

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SUPERIOR CITY EMPLOYEES' UNION,
LOCAL 244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 142
No. 53704
MA-9438

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Ms. Mary Lou Alexander, Human Resources Director, City of Superior, appearing on
behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City or Employer, respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on March 13, 1996, in Superior, Wisconsin. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, the undersigned issues the following award.

ISSUE

The parties were unable to stipulate to the statement of the issue so the undersigned has framed it. The undersigned frames the issue as follows:

When the City violates the overtime clause by assigning scheduled overtime to a junior employe rather than a senior employe, is the appropriate remedy for this contractual violation pay or the opportunity to work the next available overtime?

PERTINENT CONTRACT PROVISIONS

The parties' 1994-96 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 18 OVERTIME

. . .

- 18.05** Should it be necessary to require overtime that working day, employees on duty when the decision to work said 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 (sic) to receive pay for the number of hours worked by a junior employee. Such 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.
- 18.06** Employees of the waste water treatment plant will be offered overtime within their respective classification. Example: When overtime is needed to fill an operator's position, the overtime will be offered to the most senior operator and progress down the seniority roster through assistant operators. When overtime is needed to fill an assistant operator's position, the overtime will be offered to the most senior assistant operators and relief assistant operators. All other overtime work will be offered to the personnel working within the classification of the needed overtime. If personnel within the classification are not interested in the overtime, the overtime would be offered to the next senior,

qualified employee.

FACTS

The facts are undisputed. Interim Wastewater Treatment Plant Superintendent Dan Romans scheduled overtime work to be performed at the wastewater treatment plant on October 29, 1995. He offered this scheduled overtime work to Joseph Nelson who performed it. Nelson is the least senior employe in the department. None of the more senior employes in the department were offered this scheduled overtime. Afterwards, Robert Smith, a wastewater treatment plant worker, grieved not being offered the scheduled overtime work in question. It is undisputed that Smith is more senior than Nelson, that Smith was capable of doing the work in question, and that Smith was not offered the scheduled overtime work in question. When the City responded to Smith's grievance it acknowledged that it erred in not offering him the overtime work in question and had therefore violated the overtime clause. As a remedy for its contract violation the City proposed having Smith work the next available overtime. This proposed remedy was not accepted by the Union so the grievance proceeded to arbitration.

The record indicates that there have been other occasions in the department when scheduled overtime was improperly given to a junior employe rather than a senior employe. When it happened, the City usually acknowledged that a contract violation occurred and paid the improperly bypassed senior employe for the lost overtime. In those situations documented in the record, the bypassed senior employe was paid either all or half of the overtime hours in question. On one occasion though in 1994 when a senior employe was bypassed for overtime, the subsequent grievance could not be resolved and went to arbitration. Arbitrator Amedeo Greco held in his award that the employer had violated the contract by not offering the overtime to the bypassed senior employe. In terms of the remedy, Greco held that because of the unique facts therein the senior employe (the grievant) was not entitled to pay but instead was to be given the opportunity to work the next available overtime. Greco further stated: "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."

POSITIONS OF THE PARTIES

The Union contends that the appropriate remedy for the Employer's breach of the overtime clause is for the Employer to pay a cash amount to the grievant. It makes the following arguments to support this premise. First, it contends that the overtime provision is not silent (as alleged by the Employer) with regard to the remedy to be imposed when the Employer improperly bypasses a senior employe for overtime work. Instead, it asserts that the overtime provision specifically provides for a remedy. To support this proposition, it cites the third sentence of Article 18.05 which provides: "Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file grievance (sic) to receive pay for the number of hours worked by a junior employee." According to the Union this sentence is clear and

unambiguous in providing a monetary remedy (i.e. "pay") when the Employer improperly bypasses a senior employe for overtime work. In the Union's view, the Employer's proposed remedy (i.e. that the grievant work the next available overtime) is not consistent with this language given the use of the word "pay." Next, the Union submits that in every previous situation except one where the Employer improperly bypassed a senior employe for overtime work, the Employer paid a cash remedy to the bypassed employe. It believes this practice is consistent with the contract language just cited. Finally, with regard to the Greco award which the Employer relies on, the Union asserts that the remedy awarded therein (i.e. the next available overtime) is not applicable here because that award explicitly stated that it was not to be considered precedential. The Union therefore asks that the arbitrator award pay to the grievant for the Employer's breach of the overtime clause.

The City contends that the appropriate remedy for its breach of the overtime clause is for the grievant to be given the next available overtime. It makes the following arguments to support this premise. First, it contends that the overtime clause is silent with regard to the remedy to be imposed when the Employer improperly bypasses a senior employe for scheduled overtime work. The Employer asserts that given this contractual silence, it looked to the parties' past practice for guidance in determining a remedy. According to the Employer the parties' past practice on overtime remedies is mixed. To support this premise, it notes that some department employes who were improperly denied overtime got all of the overtime hours involved, while other employes got just half of the overtime hours involved. Finally, the Employer relies on the Greco arbitration award which it characterizes as holding that the bypassed senior employe (who had been improperly denied overtime work therein) was to get the next available overtime. In the Employer's view, the remedy in the Greco award should be imposed here as well. The Employer therefore asks that the arbitrator award the grievant the next available overtime (instead of a cash remedy) for the Employer's breach of the overtime clause.

DISCUSSION

It is noted at the outset that the City admits it violated the labor agreement. This contractual violation occurred on October 29, 1995, when the City offered scheduled overtime 1/ work to Nelson (the department's least senior employe) who performed it. By offering this scheduled overtime to Nelson, the Employer bypassed those employes in the department who were

1/ Section 18.05 makes a distinction between overtime which is scheduled and overtime which is not. The former category, which can be characterized as scheduled overtime, is assigned according to seniority provided the employe is qualified to do the work. The latter category, which can be characterized as unscheduled overtime, involves overtime work which is not scheduled in advance but needs to be performed that same working day. Unscheduled overtime is performed by the employe on duty regardless of seniority. This case involves scheduled overtime, not unscheduled overtime.

more senior than Nelson. One of those employees (Smith) grieved not being offered this scheduled overtime opportunity. It is undisputed that Smith is more senior than Nelson, that Smith was capable of doing the work in question, and that Smith was not offered the scheduled overtime. Pursuant to the overtime clause, Smith should have been offered the scheduled overtime in question. Since he was not, Smith is entitled to receive a remedy to compensate him for the violation of his contractual seniority rights and to place him in a position he would have been in had the City not violated the overtime clause. Thus, the sole issue in this case is what remedy is appropriate when the Employer commits an overtime violation. The Union contends the appropriate remedy is pay while the City argues the appropriate remedy is to give the bypassed employee (i.e. the grievant) the opportunity to work the next available overtime.

My discussion begins with an examination of the overtime clause (Article 18) to see if it addresses the matter involved here, namely what remedy is appropriate when the Employer commits an overtime violation. The Employer contends this article is silent with regard to the remedy to be imposed when the Employer improperly bypasses a senior employee for overtime work. I disagree. The third sentence of Section 18.05 specifically references this very situation. It provides as follows: "Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file grievance (sic) to receive pay for the number of hours worked by a junior employee." I read the last part of this sentence (i.e. the phrase "to receive pay for the number of hours worked by a junior employee") to mean that when a senior employee is bypassed for overtime work, the senior employee is entitled to a specifically named remedy, to wit: "pay." In my view, the word "pay" is clear and unambiguous. In the context in which it is used, the word "pay" means that the senior employee shall be paid for the overtime hours which were worked by the junior employee.

The interpretation noted above is consistent with the way the third sentence of Section 18.05 has been historically interpreted and applied by the parties themselves. The following shows this. The record indicates that there have been other occasions prior to this one where scheduled overtime was given to a junior employee rather than a senior employee. In every situation but one the bypassed senior employee was later paid for all or part of the overtime hours which were worked by the junior employee. While the Employer notes that the bypassed senior employee has not always been paid for all of the overtime hours worked by the junior employee, the undersigned does not consider that point controlling herein. In my opinion what is important is that the Employer has historically paid a monetary remedy to the improperly bypassed senior employee when it committed an overtime violation; not how many hours were paid.

Notwithstanding the explicit reference to "pay" in Section 18.05 and its historical interpretation and application, the Employer argues that a make-up remedy is appropriate here. To support this contention, the Employer relies on a previous arbitration award between the parties issued by Arbitrator Greco. In that award Greco held that the City had violated the overtime clause by not offering certain overtime to a bypassed senior employee. With regard to the remedy, he held that the grievant was not entitled to pay but instead was to be given the opportunity to

work the next available overtime. The Employer contends that remedy should be applied here as well. The undersigned believes there are several problems with doing so. First, Greco did not say in his award that henceforth in all overtime violation cases that the remedy was for the bypassed senior employe to get the next available overtime. Instead, he said that in that particular case the grievant was not entitled to pay because of the "unique facts" therein. There are not "unique facts" in this case like there were in Greco's case. Second, Greco specifically stated in the award that it (i.e. the award) "shall not have any precedential value and it shall not be considered in determining what the parties' rights are in the future." However, the Employer is doing just the opposite with the Greco award, namely using it as precedent for a make-up remedy.

Finally, there is another reason why the Employer's proposed make-up remedy won't work here. That reason is as follows. Make-up remedies for overtime assignment violations are generally awarded in those situations where overtime is equalized. Here, though, scheduled overtime is not equalized; instead, pursuant to Sections 18.05 and 18.06 of the overtime clause, it is distributed on the basis of seniority. Under this overtime distribution system every hour of available scheduled overtime could conceivably be claimed by the senior qualified employe if he/she wanted it. If the senior employe declined the scheduled overtime, the next senior employe would be entitled to it, and so on. It logically follows from this type of overtime distribution system that any future scheduled overtime assignment offered as make up to the grievant either already belongs to him by virtue of his own seniority or belongs to another employe by virtue of that other employe's seniority. Thus, a make-up remedy either gives the grievant something that is already his or deprives other senior employes of their contractual entitlement to same. In light of the above, it is held that a make-up remedy is not appropriate when the Employer commits an overtime violation.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That when the City violates the overtime clause by assigning scheduled overtime to a junior employe rather than a senior employe, the appropriate remedy for this contractual violation is pay. Since the City violated the overtime provision on October 29, 1995, when it did not assign scheduled overtime to Robert Smith, it shall pay him for the overtime hours which he missed.

Dated at Madison, Wisconsin, this 11th day of June, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator