BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MERRILL CITY EMPLOYEES LOCAL 332,
AFSCME, AFL-CIO

and

CITY OF MERRILL

Case 52
No. 52924
MA-9157

Appearances:

Mr. James C. Koppelman, Schmitt, Hartley & Koppelman, S.C., 1029 East Main Street, P. O. Box 176, Merrill, Wisconsin 54452, on behalf of the City.

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, on behalf of Local 332.

ARBITRATION AWARD

According to the terms of the 1994-95 collective bargaining agreement between Merrill City Employees Local 332, AFSCME, AFL-CIO (hereafter Union) and City of Merrill (hereafter City), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the City's assignment of seasonal employes (rather than Grievant Blaise) to perform "overtime" work on May 27 through May 29, 1995. The Wisconsin Employment Relations Commission appointed Sharon A. Gallagher, a member of its staff, to act as arbitrator in this case. A hearing was held on November 7, 1995 at Merrill, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed that the Union would submit its initial brief, postmarked by December 15, 1995, that the Employer would file a responsive brief within ten working days after its receipt of the Union's initial brief, and that the Union would have another ten working days after its receipt of the City's brief to respond thereto. All briefs were received in a timely manner by the undersigned by January 13, 1996, whereupon the record was closed.

Issue:

The parties stipulated that the following issue should be determined herein:

> Did the Employer violate the collective bargaining agreement by failing to assign Grievant Ed Blaise to work on May 27, 28 and 29, 1995?
>
> If so, what is the appropriate remedy?

Relevant Contract Language:

ARTICLE 2 - RECOGNITION

The Employer recognizes the Union as the exclusive collective bargaining representative for all employees of the Street Department, Water Department, Sanitation Department, Sewage Treatment Plant, and Park and Recreation Department, except supervisory personnel and except those employees employed to operate the ski tow and warming houses, for the purposes of conferences and negotiations on all questions relating to wages, hours and working conditions and other conditions of employment.

. . .

ARTICLE 4 - SENIORITY RIGHTS

A) It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions, and in laying off or rehiring, provided, however, the application of seniority shall not materially affect the efficient operation of the various departments covered by this Agreement.

. . .

C) There shall be two seniority groups: full time employees and seasonal employees. A seasonal employee is one who works 120 calendar days a year or less. Beginning the third season, this employee shall begin to accrue time credit for probationary purposes. While seasonal employees are working during the first and second seasons, they shall not have any bargaining unit rights, and shall at all times during the first, second and third years, be paid at the rate to be set by the City. If, at any time, a regular employee is or has been laid off and a seasonal employee is on payroll, said regular employee shall be allowed to bump the seasonal employee, and shall be paid at a rate determined as follows:

The seasonal employee's rate of pay, as set by the City, plus fifty percent (50%) of the difference between such rate and the rate for a Laborer One in the Park Department set forth in this Agreement.

. . .

K) When the need arises for an employee or employees to perform overtime work, the assignment shall be given to the employee with the most seniority from within the classification of those employees who normally perform said duties on a regular basis. In the event no such employees within that classification are available, the work shall be assigned to members of that department, if available, by seniority.

. . .

ARTICLE 11 - OVERTIME PAY - CALL TIME PAY

A) An employee required to perform work outside of eight (8) hours per day and forty (40) hours per week shall be paid one and one-half (1-1/2) time his/her regular rate of pay. Paid holidays, vacations and sick leave shall be considered as time worked when computing an employee's overtime.

. . .

ARTICLE 18 - SCHEDULE OF HOURS

. . .

D) Park and Recreation Department: 7:00 A.M. to 12:00 noon and 12:30 P.M. to 3:30 P.M. Monday through Friday.

. . .

Background:

Grievant Blaise has been employed by the City since January, 1983. In 1990, Blaise transferred into the Parks Department and has since been employed as a Laborer II, one of only two full-time unit employes in the Parks Department. Prior to 1990, only one full-time employe was employed in the Parks Department -- Merlyn Leih. Blaise is therefore second in seniority in the Parks Department. Leih and Blaise are assigned to work Monday through Friday from 7:00 a.m. to 3:30 p.m. and are generally off on weekends and holidays. The City also employs seasonal employes to perform Parks Department work. These seasonal employes are acknowledged in the collective bargaining agreement. Per that agreement, seasonals are paid less than the regular full-time Parks employes and, for their first two seasons, they have no bargaining unit rights under the contract. The seasonal workers are assigned to work half-days on Saturdays

and Sundays and to work up to four weekdays with one weekday consistently off. Seasonals are only paid overtime for seasonal work after they have worked more than 40 hours in a particular week.

During the Summer season, seasonal employes are normally assigned to clean the bathrooms at the park shelters, collect and remove trash and garbage therefrom and prepare picnic areas for weekend visitors. Seasonal employes do not normally prepare ball field diamonds on the weekends. During the normal work year, the two regular full-time Parks Department employes also perform the same duties as seasonals, as well as the following: Maintain City equipment including playground equipment and City parks, maintain all ball diamonds, operate and maintain the City's swimming pool, cut lawns and plant and remove trees. The regular full-time Parks employes (not seasonals) are normally assigned to use Department trucks and tractors, to load dirt, sand or clay into trucks, and to put these materials down at the City's ball fields and grade those areas during all times of the year.

Merlyn Leih has been employed by the City since 1972. Between May 15 and September 15 each year, Leih, who is classified as a Laborer I, is employed as a Leadman performing Crew Director duties directing seasonal employes. (Grievant Blaise performs no Leadman duties). Leih stated that in 1983 when he was the only regular full-time Parks employe, he filed a grievance regarding the City's assignment of swing shifts to seasonal employes resulting in Leih's being passed over consistently for overtime work. 1/ The parties settled the Leih grievance in December, 1983, and entered into the following settlement agreement:

. . .

> 1. The City during the period of May 15th through September 15th shall afford Mr. Leih the opportunity to work overtime hours up to a maximum of seventy (70) on the weekends if bargaining unit work is performed during the aforesaid period of time.

1/ The grievance filed by Leih, stated the circumstances upon which the grievance was based as follows:

> Seasonal Laborers will go on swing shifts beginning weekends starting the week of June 13, 1983, to cover weekends "Saturdays, Sundays" eight hours per day as part of their regular shift; thus eliminating hours I (Leih) would be asked to work when the need arises.

Leih requested that he be paid time and one-half for every hour that a seasonal worker, with less seniority, had worked outside the schedule of hours in the Parks Department.

2. The City has the right to assign bargaining unit work to seasonal employes during the period of time set forth in paragraph 1, subject to the limitations contained therein.

3. That the grievant (Leih), on or about May 1, will indicate to the Director of the Park and Recreational Department, his unavailability to work weekends during the period of May 15th through September 15th. . . .

Thus, since at least 1983, the City has assigned seasonal employes to work so as to avoid overtime liability in the Parks Department with the exception of a maximum of 70 hours of overtime each year guaranteed to Leih. Grievant Blaise admitted that since his transfer to the Parks Department in 1990, seasonal employes have been consistently employed by the City during the Summer Season and that until approximately two years ago, Blaise and Leih were always asked by the City to perform overtime work according to seniority, but that this practice changed two years ago. The Union offered no evidence to show that it had complained about the City's change in its overtime assignment practice two years ago.

Facts:

Jeffrey Stevens, Director of the Parks Department since February, 1995, stated that it is his responsibility to determine the work assignments for seasonal and regular full-time Parks Department employes. Stevens stated that he has normally scheduled seasonal employes to work less than forty hours before each Summer weekend, so that he can schedule them to work half-days on each Saturday and Sunday. Stevens stated that this was the City's practice when he was hired by the City and he continued the practice thereafter. Stevens stated that seasonal employes began working for the City during the week of May 15, 1995, and that the Memorial Day Weekend (May 27 through 29, 1995) was the first weekend that the Summer weekend schedule for seasonal employes became fully effective. Stevens scheduled seasonals Renee Ashbeck and Rachael Porath to work during the May 27th weekend. On May 26th, after his 3:30 p.m. quitting time, the Grievant complained to Stevens that he had not been scheduled to work overtime the Memorial Day Weekend. Stevens responded that he had not scheduled Blaise for overtime work. 2/

2/ The City did not dispute Blaise's assertion, by implication, that he had worked 40 hours during the week prior to the May 27th holiday weekend.

Blaise thereafter filed the instant grievance. At the instant hearing, Blaise stated that he should have been asked, according to seniority, to work any extra hours available on the Memorial Day Weekend (and any other Summer weekends) ahead of all seasonals, whether or not seasonal employes earned overtime or straight time pay for the hours involved.

Stevens stated at the hearing herein that for the work week ending Sunday, May 28, 1995, both Ashbeck and Porath worked more than forty hours (3.75 hours and 5.5 hours respectively). 3/ Stevens stated that he scheduled no one to work on the Memorial Day holiday, May 29th, and that he had checked City records prior to the hearing to confirm these facts. Stevens stated that all seasonal and regular full-time employes were paid eight hours' holiday pay for May 29th.

Positions of the Parties:

Union:

The Union asserted that the evidence in this case makes ruling against the City "nearly unavoidable". The Union claimed that it had proved that the Grievant worked forty hours during the work week of May 22nd, that overtime work was available on May 27 through 29, which the Grievant was qualified to perform, and therefore, that the contract at Article 4, Section K clearly required the City to offer any overtime work by seniority first to Leih and then to Blaise, before offering it to seasonal employes. In addition, the Union noted that Article 4, Section C states that seasonal employes do not have "any bargaining unit rights" during their first three years of employment prior to entering a regular probationary period. As Porath and Ashbeck were referred to at the instant hearing as "seasonal" employes, the Union urged that the undersigned should "assume" that they did not possess any contractual rights at the time of the relevant events herein.

The Union asserted that where, as here, the contract language is clear and unambiguous, the City's assignment of seasonals to work overtime on the holiday weekend of May 27th through 29th amounted to "a flagrant violation of the clearly expressed letter and spirit of Article 4(K)". Thus, the Union urged, past practice is "probably irrelevant" in this case. The Union pointed to the Leih settlement agreement in 1983 and contended that this agreement provided that overtime work "should be assigned in accordance with the collective bargaining agreement". The Union also asserted that the evidence demonstrated herein that overtime has been assigned by seniority in the past in line with the clear language of Article 4, Section K.

In any event, even if the Arbitrator finds the disputed contract language is ambiguous, the Union argued that the evidence showed that the consistent past practice supports its contentions,

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3/ Porath began working for the City as a seasonal employe on May 15, 1995; Ashbeck began working for the City as a seasonal on May 22, 1995.

not the City's. In this case, the Union urged, were the Arbitrator to rule in favor of the City, this would lead to a harsh and absurd result -- that is, regular full-time employes would be passed over for all weekend and holiday overtime. In the Union's view, because the parties clearly intended to give regular full-time employes preference and rights over seasonals under the contract, the Arbitrator should not disturb this demonstrated intent by ruling in favor of the City.

City's Brief:

The City argued that overtime work is not guaranteed to regular full-time employes either in the labor agreement or by past practice. In addition, the City observed that the contract does not restrict the City's rights to hire and assign seasonal employes to work varying work hours, as seasonals have no seniority or rights under the labor contract. The City also observed that the evidence showed that the work to be done on the weekend of May 27th was not normally done by regular full-time employes, but had been traditionally performed by seasonals on weekends during the season -- cleaning toilets, shelters and picnic areas and removing trash around them. The City also urged that the disputed work was not technically "overtime work" as it has been regularly assigned to seasonal employes whose regular work week includes Saturday and Sunday.

In the City's view, the Union's reliance upon the 1983 Leih grievance settlement was misplaced. The City noted in this regard that the Leih settlement specifically applied only to Leih, in his capacity as Leadman supervising seasonal employes. The City also asserted that at the time the 1983 Leih settlement was entered into, Leih was the only full-time unit employe, and that the City's Parks Department has grown and changed since that settlement agreement was entered into. The City noted that the Grievant is in the Laborer II classification which does not include Leadman duties, while Leih is in the Laborer I classification which specifically includes such duties. This distinction, the City observed, destroys the Union's arguments regarding past practice based upon the Leih settlement.

The City also argued that no overtime could be created on a seasonal weekend due to the Union's long-time recognition of the City's right to hire seasonals and set their work hours. The City urged the Arbitrator to dismiss the grievance based upon the City's unrestricted management right to schedule and employ seasonals, as supported by the clear past practice and the contract.

Union's Reply:

The Union urged that the City's argument that Blaise testified and the record otherwise supported a conclusion that Blaise did not normally perform the work performed by seasonal employes on weekends was specious. The Union noted that the disputed work was unskilled work performed in the City's parks and that this is precisely the type of work that Blaise is qualified to perform and has performed over many years.

The Union also argued that the City's claim that the disputed work performed was not technically overtime work, could, if accepted by the undersigned, result in regular full-time Parks employes never receiving any overtime hours because the City could hire and utilize seasonals on weekends to this end. Such a result could, in the Union's view, be absurd, overly harsh, and contrary to the parties' intent as demonstrated by the contract language and the clear past practice supporting it. Thus, the Union urged that the grievance should be sustained and that Blaise should be made whole.

Discussion:

The labor agreement in this case, at Article 4, expressly recognizes two separate seniority groups of employes: full-time and seasonal. The contract clearly defines seasonals, states a lower rate of pay for them, and goes on to state that seasonals ". . . shall not have any bargaining unit rights . . ." during their first and second seasons, and "accrue time credit for probationary purposes" beginning the third season they are employed. In addition, full-time employes are allowed to bump seasonal employes if a seasonal is retained while a full-time employe "is or has been laid off" (if the full-time employe accepts the lower seasonal rate of pay for the work). Finally, Article 4, Section K makes clear that should overtime work arise, the assignment thereof shall be "to the employee with the most seniority from within the classification of those employes who normally perform said duties on a regular basis". 4/

It is significant, however, that in 1983, before Blaise was transferred into the Parks Department as a full-time employe, that the Union filed and settled the Leih grievance. Of particular importance in the settlement agreement reached between the parties is the provision that in apparent exchange for Leih receiving the "opportunity" to work a maximum of 70 hours of overtime on the weekends during the season, May 15 through September 15 each year, the Union agreed that the ". . . City has the right to assign bargaining unit work to seasonal employes . . ." during the May 15 through September 15 season each year (emphasis supplied).

Certain facts proven herein as well as the lack of evidence regarding other salient points, provide a basis for the proper analysis of the instant grievance. Initially, I note that there is no evidence that the parties amended the Leih settlement agreement or changed the procedures and practices described therein after the transfer of Blaise into the Department in 1990. In addition, the record contains no evidence that Blaise has ever been assigned to perform seasonal work on an overtime basis in the past. Furthermore, it is undisputed that Blaise is classified as a Laborer II (with no Leadman duties) and that he does not normally perform the duties assigned to seasonal employes during the May 15 through September 15 season. It is also clear that Blaise was not laid off pursuant to the provisions of Article 4, Section C at the time the disputed work was performed. Thus, Blaise was not entitled to bump either Porath or Ashbeck. Finally, the Union offered no

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4/ The parties failed to proffer any evidence or to argue regarding the relevance of this portion of Article 4, Section K.

elaboration or details regarding Blaise's statement that the City changed its practice of assigning overtime by seniority two years prior to the filing of the instant grievance, and the Union failed to explain why it did not object to this alleged change at that time.

The Union has argued that should the undersigned rule in favor of the City in this case, overtime will cease to be assigned by seniority as required by Article 4. I disagree. The labor agreement, when read in light of the Leih grievance and settlement, makes clear that during the season -- May 15 through September 15 -- seasonal employes may be assigned to perform bargaining unit work during the week and on weekends. In 1983, the Union agreed to this scheme and both the City and the Union have abided by the Leih settlement since 1983. It is also significant that only employe Leih has the express right to the opportunity to work up to 70 hours of overtime on the approximately 18 weekends during each season. Thus, the principal of assigning overtime strictly by seniority as described in Article 4, Section K, has been suspended by the parties' express agreement during each season since 1983, as described above and as supported by the evidence of practice in this case. Therefore, the facts of this case fail to support the Union's assertion that the provisions of Article 4, Section K will be abrogated by an Award in favor of the City.

The Union also argued that the undersigned must essentially ignore the Leih settlement, apply only the language of Article 4, Section K to this case, and conclude that the clear language of the contract requires that the City first offer all overtime work to Leih and then to Blaise, according to their seniority. In my view, the evidence clearly showed that the Leih settlement has been acknowledged as part of the parties' labor agreement by both parties since 1983. As such, the Leih settlement cannot be ignored in determining the issues in this case. Thus, contrary to the Union's contention, I believe the parties' express agreement to allow the City to employ and utilize seasonal employes on weekdays and weekends during each season (as contemplated in the labor agreement and the Leih settlement) would be abrogated were the undersigned to accept the Union's arguments herein.

The City's evidence and arguments (not contradicted by the Union) are persuasive, that the contract does not restrict the City's right to hire and assign seasonal employes to varying work hours including weekend work hours during each season. In addition, I am persuaded by the admission of the Union's witnesses and the evidence proffered by the City that the bargaining unit work assigned to Porath and Ashbeck on May 27 and/or 28 was work not normally done by full-time employes during the season. Finally, the City is correct that the Leih settlement applies only to Leih by its terms.

The final question that must be dealt with in this case is whether the fact that Porath and Ashbeck worked a total of 9.25 hours of overtime on May 27 and/or 28 requires a conclusion that such hours should have been offered to Leih and then to Blaise by seniority. In this regard I note that Stevens stated, without contradiction, that seasonals are paid overtime pay after they have worked forty hours in a week. Stevens also stated that he assigned Porath and Ashbeck to work

the hours over forty hours per week performing seasonal work, which was work not normally performed by full-time department employes during the season. The Leih settlement clearly gives the City the right to assign seasonals to perform bargaining unit work on weekends during the season (subject only to Leih's right to work up to seventy hours of overtime on weekends). The City and the Union have acknowledged and lived by this written agreement and the past practices supporting it, without disagreement, for over a decade. Thus, the evidence failed to support the Union's arguments and assertions in this case that the 9.25 hours of overtime assigned to seasonal employes on May 27 and/or 28 should have been assigned to Blaise due to his seniority.

In all the circumstances of this case, I issue the following

AWARD

The Employer did not violate the collective bargaining agreement by failing to assign Grievant Ed Blaise to work on May 27 and May 28, 1995. 5/ Therefore, the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of February, 1996.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

5/ The evidence failed to show that anyone worked on May 29, 1995. The evidence from the City was undisputed that no one was assigned to work on that day.