop in at the City's garage to see if his services were required by the City is not supported by any evidence in the record that such a requirement is placed on City employes. Therefore the undersigned finds no merit in this argument.

The record also demonstrates that when Tollard called the grievant's residence Tollard concluded the grievant was unavailable for work because the grievant was not home. There is no evidence in the record which would demonstrate how Tollard reached the conclusion that the grievant was

unavailable for work merely because the grievant was not in his residence at the time Tollard made his call. There is no evidence that Tollard asked the grievant's spouse where the grievant was and whether the grievant would be able to report for duty. Nor is there any evidence that the City needed someone to begin plowing the streets by exactly 8:30 a.m.. Thus the undersigned finds it is irrelevant whether Tollard called at 8:00 a.m. or 10:00 a.m. because Tollard concluded the grievant was unavailable for work because the grievant was not at his residence at the time Tollard made the call and Tollard did not seek any additional information from the grievant's spouse as to the grievant's whereabouts before concluding the grievant was unavailable for work. The undersigned finds that simply not being at your place of residence does not necessarily mean you are unavailable to report for duty. For example, the grievant may have just run an errand to the store or have only been next door at a neighbor's. Thus, absent any evidence in the record that an employe must be at his place of residence when the City calls in order for the employe to be available for work, the undersigned finds the City cannot make such a conclusion without questioning when someone answers the telephone where the employe may be. Once the grievant informed his spouse of a telephone number where he could be contacted at he was making himself available for work. Having done so, the grievant was complying with work rule 3.1. Tollard's conclusion that the grievant was unavailable for work merely because he was not at his place of residence at whatever time Tollard called the grievant's residence is not supported by any evidence in the record that places a burden on employes to be at home when the City calls such that the City can conclude the employe is unavailable for work.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented the undersigned concludes the City violated the parties collective bargaining agreement when the City concluded the grievant was unavailable for work on the morning of January 5, 1991. The City is directed to credit the grievant with seven and one-half (7 1/2) hours at time and one-half compensatory time. The grievance is sustained.

AWARD

The City violated the collective bargaining agreement when it failed to properly call in the grievant for overtime on January 5, 1991. The City is directed to credit the grievant with seven and one-half (7 1-2) hours at time and one-half compensatory time.

Dated at Madison, Wisconsin this 24th day of July, 1992.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator