

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF RACINE

and

**LOCAL 2239, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

Case 585

No. 58662

MA-11026

(Emergency Services Overtime Grievance)

Appearances:

Attorney Guadalupe G. Villarreal, Deputy City Attorney, 730 Washington Avenue, Racine, Wisconsin 53403, appeared on behalf of the City.

Mr. John P. Maglio, Staff Representative, P.O. Box 624, Racine, Wisconsin 53401-0624, appeared on behalf of the Union.

ARBITRATION AWARD

On March 13, 2000, the City of Racine and Local 2239, AFSCME, AFL-CIO, jointly requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on May 24, 2000, in Racine, Wisconsin. A transcript of the proceedings was made and distributed by July 21, 2000. Post-hearing briefs were submitted, the last of which was received and exchanged by August 23, 2000.

This Award addresses the allocation of overtime hours among certain employees of the Racine Police Department.

BACKGROUND AND FACTS

As of the end of calendar 1999, nine employees occupied positions titled "Records/Data Entry Clerk I or II". Their overtime earnings for 1999 were as set forth below, in descending order of seniority.

<i>First Shift</i>		<i>Second Shift</i>		<i>Third Shift</i>	
Mudrak	366.9	Coleman	146.2	Simpson	45.1
Price	128.2	Wanek	91.9		
Nunn	149.2				
Taylor	26.3				
Putman	22.1				
Lackey	128				

Mudrak, the senior employee in the work unit, began with the City in 1978 as a Records Clerk/Typist I. He was promoted to Clerk II in April, 1994, and to Software Coordinator in 1999. Until 1999, Mudrak was paid one pay range above the Records/Data Entry Clerk I. In 1999, the Records/Data Entry Clerk I classification was reallocated up one pay range, giving those individuals wage parity with Mudrak.

Upon his reclassification in 1994, Mudrak's job description was changed to reflect certain duties he was then actually performing. At the time of his reclassification, Mudrak had assumed duties previously handled by a departmental inspector, who had retired. That individual controlled the departmental computer operation. The job description was modified to include those tasks including:

- 4) "Coordinates the centralization of the software by: a) being a contact/support person for users of the computer software and b) maintaining and keeping proper files to verify static data entered and used in the computer system (flags, new addresses, . . .)

. . .

- 5) Maintain, verify and be the contact person for the monthly alarm billings.

. . .

No similar job description revision accompanied the pay reallocations of the Records/Data Entry Clerk I's in 1999.

The overwhelming majority of Mudrak's overtime is incurred as a result of his computer skills. For a period of time, he worked side by side with a departmental investigator, who controlled the departmental computer system. The two produced ongoing reports. Upon the retirement of the inspector, Mudrak continued those reports because he had knowledge of the subject matter and of the computers. That work was subsequently incorporated into his job description following negotiations with the Union. Much of the work

involved either cannot be done by others or cannot be done so efficiently. Mudrak became an expert due to his initial position, the opportunity presented, and his computer skills. Because of his talent, he became a troubleshooter, which contributed to his skills base. One further outgrowth of this was that when the department determined to replace its computer system, it turned to Mudrak for guidance. His involvement in the computer transition generated a good deal of overtime in 1999.

As an outgrowth of efficiency concerns, certain documents and reports are generated outside of normal police counter work hours. There was a desire to avoid tying the computer system up during public business hours. Rather than assign those projects to second or third-shift employees, the Employer determined to offer that work to Mudrak as overtime. This work was not offered to other employees. The Employer viewed Mudrak as the one most capable of performing the work, and believed it optimal to consolidate this work with one person.

ISSUE

The parties were unable to frame an issue. The Union regards the issue as:

Did the Employer violate Article XXXII, Section F, of the collective bargaining agreement when it failed to equalize overtime among Records/Data Entry Clerks in 1999? If so, what is the appropriate remedy?

The Employer regards the issue to be:

Did the Employer violate Article XXXII, Section I, of the collective bargaining agreement when it assigned overtime hours to John Mudrak in November, 1999?

I believe that two issues are presented in this proceeding:

- 1) Is the Employer free to have Mudrak perform the overtime work which arises as an outgrowth of the computer-related work he performs or does Article XXXII, Section F, require that it be distributed throughout the unit?
- 2) Has the Employer distributed overtime as equally as possible, within the meaning of Article XXXII, Section F?

PERTINENT CONTRACT PROVISIONS

Article XXXII
Overtime

...

F) Overtime shall be divided as equally as possible within departments and overtime lists shall be posted in each department.

G) With twenty-four (24) hours prior notice, employees are required to work non-emergency overtime.

H) Emergency overtime: Employees are required to work emergency overtime. An “emergency” for the purpose of this section shall constitute an unforeseen occurrence (including, but not limited to all weather problems) requiring immediate action to provide necessary City service. The Employer shall offer, by seniority, emergency overtime hours to employees working the previous shift. Emergency overtime is hereby defined as overtime not known at least seventy-two (72) hours in advance. In the event that no employee on the previous shift volunteers to work, the Employer shall have the right to require the least senior employee, on a rotating basis, and working the previous shift to work four (4) hours of emergency overtime contiguous to his/her previous shift. To fill the remaining four (4) hours of emergency overtime, the Employer shall utilize the provisions contained in this section by contacting employees by seniority on the shift following such emergency overtime, with the right to require the least senior employee on a rotating basis scheduled to work the remaining four (4) hours of emergency overtime.

In the event the Employer is unable to fill any remaining overtime because the Employer is unable to reach an employee working the shift following said emergency overtime, the Employer shall, in reverse order of seniority, call employees to work the remaining overtime. One documented call will be made to every person within the specific classification, with a message left when possible. If no one is contacted, the person assigned to the first four (4) hours will be required to work the entire shift. Emergency overtime is not subject to Section F of this Article.

I.) Non-Emergency Overtime: Non-emergency overtime shall be posted as available to all employees in the classification needed, and shall be available subject to Section F above. If no one signs up for available overtime, the provisions of this Agreement shall become effective and the posted overtime shall become emergency overtime within seventy-two (72) hours of the needed overtime.

J.) Any employee who has been called to work other than his/her regular work hours and at a time not contiguous to the starting or ending time of his/her regular shift shall be granted as call-in pay at least equal to four (4) hours of pay at his/her regular rate.

K.) All overtime work and/or refused shall be charged to the employees. For purposes of this Section, all documented attempts to contact employees for overtime shall be charged to the employees. The Employer agrees to post a current overtime list on a monthly basis. . .

POSITIONS OF THE PARTIES

The base argument of the Union is that the City failed to equalize overtime in its records department in calendar year 1999, in violation of Article XXXII, Section F.

The Union, relying upon the testimony of employee Putman indicates that the job description for the Data Entry Clerk I is common to that of the Data Entry Clerk II, occupied by Mudrak, less the running of monthly and yearly reports. Aside from those two tasks, contends the Union, Data Entry Clerk I's are capable of performing all other tasks. The Union points to record testimony that other employees have offered to learn those tasks and/or have been trained on those tasks.

The Union notes that all overtime granted Mudrak in 1999 was non-emergency overtime. The Union contends that although employees have made themselves available to learn the City's new program, only one employee was assigned the duties. Although the City trained other workers to run monthly and weekly reports, those duties were always assigned to one worker. The contract requires an equal distribution of overtime. By failing to rotate the overtime opportunity among bargaining unit members, it is the Union's contention that the City has violated the Agreement.

As a remedy, the Union seeks to have all Records department employees brought to the same number of overtime hours worked by Mudrak in 1999 by making them whole for the lost overtime and benefits.

It is the position of the City that the overtime hours available in the Police Department were awarded to the holder of the Records/Data Entry Clerk II classification: the classification needed for the job. The City contends that the Union bargained for, and received, new job classifications for a job description the Employer developed to meet a need for an employee with certain skills not otherwise available in the Records/Data Entry Clerk I position holders. The two classifications are different and distinct with different duties and responsibilities.

It is the Employer's view that it did not charge Records/Data Entry Clerk I's who did not take or refused available non-emergency overtime, and thus the difference in overtime hours is not reflective of the hours that could have been earned by other employees.

It is the Employer's contention that the Union should not now be allowed to cry "foul" after it has acquiesced to the non-charging practice, and waited until the end of the year, and then claimed overtime was not being equally divided within the Department.

It is the position of the Employer that the Records/Data Entry Clerk I's could not and would not perform tasks clearly within the classification of Records/Data Entry Clerk II and outside the duties and responsibilities of their job description.

DISCUSSION

The grievance in this matter was filed in November, 1999. As developed in the record, this grievance complains that the Employer has failed to divide overtime as equally as possible. The record establishes that there is a great disparity in the number of overtime hours worked. The Employer contends that the overtime hours worked is not an adequate measure of the overtime opportunities made available to employees. Article XXXII, Paragraph K calls for overtime worked and/or refused to be a part of the calculation. However, there is nothing in the record indicating that the Employer has maintained records of overtime refused. Additionally, the overtime list set forth above appears to be a composite of emergency and non-emergency overtime, though the standards for awarding these two forms of overtime differ.

I believe that paragraph K requires the Employer to maintain a record of overtime worked and overtime refused. Without such a record, it is impossible to tell whether or not an equal division has occurred.

I believe the Employer is in violation of the Agreement in the distribution of overtime. At a minimum, the Employer has violated Article XXXII, paragraph K. It cannot be determined from this record whether the Employer has violated Article XXXII, paragraph F.

I do not believe the Union is entitled to a monetary remedy in this proceeding. The Union waited until November to file a claim that the distribution of overtime in calendar 1999 was unbalanced. There is nothing in the record to suggest that the assignment of overtime to Mudrak was covert or otherwise hidden from the Union or other bargaining unit members. To the contrary, the assignment of overtime to Mudrak was open and notorious. It appears to have been known by all who worked with him. I do not believe the Union was free to sit and wait until the end of the calendar year and then make a claim for retroactive equalization of overtime. In my view, the Union is estopped from making a claim for monetary damages.

This dispute also raises the question of whether or not the assignment of certain overtime to Mudrak, and not other employees, is appropriate. These parties have historically treated Mudrak as having a specialized area of work, both formally and informally. The competing job descriptions reflect that fact.

By all accounts, Mudrak has taken the lead in the computer area. The record supports a finding that some employees asked for training in this area. Some training materialized. The record also supports a finding that some employees were not interested in either the training or the work. There are some employees who evidently refused to do the work Mudrak performed.

Given the background, I believe the Employer was entitled to assign those job duties found on the Records/Data Entry Clerk II position, but not the I position to Mudrak, exclusively. Additionally, I believe the Employer was free to assign to Mudrak those tasks which require his level of training and expertise. Implicit in the equalization of overtime is the premise that eligible employees must be qualified to perform the available work.

AWARD

The grievance is sustained.

REMEDY

For the reasons set forth above, I make no monetary remedy. However, the Employer is directed to cease and desist from the practice of failing to keep a record of overtime refused. The Employer is further directed to distribute overtime as equally as possible within departments, in accordance with the above.

Dated at Madison, Wisconsin this 12th day of October, 2000.

William C. Houlihan /s/

William C. Houlihan, Arbitrator