BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 108, AFSCME, AFL-CIO

and

CITY OF CEDARBURG (DEPARTMENT OF PUBLIC WORKS)

Case 36
No. 53159
MA-9263

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 944, Waukesha, WI 53187-0944, appearing on behalf of the Union.

Ms. Kaye K. Vance, City Attorney, c/o Cook & Franke, S.C., 660 East Mason Street, Milwaukee, WI 53202-3877, appearing on behalf of the City.

ARBITRATION AWARD

Local 108, AFSCME, AFL-CIO, hereafter referred to as the Union, and the City of Cedarburg, hereafter referred to as the City or the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, has requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as arbitrator to hear and decide a grievance. The undersigned was so designated. Hearing was held in Cedarburg, Wisconsin, on December 20, 1995. The hearing was not transcribed, the parties filed post-hearing briefs and the record was closed on February 6, 1996.

ISSUE:

The City frames the issue as follows:

> Did the City violate the contract by not paying regularly scheduled overtime as call-in time under Section 8.01?
>
> Is disciplinary action appropriate for an employe's

falsification of time records?

The Union frames the issue as follows:

> Did the City violate the collective bargaining agreement when it refused to pay the Grievant a minimum of two hours call time at the overtime rate applicable for work performed on Saturday, May 13, 1995, and Sunday, May 14, 1995, and other dates since then?
>
> If so, what is the appropriate remedy?
>
> Did the City violate the collective bargaining agreement when it issued the Grievant an oral reprimand which alleges "falsifying official payroll documents" and placed a copy of the reprimand in his personnel file?
>
> If so, what is the appropriate remedy?

The undersigned adopts the following statement of the issues:

1. Did the City violate the collective bargaining agreement when it refused to pay the Grievant call-in pay for work performed on Saturday, May 13, 1995, and Sunday, May 14, 1995?

2. Did the City act inappropriately when it disciplined the Grievant for "falsifying official payroll documents"?

3. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE VII
WORKDAY AND WORKWEEK

7.01- Workday and Workweek. The normal workweek shall be forty (40) hours, Monday through Friday, inclusive. The normal workday shall be eight (8) hours, scheduled as follows:

For all employees except Building Maintenance Engineer and Custodians, the normal workday shall be from 7:00 a.m. to 12:00 noon and from 12:30 p.m. to 3:30 p.m.

. . .

ARTICLE VIII
CALL-IN TIME

8.01 - Employees who shall be called in to work other than their regularly scheduled starting time, shall be entitled to at least two (2) hours' work, or pay therefore, regardless of the length of time (less than two {2} hours) which they may have worked. Call-in time pay shall commence as of the time of arrival at the garage, and shall be paid at the overtime rate applicable. This Article shall not apply to hours worked consecutively prior to or subsequent to an employee's regular scheduled of hours.

. . .

ARTICLE X
OVERTIME AND HOLIDAY PAY

10.01-Daily and Weekly. All work performed in excess of eight (8) hours per day or forty (40) hours per week shall constitute overtime and shall be paid for at the rate of time and one-half.

10.02 -Saturday. Employees shall be paid premium pay of time and one-half for all work performed on Saturday, provided that if an employee misses work during the regular workweek without reasonable cause he shall receive overtime premium for only those hours worked in excess of forty (40). The City may request verification of an employee's reasonable cause.

10.03-Sunday. Sunday work shall be compensated for at the rate of double time.

. . .

10.06-Notice of Overtime. The City agrees to give reasonable notice, unless it is not practical to do so, to the employees and the appropriate Union representative when overtime

is to be worked. Employees shall be required to work overtime unless they have a reasonable excuse and have given the City reasonable advance notice.

. . .

ARTICLE XXXI
CONDITIONS OF AGREEMENT

31.01 - This Agreement constitutes an entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

. . .

BACKGROUND

During the summer season, Ken Bronson and Terry Neuman, are scheduled to work alternate weekends to perform park maintenance duties. Bronson has been performing this weekend work throughout his sixteen years of employment with the City.

On September 12, 1994, a Step Two grievance was filed which stated as follows:

> Overtime for park duty on Sat. & Sun. - Past practice was to pay employee for 2 hrs. minimum & was treated as call-in time (8.01) now we are paid for how long we are in.

The grievance alleged a violation of Sec. 8.01 and requested, as remedy for this contract violation, "Payment for time lost due to this new procedure of time keeping."

On September 26, 1994, Clinton P. Gridley, the City Administrator, issued the following memorandum to Paul Regnitz, Equipment Operator; Ken Bronson, Equipment Operator; and Terry Neuman, Equipment Operator:

Subject: GRIEVANCE CONCERNING CALL-IN PAY

A grievance was presented to this office on September 12, 1994. Its premise was that the City is in violation of section 8.01 of the Agreement regarding call-in pay when overtime is required to clean the Parks. On September 13, I wrote a memo requesting an extension to the response period to September 26, 1994 so that I would have the opportunity to meet with Les Boehm upon his return from vacation. Paul Regnitz called on September 14, 1994 to indicate his agreement with the extension.

I met with Parks & Forestry Superintendent Les Boehm and the above individuals on September 23, 1994. Les Boehm testified that from May to October the DPW cleans the parks each weekend. The assignment of the overtime has been handled cooperatively between Terry Neuman, Ken Bronson and himself. The overtime is scheduled in advance because of its regularity, and does not require the Superintendent to call them in.

Les provide (sic) a five year history of the overtime payments which showed that employees were paid for actual time worked. Lastly, discussing the language in section 8.01, both management and the union agreed that it is intended to be used when unscheduled overtime is necessary, such as snow removal, and not for scheduled overtime like park cleanup.

Therefore, the main question was regarding past practice. When asked if they had any contrary information to the 5 year list that indicated we paid based on time worked, Ken, Paul and Terry had none. They stated that at some point previously, they had been paid a 2 hour minimum, but had no current example of same.

Given that the language is clear and unambiguous regarding call-in pay, and given that the overtime activities in question are clearly scheduled therefore not qualifying as call-in, and given that we have had a clear practice over the last 5 years of paying for actual time worked, the grievance is denied. As a final point, it appears that the provisions of the grievance process which states ""(sic) within five (5) days thereafter, be presented to the City Administrator was not followed. The step one verbal denial occurred on September 6, 1994 and the written appeal was not given to myself until September 12, 1994. There was no request for n (sic) extension to the time period.

C: Bob Dreblow, Gary Kraase, Les Boehm

The City did not receive any response to this memorandum and the grievance was not processed to the Third Step of the grievance procedure. At the time of the Step Two grievance meeting, Paul Regnitz was a Union Steward.

Following the issuance of this memorandum, the Union and the City reached an agreement on their 1995-97 labor contract. Neither side raised any issue with respect to payment for the work which was the subject of the September, 1994 grievance.

On May 15, 1995, William Dudash, Public Works Superintendent, and Les Boehm, Parks & Forestry Superintendent, issued the following to Ken Bronson:

> SUBJECT: Falsification of Payroll Records
>
> On Saturday, May 13, 1995, you wrote on the daily time sheet that you worked 2 hours. Your time card shows that you were here slightly less than 1-1/2 hours.
>
> Again, on Sunday, May 14, 1995, you wrote on the daily time sheet that you were at work 2 hours. Again, your time card shows you were here exactly 1 hour.
>
> Per the memo from City Administrator Gridley, dated September 26, 1994, the matter of scheduled overtime was resolved. This action following the ruling on this matter constitutes falsifying official payroll documents.
>
> This letter serves as a verbal warning that if this practice continues, further disciplinary action will be taken.
>
> A copy of this memo will be placed in your personnel file.
>
> WMD/LLB:djb
>
> cc: Clinton Gridley, City Administrator
> Gary Kraase, Parks & Recreation Director
> Robert Dreblow, Director of Engineering and Public Works
> Personnel File

On May 19, 1995, a Step Two grievance was filed which alleged that the City had violated Article 7.01 and 8.01 when the City failed to pay Ken Bronson, hereafter the Grievant, two hours of pay for time worked on Saturday, May 13, 1995, and Sunday, May 14, 1995. The

grievance also requested that the memo of May 15, 1995, be removed from the file. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

The Grievant was scheduled to work Saturday, May 13, 1995, and Sunday, May 14, 1995, performing cleanup duties in the City parks. For each day, the Grievant performed approximately one hour of work and requested payment for two hours based upon his understanding of the terms of the labor agreement. In response to this action, the City denied the Grievant payment for the call-in time in question and, additionally, imposed a written reprimand for alleged "falsification" of records.

The City relies upon a past practice which would render the existing language of the labor agreement meaningless. The language addressing application of call time is not ambiguous. It applies when employes are called into work ". . . other than their regularly scheduled starting time . . ."

Regularly scheduled days and hours are established in Section 7.01 and are Monday through Friday. Call-in time clearly applies to any work performed on Saturday or Sunday, regardless of what practice might be in existence.

Article X provides direction in establishing the circumstances under which premium pay for weekend work will and will not apply. Article VIII, and by reference Article VII, determine when the two hour minimum call time applies. Commonly, premium rates apply in addition to call time.

The Grievant testified that, at some point, the two hour minimum did apply to Saturday and Sunday work. Thus, the City has failed to make the case that the alleged practice has been consistent. Moreover, Article XXXI explicitly concludes that practices which are not part of the written agreement do not supersede any provision of the labor agreement.

Contrary to the argument of the City, the Union has not waived its right to address this issue by virtue of not proceeding with a grievance in 1994. A party's failure to file grievances or to protest past violations of a clear contract rule does not bar that party from insisting upon compliance with the clear contract requirement in future cases (cites omitted).

The 1994 grievance, relied upon by the City, cited Section 8.01 alone. The instant grievance cites Section 7.01 and 8.01. Since the grievance relied upon by the City is similar, but not identical, to the instant grievance, the City's estoppel defense is not valid.

There is no distinction between scheduled Saturday and Sunday work and unscheduled Saturday and Sunday work in the labor agreement. To allow the City to unilaterally impose such a distinction would fly in the face of arbitral precedent and the clear language of the labor agreement.

The Union is incredulous that the City would impose a letter of reprimand in this case. There could not be a more clear example of interference, restraint and coercion of employes in the exercise of their rights guaranteed under the law.

The Union requests that the City be ordered to observe the language of the labor agreement in administering call-in pay, make the Grievant whole, and remove any and all reference to the discipline in question from the Grievant's personnel file.

City

This grievance is identical to a grievance filed and not pursued in September, 1994. The Union acknowledged this grievance is identical to the September, 1994 grievance when the Union stated the following:

> The Union will acknowledge that a grievance filed in September of 1994 which addressed the procedure for paying for Saturday call-in . . . we recognize that by declining to pursue the grievance in 1994, we may have waived the right to pursue the *same* grievance in 1995 (Jt. Ex. 8)

Merely citing an additional contractual clause does not change the fact that it is the *same* grievance. Moreover, since no argument was presented which defined a violation of Section 7.01, the reliance on the additional clause is placing form over substance.

In the statement cited above, the Union admitted the elements of waiver. Additionally, at hearing, the Grievant acknowledged that he knew that he could have pursued the September, 1994 grievance, but chose not to. The failure to pursue the first grievance, as well as the failure to challenge the resolution of the first grievance in the subsequent contract negotiations, constitutes a waiver of the right to pursue this grievance.

Past practice can be used to show the intent of the parties if the contract language is ambiguous. This contract does not directly address regularly scheduled overtime and, thus, it is appropriate to consider the evidence of past practice.

The Grievant has always been scheduled to perform weekend park maintenance work.

The testimony of Les Boehm establishes a consistent past practice of paying the Grievant, as well as Terry Neuman, for actual time worked when performing weekend park maintenance. In addition, the City has five years of documents verifying this past practice. The Grievant's vague recall that, at some time in the past he received on-call pay for weekend park maintenance work, is not sufficient to rebut the City's evidence of past practice.

Contrary to the argument of the Grievant, Section 8.01 is not clear and unambiguous. Section 8.01 refers to employes who shall be called in to work other than their "regularly scheduled" starting time. This grievance concerns the payment of overtime for regularly scheduled Saturday and Sunday work. As the testimony of the City Administrator and Les Boehm demonstrates, call-in pay is intended for unexpected and unscheduled overtime.

It is the Grievant's position that all non-contiguous overtime must be paid as call-in. Acceptance of this argument would mean that the overtime provisions of Article X, which provide a premium pay for Saturday and Sunday, are superfluous.

It is argued that the zipper clause precludes any consideration of past practice. Such an argument is contrary to arbitral authority (cites omitted).

The Grievant knew when he completed the time record on May 13 and 14, 1995, that it did not reflect his time worked. The written reprimand is an appropriate discipline.

DISCUSSION:

Call-in Pay

The City relies upon conduct which occurred during the processing of the September, 1994 grievance and conduct which occurred during the negotiation of the 1995-97 collective bargaining agreement to argue that there has been a waiver of the right to "pursue" the instant grievance. The undersigned disagrees.

The conduct relied upon by the City may be relevant to the disposition of the merits of a future related grievance, but does not serve to waive any right to process a future related grievance. The right to process a grievance is determined by the parties' contract language. The relevant contract language, contained in Article XXII, does not restrict grievances to matters not previously raised, or resolved, in the grievance procedure.

Section 7.01, relied upon by the Union, identifies a "normal" workweek and a "normal" workday. With the exception of the provision on Street Sweeping, which provision is not applicable to this grievance, it does not address the issue of payment for time worked outside of a "normal" workweek or workday. The undersigned is satisfied that the City's conduct in denying the Grievant's claim for call-in pay is not contrary to any provision of Sec. 7.01.

The Union argues that Sec. 8.01, read in conjunction with Sec. 7.01, leads to the conclusion that call-in pay is applicable to all Saturday and Sunday work. The undersigned disagrees. Section 8.01 does not reference "normal" workweek or "normal" workday. Rather,

Sec. 8.01 provides call-in pay for employes who are "called in to work other than their regularly scheduled starting time."

It is plausible, as the Union argues, that the phrase "regularly scheduled starting time" is a reference to the starting time of the Grievant's "normal" workday and workweek, as defined in Sec. 8.01. Under such a construction, the Grievant would be entitled to call-in pay for performing weekend park maintenance work.

However, it is also plausible that the phrase "regularly scheduled starting time" refers to the starting time of any regularly scheduled work. Under such a construction, the Grievant would not be entitled to call-in pay because weekend park maintenance work is regularly scheduled work. 1/ Since the language of Sec. 8.01 is susceptible to more than one reasonable interpretation, the City may rely upon evidence of past practice to establish the parties' mutual intent.

Article XXXI confirms that the written agreement constitutes the entire agreement between the parties and that verbal agreements "shall not supersede" any provision of the written agreement. Since the evidence of past practice is not being used to supersede a contract provision, but rather, is being used to give meaning to an ambiguous contract provision, Article XXXI does not preclude the undersigned from giving consideration to the evidence of past practice.

For at least nine years prior to hearing, Les Boehm has been a supervisory employe with responsibility to review time cards and authorize the pay of various City employes, including the Grievant. According to Boehm, the Grievant and Terry Neuman always have been paid for actual hours worked on weekend park maintenance.

The Grievant recalls that, at one time, the weekend park maintenance work was treated as call-in time. The Grievant further recalls that call-in time was eventually phased out and, thereafter, he was paid for actual time worked. Since the Grievant could not recall when this "phase out" occurred, the Grievant's testimony does not contradict Boehm's testimony that, for at least nine years, the Grievant has been paid for actual time worked when performing weekend park maintenance.

Employer Exhibit #4, which was prepared after reviewing records from May 5, 1990, through September 30, 1994, demonstrates that, on more than fifty occasions during this time period, the Grievant or Neuman worked less than two hours when performing weekend park maintenance work. Employer Exhibit #4 further demonstrates that, on each of these fifty

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1/ Throughout the Grievant's sixteen years of employment with the City, the Grievant has been scheduled to perform Saturday and Sunday park maintenance work during the summer season. Thus, for the Grievant, weekend park maintenance is regularly scheduled work.

occasions, the Grievant or Neuman received pay for actual time worked, rather than the minimum two hours of call-in pay required by Sec. 8.01.

The evidence of these fifty occasions, as well as the testimony of Boehm, is sufficient to demonstrate a consistent and long-standing practice. By this practice, the parties have demonstrated a mutual understanding that the Grievant's weekend park maintenance work is not a "call-in" within the meaning of Sec. 8.01.

The September, 1994 grievance and the instant grievance raise the same issue, i.e., the Grievant's right to receive call-in pay for performing weekend park maintenance work. The testimony of City Administrator Gridley establishes that, during the Second Step meeting on the grievance, the Union Steward and the City agreed that Sec. 8.01 was not applicable to the Grievant's weekend park maintenance work. The parties' conduct during the processing of the September, 1994 grievance is further evidence of a mutual understanding that the Grievant's weekend park maintenance work is not a "call-in" within the meaning of Sec. 8.01.

In summary, the evidence of the parties' past practices, as well as the evidence of the parties' conduct during the processing of the September, 1994 grievance, persuades the undersigned that the Grievant's weekend park maintenance work does not involve a "call-in" within the meaning of Sec. 8.01 of the parties' collective bargaining agreement. Contrary to the argument of the Union, the City did not violate the collective bargaining agreement when it failed to pay the Grievant call-in pay for work performed on Saturday, May 13, and Sunday, May 14, 1995.

Disciplinary letter

The Grievant is required to punch a time clock at the start and the end of his work period. The Grievant's time cards indicate that he worked approximately one and one-half hours on Saturday, May 13, 1995, and one hour on Sunday, May 14, 1995. The City does not dispute the accuracy of these time cards.

In addition to the time card, the Grievant submitted a document claiming two hours of compensatory time for Saturday, May 13, 1995, and two hours of compensatory time for Sunday May 14, 1995. The undersigned does not consider the Grievant's claim for compensatory time to be a statement that the Grievant worked two hours on Saturday, May 13, 1995, and Sunday, May 14, 1995.

A claim may be allowed, or disallowed, by an employer. In the present case, Boehm, as is his custom, reviewed the Grievant's time card; determined that the Grievant was not entitled to two hours of compensatory time on Saturday, May 13, 1995, and Sunday, May 14, 1995; and disallowed the Grievant's claim for two hours of compensatory time.

In summary, the record fails to establish that the Grievant submitted any payroll document in which the Grievant claimed to have worked two hours on either May 13, 1995, or May 14, 1995. Rather, the payroll documents relied upon by the City constitute a claim for two hours of compensatory time for time worked on May 13, 1995, and May 14, 1995.

While the Grievant did intentionally claim two hours of compensatory time, he did so under the belief that he was contractually entitled to call-in time for time worked on May 13 and 14, 1995. 2/ Since the Grievant did not falsify a payroll record, it was not appropriate for the City to discipline the Grievant by issuing a verbal warning for "falsifying official payroll documents." 3/

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The City did not violate the collective bargaining agreement when it refused to pay the Grievant call-in pay for work performed on Saturday, May 13, 1995, and Sunday, May 14, 1995.

2. The City did not act appropriately when it disciplined the Grievant for "falsifying official payroll documents."

3. The City is to immediately rescind the verbal warning for "falsifying official payroll documents" and remove the disciplinary memo of May 15, 1995, from the Grievant's personnel file.

2/ The Grievant understood that the grievance of September, 1994, had not been processed past the second step. The Grievant received a copy of the City Administrator's memo of September 26, 1994. However, as the Grievant testified at hearing, he did not believe that the Union and the City had reached any agreement with respect to his claim that he was entitled to call-in pay. Thus, at the beginning of the 1995 season, the Grievant requested two hours of compensatory time in accordance with his belief that he was entitled to the minimum two-hour call-in for time worked on Saturday, May 13, 1995 and Sunday May 14, 1995.

3/ While the parties have referred to the disciplinary memo of May 15, 1995, as a "written warning" or a "written reprimand," the document, on its face, indicates that it is a written confirmation of a "verbal warning."

Dated at Madison, Wisconsin, this 6th day of August, 1996.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator