

assigned to a call and was working an accident case and never received the message.

After the grievant cleared the traffic accident, the grievant then informed the 911 dispatcher that she was on her way to complete an errand given to her by her supervisor, getting a waste basket.

Following completion of her errand, the grievant then was asked to assist another cadet in loading barricades for the Presidential parade.

After completing this assignment with the fellow cadet, the grievant then entered the police station. At the same time, the grievant saw her supervisor, Sergeant Bott, leaving the station. Sergeant Bott did not mention to her that overtime was available. Moreover, he made no effort to leave any message with the shift commander or any other employe of the Police Department concerning the availability of overtime.

When the grievant entered the squad room, she noticed that there was a sign-up sheet for overtime and specifically inquired of the shift commanders why she was not afforded an opportunity for this overtime. None of the shift commanders had any information concerning the matter.

Two days later, on November 1, 1992, the City extended the overtime (parade work) to less senior and non-bargaining unit (police reserve volunteer) persons.

On or about November 2, 1992, the grievant unsuccessfully discussed resolution of this matter with her supervisor, Sergeant Bott, pursuant to the grievance procedure of the collective bargaining agreement.

A written grievance was then filed on November 11, 1992. Thereafter, the City answered the grievance stating "it has been past practice for events requiring overtime of an immediate, same date or next date nature, to ask working CSE's if they wanted the overtime which was not according to seniority."

In the City's answer to the grievance, no mention was made of untimeliness. By said answer, the City denied the grievance.

The grievant responded to the grievance answer taking issue with the City's denial.

Thereafter, on or about November 19, 1992 the parties discussed the grievance and thought they had settled it. However, the Union thought the settlement entailed make whole monies (two hours overtime) while the City understood the settlement to include a posting procedure for overtime sign-up. The next day the grievance settlement fell through.

On December 28, 1992, the Union requested arbitration of the dispute.

In December, 1992, and February, 1993, mediators from the Wisconsin Employment Relations Commission met with the parties in an unsuccessful attempt to resolve the dispute.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 2

GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a

grievance under the provisions set forth below:

1. Discuss the grievance with his immediate supervisor within thirty (30) working days, excluding Saturdays, Sundays, and holidays of the date the employee should have known of the grievable matter. If no solution is reached he may,
2. Reduce the grievance in detail to writing, using an "Initiation of Grievance Form" and submit it to his supervisor who will note his comments and forward it to the Director of Personnel, who, with the Department Head, will within five (5) days (Saturdays, Sundays, and holidays excluded) attempt to solve the grievance.
3. If a satisfactory solution cannot be reached, the grievant may, within seven (7) days appeal to the Wisconsin Employment Relations Commission who will within ten (10) days appoint a neutral arbitrator; the findings of the arbitrator to be final and binding on the parties hereto.

The arbitrator shall not add to, or subtract from the terms of this Agreement.

The City and the Union agree that the decision of the arbitrator shall be final and binding on both parties.

The grievance procedure set forth herein shall be the exclusive complaint of any employee as to any matter involving the interpretation or application of this agreement.

All complaints originating in all City departments shall be handled in the manner outlined above and no deviation therefrom will be permitted. Specifically, employees are prohibited from presenting such complaints, formally or informally to officers of the City of La Crosse not included in this procedure.

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ARTICLE 10

WAGES AND SALARY SCHEDULE

Effective January 1, 1991, and the first pay period in July, 1991, (July 5, 1991) the wages and salaries of employees shall be set out on the schedule attached hereto and made a part hereof.

. . .

ARTICLE 12

OVERTIME

Employees subject to this Agreement shall be

compensated at the rate of one and one-half (1 1/2) times their regular rate of pay for services rendered and hours worked over and above their regularly scheduled work week. In no case shall time and a half be authorized for services less than forty (40) hours in one week.

Sick leave, vacation, holidays and excused absences by the supervisor in writing shall be interpreted as time worked for purposes of calculating overtime hours within the weekly pay period.

In each calendar year, at the employee's option, he/she may accumulate up to 40 hours of compensatory time at a rate of time and one-half for each hour of overtime worked over 40 hours. Such compensatory time will be taken at a time mutually agreed upon by the employee and supervisor. Accumulated compensatory time may not be carried forward into the next year. Employees will be paid for the accrued compensatory time at the rate in effect on the last day of the year. Such payments shall be made during the first pay period in January.

PARTIES' POSITIONS:

The Union initially argues that the grievance was timely filed, and processed to arbitration. The Union rejects the City's contention that submitting the grievance to mediation before two mediators from the Wisconsin Employment Relations Commission does not extend the time limits for the Union to request arbitration within the meaning of Article 2, Step 3 of the agreement. The Union also argues that to hold this grievance untimely would discourage settlement of grievances. Finally, the Union maintains that the City's own failure to raise the timeliness issue before the hearing date constitutes a waiver.

With respect to the merits of the dispute, the Union argues the City violated the past practice of offering overtime of an immediate, same date or next date nature to working CSE's by failing to offer the grievant the overtime in question. In addition, the Union argues that the City violated an even more stringent and clearly stated past practice of not allowing non-bargaining unit members to perform bargaining unit work. Based on the foregoing, the Union does not believe the Arbitrator needs to reach the broader issue of the application of the rules of seniority (i.e., whether or not the City had an obligation to offer the overtime in question to all CSE's on a seniority basis) regarding the assignment of overtime.

With respect to its contention that the City violated its duty to offer the grievant overtime on the date in question, the Union argues the City has a duty of notice of overtime which it breached because one, the grievant was faultless in her efforts to make herself available to work the overtime; two, the City was culpable in failing to see that the grievant received notice of the overtime; and three, the City's duty of notice to the grievant cannot be excused by any doctrine of emergency.

For a remedy, the Union requests that the grievance be sustained and the grievant be awarded the disputed overtime of two hours at time and one-half.

The City first argues in its brief that the Union did not request arbitration on a timely basis following mediation and "settlement" of the dispute on November 18 and 19, 1992. In the alternative, the City argues in

its reply brief that the issue of resolving this dispute was never raised in any mediation session, nor did the City waive the contractual time limits at any time material herein by participating in mediation.

The City next argues that it did not violate any procedural or policy requirements of Articles 12, Overtime, and 13, Recall Pay. The City also argues that there is no binding past practice. In this regard, the City maintains that the assignment of overtime in the Police Department has never been on a strictly seniority basis, that the City made a reasonable attempt to poll all CSE's in accordance with past practice, and that the actions of management in the assignment of overtime were consistent with the needs of efficient law enforcement activities. The City adds that it has committed no violation regarding bargaining unit work by allowing a police reserve to work on the date in question.

Finally, the City maintains that the clear language of the aforesaid contract provisions overrides past practice in the instant case, and the Arbitrator would be exceeding his authority if he upheld the Union's position.

Based on all of the above, the City requests that the Arbitrator deny the grievance.

DISCUSSION:

The City initially raises a procedural objection that the grievance was not properly processed at Step 3 and, therefore, should be dismissed. The Arbitrator agrees. Read within the context of Step 2, Step 3 clearly requires that if the grievance is not resolved at Step 2 "the grievant may, within seven (7) days appeal to the Wisconsin Employment Relations Commission" for appointment of a neutral arbitrator. There is no evidence that the City has been lax in enforcing this requirement. Nor is there any evidence of a past practice contrary to the contractual requirement of timeliness in grievance processing. Finally, there is no evidence that the City expressly waived or that the parties agreed to waive the third step requirement of a timely appeal to arbitration at any time material herein.

The record indicates that the parties met on or about November 19, 1992 in an attempt to resolve the grievance. The record is also clear that the parties knew the next day that the grievance was not resolved. The Union did not request arbitration of the dispute until December 28, 1992, well outside of the seven (7) days period for requesting arbitration of a matter not resolved at Step 2 contained in Step 3 of the grievance procedure.

