BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA CITY HALL AND POLICE SUPPORT STAFF UNION LOCAL 1035-B, AFSCME, AFL-CIO

and

CITY OF MENASHA

Case 98
No. 57604
MA-10689

Appearances:

Godfrey & Kahn, S.C., by **Attorney James R. Macy**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Menasha.

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54915.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned, Thomas L. Yaeger, herein the Arbitrator, to hear and decide a grievance dispute concerning whether part-time employe Karen LaChey, herein the Grievant, was entitled to certain prorated fringe benefits. A hearing was held in the City of Menasha, Wisconsin, on June 22, 1999, and was transcribed. The record was closed on September 13, 1999, upon receipt of the last of the parties' written briefs.

ISSUES

The parties were unable to stipulate to a statement of the issue.

The Union would state the issue as follows:

1. Did the City violate the agreement when it failed to provide the Grievant with prorated benefits based upon all time paid and/or worked in 1998?

2. If so, what is the appropriate remedy?

The Employer would state the issue as follows:

1. Did the City violate Notes D of the agreement when overtime hours were not included in the calculation for the proration of benefits to be paid to the permanent part-time Complaint Clerk for 1999?

The Arbitrator frames the issue for determination as follows:

1. Did the City violate Article VIII, Notes, paragraph D, of the agreement by not including Grievant's 1998 overtime hours worked when it calculated Grievant's 1999 prorated fringe benefits?

2. If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE VIII – WAGES

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NOTES

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D. Regular part-time employees shall receive prorated fringe benefits based upon the amount of time worked in a calendar year compared to the amount of time normally worked by a regular full-time employee during the same period. In determining the proration, all time paid shall be considered time worked.

. . .

BACKGROUND

The City's Police Department's support staff includes the positions of regular part-time Complaint Clerk and regular full-time Complaint Clerk. The part-time schedule consists of a 2-5, 3-5 cycle of work days whereby the employe works two days "on duty," followed by five days "off duty," then three days "on duty," followed by five days "off duty." The full-time schedule is 5-2, 5-3, and has a similarly staggered schedule. Both positions typically work 1 out of 3 eight-hour shifts in a 24-hour period.

Also within the same Department is the Relief Clerk position. That person's duties are to fill in for the regular part-time Complaint Clerk or the regular full-time Complaint Clerk when either is absent. The Relief Clerk position is not within the bargaining unit and operates on an on-call basis.

From November, 1990 until June, 1996, Darlene Kraus held the regular part-time Complaint Clerk position. From 1992 to 1996, the City provided to Kraus, on an annual basis, written calculations of her eligible prorated fringe benefits. For example, on January 2, 1996, the City wrote to Kraus that she had worked a cumulative of 1,709 regular, vacation, sick leave and floating holiday hours in 1995, and, therefore, was eligible for 82% of prorated full-time fringe benefits effective January 1, 1996 (1,709 hours divided by 2,080 hours equals 82%). There were no overtime hours included in this example. Nor were there overtime hours included in the City's other prior annual written calculations to Kraus. In June, 1996, Kraus left the regular part-time Complaint Clerk position and took the regular full-time Complaint Clerk position.

On July 30, 1996, Grievant Karen LaChey was hired as the regular part-time Complaint Clerk. This was the same position that Kraus had vacated. Prior to this time, Grievant had worked as a Relief Clerk.

On January 8, 1998, Grievant filed Grievance Nos. 98-1 and 98-2. These grievances are separate from the instant dispute and grievance, Grievance No. 99-1, which will be stated below. Both of the 1998 grievances allege violations of Article VIII, Notes, paragraph D of the agreement. In those grievances, Grievant stated that in calendar 1997, she received 50% prorated fringe benefits based upon her 680 hours worked over five months, and that a normal full-time employe would have worked approximately 866.65 hours during that same time period. Therefore, she believed her calendar 1997 proration should have been higher than the 50% actually prorated and paid by the City.

On January 12, 1998, the City provided to Grievant written calculations of her prorated fringe benefits for 1998. The City wrote that she had worked a cumulative 1,704 regular, vacation, sick leave and floating holidays hours in 1997, and therefore, was eligible for 82% of prorated full-time fringe benefits effective January 1, 1998 (1,704 hours divided by 2,080 hours equals 82%).

On February 20, 1998, Grievant, the City and the Union settled Grievances Nos. 98-1 and 98-2. That settlement agreement stated, in pertinent part:

> 1. prorated benefits for the part-time complaint clerk in 1997 should have been based comparing all hours paid in 1996 for the position of part-time complaint clerk, whether worked by Darlene Kraus or Karen LaChey, compared to regular full-time hours (2080 hours). The total hours worked in 1996 was 1078.25 hours, or 51.8% of regular full-time hours.
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> . . .
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> 10. Local 1035B Grievances 98-1 and 98-2 are dropped with prejudice.

Attached to the above-noted settlement agreement was a single typed sheet showing that Kraus and Grievant had cumulatively worked, 1,078.25 hours for 1996. The sheet enumerates their regular, vacation, sick leave and floating holiday hours for a total of 1,078.25 hours. Also attached to the settlement agreement were computer printout sheets, entitled "Employee Pay Inquiry," detailing Grievant's hours for 1997. These sheets showed that, in addition to Grievant's regular, vacation, sick leave and floating holiday hours, Grievant had worked 32.08 overtime hours in 1997. However, the 32.08 overtime hours were not added to the enumerated hours for the "Total Hours 1078.25." The settlement agreement was signed by Grievant, the City Attorney Jeff Brandt, and Local Union President Birdie Steiner.

Sometime during 1998, the full-time Complaint Clerk resigned. As a result, the City mandated that its clerks, including Grievant, fill in and cover that person's shifts until another full-time Complaint Clerk could be hired and trained. Consequently, Grievant and others were required to work 12-hour shifts instead of their normal 8-hour shifts. As a result, Grievant worked 125.14 overtime hours in 1998.

On January 5, 1999, the City provided written calculations to Grievant of her eligible prorated fringe benefits for 1999. The total amount of eligible prorated fringe benefits was lower than what Grievant had expected. This was because the City had again not included the Grievant's 125.15 overtime hours performed in 1998. The City determined that Grievant had worked a total of 1,320 regular, vacation, sick leave and floating holiday hours in 1998, and, therefore, would be eligible for 63% of prorated fringe benefits effective January 1, 1999 (1,320 hours divided by 2,080 hours equals 63%). Attached to the City's correspondence was a computer printout detailing Grievant's hours for 1998. The printout, entitled "Employee Pay Inquiry," showed that Grievant worked 1,320 regular, vacation, sick leave and floating holidays hours, and had worked 125.15 overtime hours.

On January 9, 1999, Grievant wrote to the City and questioned its January 5, 1999 calculations. The Grievant stated that her 125.15 hours of overtime were not included when the City determined the total number of hours worked for purposes of her prorated fringe benefits. Grievant also stated that had the City included her overtime, she would be entitled to a 69% proration. The City responded in writing that the Grievant's proration is based upon her regular hours only, that overtime hours fluctuate and cannot be promised or predicted, and that this was figured the same as had been done previously for Grievant and for Kraus, Grievant's predecessor, for many years.

On January 15, 1999, the instant Grievance No. 99-1 was filed alleging a violation of Article VIII, Notes, paragraph D of the agreement. The grievance requests all unpaid benefits, including sick leave, clothing allowance, floating holidays, vacation and insurance premiums.

Pursuant to the agreement, the matter was appealed to arbitration, and the Union filed a request with the Wisconsin Employment Relations Commission.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

Union

The Union argues that the City violated the agreement when it failed to credit Grievant with all hours worked and paid for in 1998, including overtime. In support of its conclusion, it points to the settlement of two prior grievances involving the Grievant. Those grievances concerned whether or not the City should base proration on the hours worked solely by Grievant in 1996, or whether it also had to include those hours worked by Grievant's predecessor, Kraus. The City agreed, with prejudice, to count all hours worked "for the position" rather than counting only those worked by the individual employe.

The Union believes the relevant contract language is simple and unambiguous, i.e., all time paid is considered time worked. The City's claim of ambiguity due to its involvement of prior grievances with Grievant is not supported. Just because one part of Notes, paragraph D has been a subject of dispute does not mean that that entire section is subject to dispute and/or various interpretations. Since Grievant was required to work significant overtime (125 hours) for 1998, and since she worked and was paid for that overtime, then she is entitled to have the City count those overtime hours when calculating her prorated benefits. Moreover, there is no dispute Grievant worked and was paid for 125 overtime hours in 1998. Therefore, she is entitled, by virtue of the agreement's language, to count those hours toward her prorated fringe benefits. If this Arbitrator denies counting those hours, he would have to read nonexistent language into the contract, i.e., that overtime hours are to be excluded. The agreement's "all time paid" language is self-explanatory.

The Union also insists that the City's argument of waiver and/or acquiescence must be rejected for several reasons. First, prior to 1998, the part-time Complaint Clerk's overtime hours were minimal and would have had little impact when calculating fringe benefit levels. Hence, the exclusion of overtime hours would have been an easy mistake or it would have been easy to assume that overtime hours were included when calculating prorated fringe benefits. This is particularly true because the Grievant enrolled in the City's group health insurance program, an expensive fringe benefit, while her predecessor had not. Thus, it is easy to understand why Grievant was more concerned about how the City's calculations were performed. Second, and more importantly, the Grievant's 1998 overtime hours were mandatory that she could not refuse to perform. Third, if the Union had asserted a similar waiver argument, in spite of the agreement's clear language, then the City would justifiably cry foul. Therefore, the Union deserves no less consideration on this point.

Although Kraus trusted the City was properly calculating her hours, she was unaware that overtime was not included in the City's calculations. Further, it is ridiculous for the City to claim that overtime hours should not be counted because they can be manipulated by employes. This is because overtime can only be considered as time worked, regardless of whether or not they can be "manipulated." This is especially true since Grievant had no option to reject the 125 hours of overtime and, therefore, the issue regarding manipulation becomes irrelevant. Grievant testified that she could not refuse to accept the 125.15 overtime hours. This makes the City's refusal to include them in its calculation of Grievant's prorated benefits all the most unfair. Nonetheless, all overtime hours should be counted since all were worked and paid.

Regarding the City's waiver argument, i.e., the Union did not explicitly bring up the present overtime issue in the prior 1998 grievances, the Union rhetorically wonders whether such a conclusion is in the best interests of the parties. This is because the Union never agreed to exclude overtime hours from the definition of time paid and/or worked, Krause was unaware that her overtime hours were not being counted and assumed that they were counted, and Grievant worked a significant number of overtime hours in only her second full year of 1998. The City's argument that the Union waived the right to include overtime is, therefore, preposterous.

The Union also rhetorically questions the City's response to a potentially similar situation when interpreting the agreement's military leave provision. Under Article XXI of the agreement, the City is required, in addition to granting time off, to pay an affected employe the difference between his or her regular pay and the actual military pay received. Past practice, however, has been that the City continues to pay the employe his or her wages while on duty, and that the employe turns over to the City whatever military earnings he or she receives. Assume, hypothetically, that an employe, who has performed military duty, has been paid his regular wages by the City and that the employe does not reimburse the City for money received from the military. Also assume that this goes on for a number of years and during the

course of two contracts. (The Union states that this scenario is based on actual events involving another City employee in a different bargaining unit a few years ago whereby the parties agreed that the City was entitled to reimbursement of the military payment even though the City failed to reconcile its own books and failed to request reimbursement.) Thus, when the City realizes its mistake and demands that it be reimbursed the military pay, the City cannot be said to have "waived" its right to enforce Article XXI by not demanding it. Article XXI's language clearly states that the City is only obligated to make up the difference in pay.

City

The City insists it did not violate the agreement when overtime hours were not included in the calculation for the proration of benefits to be paid to the permanent part-time Complaint Clerk for 1999. It argues it has never entered overtime hours into the calculation of total hours for determining prorated benefits for the part-time employes. Every year the City communicated by memo an explanation of how the previous year's hours were figured to each individual part-time employe. From 1992 to 1996, the City outlined the Grievant's predecessor's hours and how they would be figured into the calculation of her prorated benefits. Within the context of those memos, overtime was not listed as a calculation for the total. When the City notified Grievant by memo on January 12, 1998, regarding her proration of benefits for 1998, there was no reference to the inclusion of overtime in that memo. This was consistent with the other memos sent to other part-time Complaint Clerks. Furthermore, there were two prior grievances over the issue of how to calculate the previous years' hours for determining benefits for the part-time employes. Throughout the discussions regarding those grievances, overtime and the calculation of overtime hours were discussed, including whether or not overtime should be included in the calculation of benefits. During those discussions, the City indicated that overtime was not guaranteed and that it was controllable by the part-time Complaint Clerk. The resolution of those prior grievances specifically excluded the calculation of overtime, such that, in the final calculation, the parties excluded overtime from the total calculation.

The City also contends the contract language as to the treatment of overtime hours is unclear. A review of that language reveals that it does not specifically include overtime hours in the amount of time worked to prorate benefits. While a reference is made to paid time, a comparison is also made to hours normally worked by full-time employees. The language does not indicate whether the paid time reference is intended to compare hours normally worked by the part-time employes. While sick leave and holidays may be time paid for a time when the employe normally works, overtime is not. The language does not indicate whether one is to compare all paid time for the part-time employes as compared to all paid time, including overtime for the full-time employes. Nowhere in the language does it state that "overtime" hours are defined as hours to be included in the proration of benefits. In total, the language is unclear.

The City also asserts that the agreement in this case requires that part-time employes' benefits will be prorated based on the amount of time worked in a calendar year compared to the amount of time normally worked by a regular full-time employe. If the City is required to include overtime hours, the result is not an "apples to apples" comparison. The language calls for a comparison of the time **normally** worked by a regular full-time employe to that of a part-time employe. If one were to include the overtime hours of the part-time employe, one would have to include the overtime hours of the full-time employe in order to gain a true comparison. Also, the essence of the part-time Complaint Clerk is to fill in those normal hours not covered by the full-time Complaint Clerk. The opportunity is there for the part-time Complaint Clerk to gain the normal hours of the full-time Complaint Clerk, but not to gain further benefits with overtime. Under the Union's argument, a part-time Complaint Clerk could gain full-time hours as well as more than 100% of benefits by adding overtime. This is a nonsensical result. Further, the part-time Complaint Clerk has some control over the amount of overtime. This is one of the reasons the parties have not historically included overtime. Thus, the Union's interpretation of the calculation of overtime would not be reflective of what the parties intended. The intention of the parties was not to allow part-time employes the ability to enhance their level of fringe benefits by accumulating both normal hours and overtime hours.

The City also argues that there is a past practice that supports the City's decision not to include overtime hours in the proration of benefits for Grievant, and that past practice has been unequivocal. Further, the Union was aware that the City took the position that it had the authority to prorate benefits without including overtime hours. First, there has been one part-time Complaint Clerk since approximately November of 1990, and that Clerk has received prorated benefits according to the contract. Second, every year the City would communicate to the employes by memo, an outline of the calculation of their fringe benefits. Third, the City gave its employes annual notice regarding their proration of benefits. Furthermore, the Union filed two grievances in 1998 with respect to the calculation of fringe benefits. In each grievance the issue was either settled or the Union accepted the City's denial as shown by the Union's failure to advance them to arbitration. In settling, Grievant voluntarily agreed to the City's calculation of determining hours wherein overtime was excluded from the final calculation. The settlement documents encompassing those grievances listed overtime, but specifically excluded overtime in their calculations of hours for benefit purposes. Moreover, the parties discussed the issue of overtime as a part of those settlements and why overtime would not be included in the calculation. The grievances were settled with overtime being specifically excluded.

In conclusion, the City argues it has authority to do what it did, has done so historically in the past, and thus, did not violate any express provision of the agreement. The Union had knowledge of this and accepted this binding practice. Furthermore, the parties resolved this issue when they settled their prior grievances. As such, if the Arbitrator rules in favor of the Union, he would be giving the Union something through grievance arbitration which the Union could not obtain through collective bargaining or through prior grievances. The City notes that

Article IV of the agreements restricts the Arbitrator's authority to the four corners of the agreement. In essence, the Union asks this Arbitrator to ignore the long history established between these parties regarding this issue, and this Arbitrator to exceed his authority.

DISCUSSION

The Union argues that the language of Article VII, Notes, paragraph D is clear and unambiguous because of the last sentence of the clause which states "all time paid" shall be considered "time worked." Standing alone, it does appear clear on its face. However, that language cannot be read in isolation because it is not the only language governing proration. Rather, it must be read in conjunction with the prior sentence of paragraph D, and when that occurs, it becomes apparent that the words "all time paid" can have more than one plausible meaning. Generally, when language is susceptible to more than one plausible interpretation it is deemed to be ambiguous. In this case, the City's practice relative to what hours it considered as "hours worked" is evidence of a plausible construction of "all time paid" other than the meaning argued for by the Union. The City's practice treats "all time paid" as being those hours not worked, but for which the employee was paid – sick leave, vacation, and floating holidays. These would have been shifts/hours the employee did not work, but was absent with pay. The Union argued paid overtime work also should be counted as "time paid" and therefore "hours worked."

Both of these interpretations of the clause are plausible. Thus, I have concluded the language in dispute is ambiguous. I believe the preferred approach to interpreting ambiguous language is to first look to the parties' conduct over time to see if there is evidence of their conduct that can shed light on or aid in the interpretation of the ambiguous language. In the instant case, there is such evidence.

First, the City has historically excluded regular part-time Complaint Clerks' overtime hours from "all time paid" when calculating prorated fringe benefits. Since at least 1992, on approximately a yearly basis, the City has communicated with the regular part-time Complaint Clerks and provided them with the formula used to determine the level of proration of their benefits. The formula that has historically been used by the City has included regular hours, vacation, sick leave and floating holidays hours, but not overtime hours. This was consistently done for many years and never grieved by the employes or the Union.

Further, the prior grievance settlement agreement supports the City's contentions. The Grievant and Union entered into a binding settlement agreement to her earlier grievances (98-1 and 98-2) challenging the City's proration calculations. It is most significant that the same proration formula was used by the City and that the work sheets attached to the settlement agreement excluded overtime in the computation of the proration percentage. In particular were two work sheets entitled "Employee Pay Inquiry" for the Grievant with a column titled "ovt." (overtime). Nonetheless, the calculation showed that Grievant and her predecessor had worked a cumulative 1,708.25 hours for 1996, and enumerated the specific types of hours that

were included in the total hours paid: regular, vacation, sick leave and floating holiday hours. This list of enumerated hours did not include overtime hours. It excluded any overtime hours in a similar fashion to the formula used by the City on an annual basis since 1992. It is also significant that the Grievant signed the settlement agreement on February 20, 1998. That was after she had received the City's January 12, 1998 letter setting out the hours worked breakdown for 1997 that was used to determine her 1998 level of proration of fringe benefits. Again, the City had not included any overtime hours she had worked in 1997. Thus, Grievant knew, or should have known during the settlement discussions leading up to signing of the settlement agreement pertaining to her 1997 proration that she was agreeing not to include overtime hours. Further, the Union President testified she was present during the discussions leading up to the settlement agreement and executed the agreement on behalf of the Union without overtime hours being a part of the settlement governing the Grievant's 1997 proration.

The undersigned is persuaded that the City's consistent practice of not including overtime hours worked by the part-time Complaint Clerks, and providing them each time with the formula that excludes any reference to overtime hours worked, coupled with the binding settlement agreement, is the best evidence of what the parties to the contract believed was an acceptable interpretation of paragraph D. The undersigned finds the practice and settlement compelling evidence that the City's interpretation of paragraph D is the preferred construction because it is drawn from what the parties have found acceptable. Thus, given the past practice of the City's application of the treatment of overtime, the effect of the Grievant's prior settlement agreement governing her 1997 proration, and the City's reasonable expectation that the issue of overtime as applied to the Grievant was resolved by that settlement agreement, the Arbitrator concludes that the City did not violate the parties' collective bargaining agreement by not including Grievant's 1998 overtime hours when it calculated her 1999 prorated fringe benefits.

Based upon the foregoing and the record as a whole the undersigned enters the following Award.

AWARD

The City did not violate Article VIII, Notes, paragraph D, of the parties' collective bargaining agreement by not including the Grievant's 1998 overtime hours when it calculated Grievant's 1999 prorated fringe benefits.

Dated at Madison, Wisconsin, this 13th day of December, 1999.

Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

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