

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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OSHKOSH CITY EMPLOYEES UNION, : Case 197  
LOCAL 796, AFSCME, AFL-CIO : No. 48438  
 : MA-7599  
and :  
 :  
THE CITY OF OSHKOSH :  
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Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40,  
AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901,  
appeared on behalf of the Union.  
Mr. Warren P. Kraft, Attorney at Law, City Attorney, City of Oshkosh,

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ARBITRATION AWARD

On December 9, 1992, the captioned parties filed a joint request with the Wisconsin Employment Relations Commission to have the undersigned appointed to hear and decide a grievance pending between them. On January 13, 1993, the Commission appointed me to hear and decide the matter. A hearing was conducted on March 3, 1993, in Oshkosh, Wisconsin. The proceedings were not transcribed. At the conclusion of the hearing, the parties made oral argument. No post-hearing briefs were filed.

This arbitration involves the right of the City to require Ralph Kosmer to take a scheduled day of work off during a week in which he was called in to work overtime.

BACKGROUND AND FACTS

The facts giving rise to this dispute occurred on Saturday, September 5, 1992 at approximately 7:00 p.m. Employee Jim Berger, the senior Wastewater Treatment Plant operator, called his supervisor, Chuck Isham, and indicated that he was too sick to work the 12 Midnight to 8:00 a.m. Sunday shift, for which he was scheduled. Isham immediately began to seek a replacement and his first phone call was to Ralph Kosmer. Kosmer, who has worked for the City for 18 years, is the second senior employee, and also the most available. Isham asked Kosmer if the latter man was available to work on Sunday and then take a different day off later in the week. Kosmer replied that he would work, but that he did not want to take a day off later, that he wanted to work his regular schedule and be paid for the overtime. Isham responded that that was not consistent with the policy and advised Kosmer that he was unwilling to make a policy change over the telephone and that if Kosmer sought a policy change, the two men ought to sit down and discuss it. It is Isham's testimony that he advised Kosmer that if Kosmer were not prepared to take a subsequent day off, he would call someone else. Kosmer replied that he knew Isham was in a bind, that he would agree to come in, and that he wanted overtime. Isham responded that he was not really in a bind, and that he (Kosmer) was the first person called. According to Isham, he advised Kosmer that there were a bunch of other guys he could call. Kosmer repeated that he knew that Isham was in a bind and would agree to work. Isham's grievance answer contains an essentially accurate summary of the discussion between the men. That summary is set forth below in its entirety.

It appears that there were a number of employees available for Isham to call, specifically, there were a number of mechanics who would be available to

perform the work. It also appears that typically the scenario outlined by Isham is the one utilized by the parties. When there is a vacancy, an employee is called. He typically agrees to work the hours offered, and typically agrees to take a subsequent day off, and thus no overtime is generated. It is clear to me from the testimony of the two men, that Isham conditioned his willingness to give Kosmer the overtime on Kosmer's willingness to take a subsequent day off. It is equally clear to me that Kosmer conditioned his willingness to work on maintaining his ability to work his full schedule and to be paid at an overtime rate. The two men agreed to meet and talk on a subsequent date. I believe that the two men viewed that date as serving different purposes. For Isham, it was a date upon which Kosmer could select a day off. For Kosmer, it was to carry on the conversation with respect to his earning overtime.

Isham and Kosmer met again on Tuesday, September 8. Their conversation consisted of a rerun of the positions the men advanced to one another the preceding Saturday. Before the conversation went very far, Kosmer called in Local Union Steward Harry Butcher. Butcher agreed with Kosmer that Kosmer was entitled to work his entire schedule. Isham advised the men that he disagreed with that interpretation. The result of the Tuesday meeting was that Isham scheduled Kosmer off on Wednesday. As a consequence, Kosmer worked a 40 hour week instead of 48 hours. Kosmer lost 8 hours work and pay at time and one-half.

Sunday is the first day of the pay week. The parties stipulated Mr. Kosmer's work schedule for the week in question. He was scheduled to be off on Sunday, September 6. Pursuant to the call in, he did come in and he did work from midnight until 8:00 a.m. Monday was Labor Day. Kosmer was scheduled to work the 8:00 a.m. to 4:00 p.m. shift and he worked that shift. Tuesday, he was scheduled to work 8:00 a.m. to 4:00 p.m. He did so. On Wednesday, he was scheduled to work 8:00 a.m. to 4:00 p.m. and he was directed to take that day off, over his objection. Thursday was his scheduled day off and he took the day off. Friday, he was scheduled to work midnight to 8:00 a.m. and worked those hours. Saturday, Kosmer was scheduled to work 8:00 a.m. to 4:00 p.m. and worked those scheduled hours.

Kosmer filed a grievance on or about September 18, 1992. There are a series of answers, the most notable of which is that provided by Isham, a Step 2 reply dated September 24, 1992, and set forth below in its entirety:

To: Ralph Kosmer, Liquid Operator  
From: Charles Isham, Supt. of Wastewater  
Treatment Plant  
Date: September 24, 1992  
Subject: Grievance regarding sick leave call in  
overtime

Vacancies created by sick leave on weekends and night shifts at the City of Oshkosh Wastewater Treatment Plant are filled by a supervisor calling other available qualified operators or maintenance mechanics and requesting if they would like to work and then take off later in the week. This procedure has been used by you and other plant personnel in the past with the participants always very eager to fill in and plan a day off to their convenience later.  
James Berger called me at home on 9-5-92 at 1900 to

inform me that he would be sick for his 12-8 shift on 9-6-92. I looked at the schedule for Liquid Plant Operators and found that you and Gordon Selbach were both off. I called you first and asked if you would like work the vacant shift and then take off when extra on either Tuesday or Wednesday. You replied that you would prefer work overtime. I said that was not the procedure established and that it was strictly your option to work or not. You then said you were aware of that and you agreed to work and see me later in the week.

On Tuesday, 9-8-92 you and Mr. Butcher, Plant Steward, came in to see me. Both you and Mr. Butcher at that time acknowledged the procedure used to fill in the sick leave vacancy was the established past practice and the only day left for you to take off was the next day on Wednesday.

Therefore, because of this, your grievance is denied.

#### ISSUE

The parties were unable to stipulate the issue. I believe the issue to be:

May the City require an employe called in to work overtime to take an equivalent amount of time off within the pay period in order to avoid overtime?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

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ARTICLE X

NORMAL WORK WEEK, NORMAL WORK DAY AND NORMAL WORK SCHEDULE

The normal work week shall be forty hours, Monday through Friday. The normal work day shall be eight (8) hours per day, Monday through Friday. The normal work schedule shall be five (5) consecutive eight (8) hour days, Monday through Friday, for the following divisions:

- a. Street Department
- b. Parks Department
- c. Sanitation Department
- d. Cemetery
- e. Water Department, Outside Crew
- f. Electrical Division
- g. Forestry Division
- h. Labor Pool Division

The Sewage and Water Plant operation shall work a forty (40) hour work week, as per mutually agreed to schedule.

Transit employees shall work in accordance with present, mutually agreed upon schedule. Selection of the runs shall be made semi-annually unless requested in writing by not less than seventy percent (70%) of the total employees affected. Each driver shall make his/her "selection" on the order of his/her division seniority. Transit garage employees shall receive a thirty (30) minute uninterrupted unpaid lunch break.

Sanitation Division: The Union agrees to the concept of the route change and will continue to work with the City to finalize the changes. Any change in route shall be by mutual agreement between the employee and the employer. The adjustment of the normal work day and the normal work week shall be the function of the Employer, subject to consultation with employees, as above. A Route system shall be defined as a designated number of pickups for a certain area, as the case may be, and the employee is expected to complete the work involved on a weekly basis. In the event of severe weather, the closing of the landfill or other reasons the Sanitation employees cannot go on the routes, every effort will be made by the employer to notify the employees before they report for work. If this is not possible, employees will either be sent home with no pay for that day or temporarily transferred to other departments for work. Routes will be made up either within the normal work week or by working on Saturday. Employees will be compensated at the rate of time and one-half for hours worked in excess of 40 hours in that week.

In the event it is necessary to change employees from one regular schedule of hours to another schedule of hours the employees shall be given at least 24 hours notice of change. Work performed on a revised schedule during the 24 hour notice period shall be compensated at 1 1/2 times the normal rate of pay whether or not the total working hours for the week are in excess of 40 hours, except as otherwise provided herein for emergencies.

For an emergency such as snow removal, ice control, flood control, sickness and so on, the employer shall have the right to schedule the work week as may be necessary and from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his normal work week schedule shall not be sent home early on subsequent days or denied his regular work week schedule to avoid the over-time payment without his consent. The spirit of this provision is that the employer shall not be penalized during emergency conditions through overtime payment during the 24 hour notice period, but neither shall the employer adjust the working hours after emergency conditions (e.g. to less than 8 hours per day) so as to deny employees legitimate overtime.

Compensation for work on any regularly scheduled shift shall be at the straight time rate of pay, unless otherwise specified in this agreement.

The employer shall endeavor to maintain stability of employment throughout the year.

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#### ARTICLE XVIII

##### GRIEVANCE PROCEDURE

Both the Union and the City recognize that grievances and complaints should be settled promptly and at the earliest stage and that the grievance process must be initiated within 10 work days of the incident or knowledge of the incident. A grievance shall be defined as a dispute which involves the interpretation, application or compliance of the provisions of this Agreement. All grievances which may arise shall be processed in the following manner:

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Step 5. . . .The decision of the Arbitrator shall be final and binding on both parties, however, he shall have no right to amend, modify, ignore, add to or delete the provisions of this Agreement. The decision of the Arbitrator shall be based solely upon his interpretation of the express language of the Agreement. Expenses for the Arbitrators services and proceedings shall be

borne equally by the Employer for compensating its own representatives and witnesses, except that the grievant and four employees shall receive their regular rate of pay for any scheduled time lost.

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#### POSITIONS OF THE PARTIES

The Union points to the language in Article X relative to changing days. The Union contends that that language makes clear that in the sewage and water plant operation there is a mutually agreed upon schedule. The schedule provided that the grievant was to work on Wednesday, September 9. His schedule was changed in order to avoid the payment of overtime. Kosmer never consented to having his schedule changed for the avoidance of overtime. The Union contends that whatever practice exists was one where the employee consented to have his hours changed in order to avoid overtime. Any such practice is not binding where the employee withholds his consent.

The Union contends that the Employer could have told Kosmer not to come in. The Employer did not do so. By the time the parties met on Tuesday, Kosmer had no choice. He was given no option. His convenience was not a matter for discussion. The Union points to the grievance procedure, Article XVIII, and notes that I have "no right to amend, modify, ignore" any provision of the Agreement. The purpose of the language in Article X is to preclude the Employer from adjusting an employee's hours to avoid overtime. It is absolutely, clearly on point with respect to the facts underlying this grievance. The Union urges that I find a clear violation of the collective bargaining agreement, and award Kosmer 12 hours of compensatory time.

The City agrees that Article X governs the disposition of this case. The City argues that an illness created a temporary vacancy. That vacancy was filled pursuant to an established past practice. That practice was acknowledged by both the grievant and the steward at the subsequent meeting on Tuesday. Since at least 1985 employees called in have been rescheduled. Sometimes, it is with their consent; sometimes, it is without their consent. The grievant and the steward were looking for a change in the established practice of filling in for vacancies. It is the Employer's view that if the Union seeks a change in the established practice, it should seek such a change in bargaining. The Employer contends that the practice is clear, unequivocal, recognized, long-established and that no violation of the contract occurred.

#### DISCUSSION

The Employer's view of this case is that there exists an established past practice which causes an employee called in to work overtime to take a subsequent day off. It appears that this is the way it is done in this employment setting. However, the language of the collective bargaining agreement contemplates an employee taking a subsequent day off if, and only if, he consents to do so. It appears that in the routine day-to-day operation, employees consent. That is not the case in this proceeding, however, Isham testified to having required employees to take days off against their will previously. However, there were no examples, dates or names provided. There is thus no basis in the record to conclude that such a practice exists.

The practice of an employee consensually taking a day off is consistent with the specific provisions of the collective bargaining agreement. I find that as a practical matter, the parties have accommodated one another throughout their relationship, and such a consensual practice does exist. I find no basis to conclude that there exists a practice of the Employer

obligating a reluctant employee to take a day off over his objection.

I believe the language of the collective bargaining agreement to be clear and to control this proceeding. An emergency is defined to include sickness. Berger called in sick. That fact gave rise to the need to call someone in, and the emergency status waived the contract's prior notice obligation. Here, Kosmer was called in to work. The hours he was asked to work were outside his normal work week schedule. Kosmer did not consent to having Wednesday cancelled as a work day. Given his unequivocal refusal to consent to having a day scheduled off, I believe that Article X precludes Isham from denying Kosmer his regular work week schedule in order to avoid overtime. I believe it is precisely the avoidance of overtime that motivated Isham to cancel Wednesday for Kosmer. The language is not ambiguous. Article XVIII goes to great lengths to define my role. I am to apply, not reform, the terms of the collective bargaining agreement.

There was a dispute as to the availability of people other than Kosmer to come in to work. Kosmer testified that he felt that Isham was in a bind. Isham indicated that Kosmer was the first person called with several others who may have been available, and adequate time to attempt to reach them. I believe this dispute to be irrelevant. For purposes of this Award, Kosmer was called, he was asked to work, and he worked. It is clear that he never consented to take a subsequent day off. While it appears that it is true that typically employees simply agree to take the subsequent day off, that is not the case here. Kosmer was not obligated to take a subsequent day off, and he did not consent to do so. It is equally clear that Isham went to great lengths to condition his willingness to have Kosmer come in on Kosmer's willingness to take a subsequent day off. While that may be true, it is equally true that Isham had no right to compel Kosmer to take the day off. Ultimately, with the issue of the day off in dispute, Isham agreed to allow Kosmer to come in and perform the overtime work. It is Kosmer's right to waive or not waive his right to work his scheduled work week. Kosmer put Isham on notice that he intended to work his entire work week before he was allowed to come in and work.

This Award does not address nor comment upon, what right, if any, the Employer has to call other employees in to perform the work. That issue was not a part of the question put to me by either party, nor is it intended to be commented upon by the issue or discussion contained within this Award. I have made a conscious effort not to address that issue.

#### AWARD

The grievance is sustained.

#### RELIEF

The grievant, Mr. Ralph Kosmer, is to be given 12 hours of compensatory time.

Dated at Madison, Wisconsin this 23rd day of March, 1993.

By William C. Houlihan /s/  
William C. Houlihan, Arbitrator