The Union argues that the City's own failure to raise the issue of timeliness before the date of the hearing constitutes a waiver. The Arbitrator does not agree. Failure to request arbitration in a timely manner, unless waived by the other party or otherwise excused, renders the dispute nonarbitrable. As noted above there was no waiver herein, and the Arbitrator can find no basis in the record for the Union's failure to meet the notice requirements or to justify failure to enforce such requirements. Contrary to the Union's assertion, the right to contest arbitrability before the Arbitrator is not waived merely by failing to raise said issue until the arbitration hearing.

The Union also argues that "to hold that this grievance was untimely would have the effect of discouraging settlement discussions and require the Union to initiate arbitration even before an answer is filed." However, the plain language of the grievance provides to the contrary. Step 2 provides for an "answer" to grievance from the grieving employe's supervisor and then settlement discussions with the appropriate Department Head and City's Personnel Director. Only after said settlement discussions fail, is the Union

obligated to request arbitration in a timely manner. (Emphasis added).

The Union further argues that mediation efforts by Wisconsin Employment Relations Commission staff should have tolled the Step 3 filing requirements. The contractual grievance procedure, however, does not address the issue of grievance mediation by Wisconsin Employment Relations Commission staff. Therefore, unless there is an agreement, practice or policy by the parties which provides otherwise, the parties are still obligated to follow the time limits contained in the parties' contractual grievance-arbitration procedure. There is no evidence herein that mediation of the grievance by Wisconsin Employment Relations Commission staff mediators tolled the Union's obligation to proceed to arbitration on a timely basis.

Finally, the Union maintains that successful assertion of timeliness as an issue will have a chilling effect on meaningful good faith discussions to settle grievances and runs counter to responsible public policy. However, there is no evidence that the City's hauling "out the timeliness card" in the instant case discouraged efforts to resolve the grievance either under the parties' contractual grievance procedure or outside that procedure through voluntary grievance mediation. Article 2 clearly requires timely processing of grievances by both the Union and City. Article 2, Step 3 clearly provides a time limit for requesting arbitration. At the same time, the parties are specifically afforded the opportunity for meaningful good faith resolution discussions at both Steps 1 and 2 of the grievance procedure. A plain reading of the parties' contractual grievance/arbitration provision (Article 2), in the opinion of the Arbitrator, allows for both timely processing of grievances and meaningful good faith settlement talks. On its face, enforcement of the disputed contract provision does not lead to the negative or undesirable result envisioned by the Union.

Likewise, enforcement of contract terms such as Article 2 by the Arbitrator does not run counter to public policy. Article 2 provides that "the Arbitrator shall not add to, or subtract from the terms of" the Agreement. Article 2 also provides that "the grievance procedure set forth herein shall be the exclusive complaint of any employe as to any matter involving the interpretation or application of this agreement." Finally, Article 2 states that "all complaints originating in all City departments shall be handled in the manner outlined above and no deviation therefrom will be permitted." Arbitrators have recognized that the grievance procedure, when adhered to, advances peaceful and constructive industrial relations, with resultant benefits to labor, management, and the public. "Moreover, arbitrators realize that the success of arbitration itself may be jeopardized if the grievance procedure is not carefully followed." 1/ Arbitration awards show that arbitrators expect the parties to pay due respect to the grievance procedure, not only by using it, but also by observing its formal requirements. 2/

Based on all of the above, the Arbitrator finds that the answer to the procedural issue, as framed by the City, is YES, the grievance was not processed to arbitration in a timely manner.

In light of the foregoing, it is my

AWARD

That the grievance is denied and the matter dismissed.

Dated at Madison, Wisconsin this 7th day of February, 1994.

1/ Elkouri and Elkouri, How Arbitration Works, 198 (Fourth Edition, 1989).

2/ Id.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator