

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	Case 120
of a Dispute Between	:	No. 51023
	:	MA-8466
SUPERIOR CITY EMPLOYEES UNION	:	
LOCAL 244, AFSCME, AFL-CIO	:	Case 121
	:	No. 51024
and	:	MA-8467
	:	
CITY OF SUPERIOR	:	
	:	

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, on behalf
Mr. Thomas Hayden, City Attorney, on behalf of the City.

of the

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "City", are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Superior, Wisconsin, on September 21, 1994. The hearing was not transcribed and the parties then presented oral argument in lieu of briefs. I there issued "bench awards", which this Award augments.

Based upon the entire record, I issue the following Award.

ISSUES

1. Did the City violate the contract by offering overtime to a less senior employe rather than to grievant Donald Reed and, if so, what is the appropriate remedy?
2. What disposition should be made of grievant Terry Jacobson's grievance which asserts that the City violated the contract by not awarding him certain overtime.

DISCUSSION

The Donald Reed Grievance

The City on February 21, 1994, offered six and a half hours overtime to Keith Zowin who had less seniority than grievant Reed. Zowin - who worked the 7:00 a.m. to 3:30 p.m. shift that day - then worked the overtime from 3:30 p.m. to 10:00 p.m.

John Sheppard, the City's Parks and Recreation Superintendent, earlier that day at about 2:15 p.m. discussed the overtime with Ray Midban while he was out "stumping". Midban said that Sheppard definitely offered him or another employe the overtime; that he then turned it down; 1/ and that he at that time suggested that Sheppard offer the overtime to fellow employee Gunderson. Sheppard, on the other hand, said that he as of that time had not definitely made up his mind whether overtime, in fact, would be necessary and that he did not make that final determination until after he made sure that day that the ice skating rink was frozen at about 2:45 p.m.

1/ Reed also said that Sheppard admitted at a subsequent grievance meeting that he knew by 1:30 p.m. that day that overtime would be needed.

Sheppard added that at about 3:00 p.m. he later offered the overtime to other more senior employes at the garage who turned it down before he offered it to Zowin. Sheppard said that he then looked around and did not see Reed who was more senior than Zowin and who was at the garage between 2:30 and 3:00 p.m. that day. Reed apparently left work before Sheppard spoke to Zowin because he that day worked from 7:00 a.m. to 3:00 p.m. without a lunch break. Sheppard also stated that he subsequently learned that the garage clock was about 5 minutes fast and that apparently was the reason he did not see Reed at 3:00 p.m.

The Union mainly argues in support of the grievance that the City violated Article 18.05 of the contract by not offering the overtime to Reed, who has more seniority than Zowin, and that the City's method of assigning overtime is "haphazardous" and that it often leads to confusion among bargaining unit members regarding whether overtime is being offered on a given day and who is entitled to receive it. As a remedy, it wants the City to pay Reed for the February 21, 1994 overtime.

The City, in turn, asserts that it did not violate the contract because Sheppard did not know before 2:45 p.m. that overtime was definitely needed and because Reed was not present in the garage when Sheppard awarded the overtime to Zowin.

As I ruled at the hearing, I find that the City violated the contract by not assigning the overtime to Reed since he was available to do that work and since Article 18.05 provides:

18.05 Should it be necessary to require overtime that working day, employees on duty when the decision to work overtime is made shall be entitled to work said overtime regardless of seniority. In the event that overtime is to be scheduled, employees will be called to work such overtime work according to seniority rights, provided such employees are qualified to perform the work scheduled. Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file grievance to receive pay for the number of hours worked by a junior employee. Said grievance shall be filed before the end of the next working day. An employee who does not answer a telephone call or who answers by a telephone answering machine may be considered unavailable for overtime. The other provisions of this Section notwithstanding, any employee who has worked sixteen (16) continuous hours shall not work or receive pay for the next eight (8) consecutive hours.

However, Reed is not necessarily entitled to back pay for missing that overtime opportunity. Instead, he is only entitled to the chance to work that overtime. As a result, the City shall offer Reed six and a half hours overtime to make up for the six and a half hours that it did not offer him on February 21, 1994. If Reed accepts that offer, more senior employees will be precluded from grieving over that assignment since the City is being ordered in this proceeding to make that assignment in order to comply with Article 18.05.

Moreover, because of the unique facts of this case, this Award shall not have any precedential value and it shall not be considered in determining what the parties' rights are in the future.

Furthermore, and as I stated at the hearing, the parties should sit down and discuss among themselves whether the present system of assigning overtime

can be improved since it appears to be based on a process of elimination. Given the fact that employees are frequently left in the dark regarding specific overtime opportunities until the last minute, a daily notice posting in the shop may help alleviate this problem. Installing radios so that supervisors can contact employees is another option which the parties may want to consider. Irrespective of what the parties agree to, however, it is necessary for them to work out clearer means for offering and accepting overtime in order to avoid the kind of problem found here.

ISSUE 2: The Jacobson Grievance:

Assistant Supervisor Dan Romans on Sunday, March 6, 1994, telephoned Operator Terry Jacobson at home at about 8:45 p.m. to ask whether he wanted to work overtime on Tuesday, March 8, 1994 on the midnight shift. Grievant Jacobson was asleep at the time and was awakened by his wife. When he came to the phone, Jacobson told Romans that he would let him know when he reported in for work that day for his scheduled 10:00 p.m. to 7:00 a.m. shift.

Romans did not agree to that delay because he needed to know right away who would work the overtime in order to avoid an emergency call in which would have cost the City extra money. Romans therefore at about 9:00 p.m. telephoned Assistant Operator Charles Tomczak who agreed to work that overtime.

As I stated at the hearing, there is a gap in the contract regarding this issue. Thus, Article 18.05 provides in pertinent part: "An employee who does not answer a telephone call or who answers by a telephone answering machine may be considered unavailable for overtime." The clear intent of this language is that the City is entitled to know immediately whether to skip over someone before asking the next employee whether he/she wants to work overtime.

However, there is nothing in this language regarding whether employees such as Jacobson can delay giving a definite answer for a short period of time while they collect their thoughts and/or speak to other family members. Jacobson testified here that, consistent with prior practice, he intended to call other employees on his own once at work if he decided against taking the overtime. Had he been given that opportunity, there would not have been any grievance.

As a result, the City shall offer Jacobson eight hours light duty overtime at his regular rate of pay (as opposed to his current light duty pay). Moreover, no more senior employees are entitled to grieve over that assignment since the City is making it in order to comply with this Award. In addition, this Award shall not have any precedential value and it shall not be considered in determining what the parties' rights are in the future.

Lastly, the parties should discuss this issue among themselves so as to avoid future misunderstandings.

In light of the above, it is my

AWARD

1. That the City violated the contract by not offering overtime to grievant Donald Reed on February 21, 1994. To rectify that situation, the City shall take the remedial action stated above.

2. That the City shall offer eight hours overtime to grievant Terry Jacobson.

Dated at Madison, Wisconsin this 27th day of September, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator