BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY POLICE BARGAINING UNIT

and

CITY OF GREEN BAY
(POLICE DEPARTMENT)

Case 303
No. 58244
MA-10894

and

Case 304
No. 58245
MA-10895

(DuBois and Leick Overtime Grievances)

Appearances:

Parins Law Firm, S.C., by **Attorney Thomas J. Parins, Jr**., on behalf of the Green Bay Police Bargaining Unit.

Mr. James M. Kalny, Human Resources Director, on behalf of the City of Green Bay.

ARBITRATION AWARD

The Green Bay Police Bargaining Unit, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and the City of Green Bay, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the disputes. The parties agreed the matters should be combined for the purposes of hearing and award. A hearing was

held before the undersigned on April 7, 2000, in Green Bay, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matters by August 1, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the substantive issue:

Did the City violate the Collective Bargaining Agreement when it refused to pay Officers DuBois and Leick three hours call-in pay for the phone calls of April 21, 1999?

The City also raises the procedural issue:

Are the grievances timely?

The Union also raises the following issue:

Did the City notify Officer Leick of the denial/change in his overtime card in a timely manner as set forth in Article 6.04 (sic) (6.01) of the Collective Bargaining Agreement?

(The City objected to that issue as having not been previously raised by the Union.)

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE 3

GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS

. . .

3.04 COMPUTATION OF TIME. The days indicated at each step should be considered a maximum. Days shall mean working days Monday through Friday, excluding holidays. The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a waiver of the

grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. The time limits may be extended by mutual consent.

. . .

3.06 STEPS AND PROCEDURE

(1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she or the Union knew or should have known of the event giving rise to such grievance. The Chief shall furnish the grievant and the Union representative an answer within five (5) working days after receiving the grievance.

(2) STEP TWO. If the grievance is not satisfactorily resolved at the first step, the grievant or the Union representative shall prepare a written grievance and present it to the Personnel Committee within ten (10) working days of the Chief's response. The Personnel Director shall review the grievance and shall respond in writing within five (5) calendar days after his receipt of the written grievance.

(3) STEP THREE. If the grievance is not resolved at the second step, the grievant or the Union representative shall present the written grievance to the Personnel Committee within five (5) working days of the Personnel Director's response. The Personnel Committee shall review the grievance and respond in writing within five (5) days of their decision which shall be made at the next regularly scheduled Personnel Committee meeting. In reaching their decision, the Personnel Committee may hold a fact-finding hearing after having received a written statement of fact and position by each party. The grievant and the Union shall be given a five (5) day notice of said hearing.

(4) STEP FOUR. If no agreement is reached in step 3, the dispute may be referred to arbitration. The party desiring arbitration shall, within fifteen (15) days of receiving the Personnel Committee decision, petition the Wisconsin Employment Relations Commission for arbitration with a copy of such petition sent to the other party.

. . .

ARTICLE 6

OVERTIME

6.01 OVERTIME PAYABLE. Employees will be compensated at the rate of time and one half (1 ½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8 ½ hours on a regular work day or for hours worked outside the normally scheduled work week. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. No change in the amount of overtime claimed by an employee shall be made unless the employee is notified of such proposed change within seven (7) days of the employee turning in an overtime card.

. . .

6.04 MINIMUM CALL-IN TIME. Employees will be compensated for a minimum of three (3) hours for any call-in time worked on a scheduled work day, a day on which an officer works a full 8 ½ hour work day pursuant to posted shift overtime, or for a call-in while an officer is attending either a voluntary school or in-service training (an officer receiving call-in pay on a day attending school shall still be entitled to compensatory time as if no call-in occurred if the officer successfully completes the school in question, and if the school is not successfully completed, shall receive compensatory time for those hours in attendance). The department may engage police officers in police business on site during in-service training without paying call-in, provided such shall not jeopardize the officer receiving full credit for the class interrupted. Employees will be compensated for a minimum of six (6) hours for any call-in time on a day off or scheduled vacation. This call-in time shall be compensated at the base rate of pay.

(1) Any officer who takes vacation or off-time coming, personal leave day or any other off-time authorized after being scheduled and notified of a required court appearance or other required non-shift departmental duties shall be compensated for a minimum of three (3) hours.

(2) Continuous Duty: In the event an officer is called in for more than one (1) call in any given day, that officer shall not receive two call ins, but shall be paid continuous pay at the overtime rate of time and one-half from the beginning of the first call in to the end of the second call in; excepting that if the call ins in question are for specialized units established and existing for the purpose of being called in for special problems or occurrences, such as SWAT, K-9, the contemplated Bomb Squad, or the like, the continuous duty rule shall not apply to more than one call in of such nature, but rather each call in shall be a separate call in.

. . .

ARTICLE 36

NO OTHER AGREEMENT

. . .

36.02 INCORPORATION OF AGREEMENTS. All amendments, deletions, or additions to the labor agreement which are mutually agreed to by both parties during this agreement shall be incorporated into the body of the next successor agreement.

BACKGROUND

There was an arson fire at the Leicht Warehouse in Green Bay on the evening of April 20, 1999. Officer DuBois was working his regular 10:15 p.m. – 6:45 a.m. shift the evening of April 20 and Officer Leick was working the "power shift" that evening. Both Officer DuBois and Officer Leick ultimately ended up working at the fire the evening of April 20th. In the early afternoon of April 21, 1999, Lieutenant Brodhagen called both of those officers and asked each of them if they had been at the fire, where they had been at the fire scene, who and what they had observed, and then told them to write up a detailed report of what they had told him as soon as they came in for their regular shift that evening. The Department's computer log of phone calls indicates that the phone call to Officer DuBois lasted approximately three minutes, while the call to Officer Leick lasted approximately two minutes, the computer rounding up the time. Lt. Brodhagen testified that he made similar calls to three other officers that day, but they did not request to be paid.

During their regular shifts on April 21, 1999, both Officer DuBois and Officer Leick submitted overtime cards requesting three hours of overtime pay for the phone call each had received from Lt. Brodhagen that day. Both officers had indicated "1B" for the "overtime code" on their cards. "1B" indicates "Posted O.T. – contacted by phone (Patrol Officers)." On April 22, 1999, both Officer DuBois and Officer Leick received their overtime cards back with the indication that they had been reviewed by Lt. Brodhagen on that date and denied.

Both DuBois and Leick subsequently resubmitted their overtime cards, this time with the code for the Leicht Warehouse fire referenced for the "overtime code". On April 26, 1999, DuBois received an "overtime card review form" indicating he was to provide further explanation and justification as to why he felt it was appropriate to submit the overtime card for April 21st and return it to Lieutenant Van Schyndle by April 27th. DuBois completed and returned the form on April 27, which included the following explanation:

> I was called at home by Lt. Brodhagen and questioned about the fire at Leichts dock. He told me that ATF was investigating and they wanted details from all responding officers.
>
> Lt. Brodhagen asked questions about when I arrived, where I went and what I observed. He also asked who else was on scene. He asked that when I got to work I write details.
>
> Because I was off duty and contacted and questioned and given an order I feel I am entitled to compensation.

On April 29, 1999, Officer DuBois' overtime card for April 21, 1999, that he had resubmitted, was returned to him with a note affixed to it stating, "The information in reference to the overtime request has been reviewed. The card is still denied. 4-29-99 Lt. Van Schyndle."

Officer DuBois testified he was not working the same shift as Lt. Van Schyndle at the time and that he gave a Union Steward the "paperwork" regarding the denial of his overtime on or about April 30th or May 1st, after discussing whether he had a basis for his claim. By the following letter of May 18, 1999, received by the Chief on May 19, 1999, the Union filed the grievance of Officer DuBois:

RE: Green Bay Police Bargaining Unit Grievance
Officer DuBois Overtime Denial
Date Overtime Earned: 4/21/99

Dear Chief Lewis:

The Green Bay Police Bargaining Unit does hereby grieve the denial of call-in pay for Officer Rod DuBois for the overtime card submitted for overtime earned on April 21, 1999.

This grievance is based upon Section 6.04 of the current contract which calls for a minimum of three (3) hours to be paid for any call-in on a scheduled work day.

Officer DuBois was called at home during his off-time hours by Lt. Brodhagen and questioned about an incident that occurred the night before. Lt. Brodhagen questioned Officer DuBois about the fire at Leicht's dock regarding work related details of his response and observation of the fire.

The remedy sought with this grievance is that Officer DuBois be paid the minimum three hours call-intime as set forth in the contract.

Sincerely,

PARINS LAW FIRM, S.C.

Thomas J. Parins, Jr. /s/
By: Thomas J. Parins, Jr.

By letter of May 19, 1999, Chief Lewis denied Officer DuBois' grievance stating, in relevant part,

Officer DuBois was contacted by telephone at his home. The telephone conversation lasted less than two minutes and was due to the fact that no report was accomplished describing in thorough detail his actions at an arson fire. Officer DuBois was not called out as covered by Section 6.04, nor did he perform any substantial work during the less than two minute telephone call. I must reject your grievance that there has been a violation of Section 6.04.

I must also raise the issue of the timeliness of this grievance as covered by Section 3.06 of the Bargaining Unit Contract.

Officer Leick received his resubmitted overtime card back with the following notation attached from Lt. Brodhagen: "This card is denied for non-substantial work", and dated May 4, 1999. By letter of May 27, 1999, received May 28, 1999, the Union filed the grievance in this matter on behalf of Officer Leick, which letter was substantively the same as that filed on behalf of Officer DuBois. By letter of June 1, 1999, Chief Lewis denied Officer Leick's grievance, which letter was substantially identical to the Chief's denial of Officer DuBois' grievance.

The grievances were processed through the parties' contractual grievance procedure. The parties were unable to resolve their dispute and proceeded to arbitrate the grievances before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that the overtime card submitted by Officer Leick, on April 22, 1999, was not denied in a timely manner and that therefore, he is entitled to the overtime for April 21. The language of Section 6.01 clearly sets forth that the overtime amount claimed cannot be changed unless the employee is notified of the proposed change within seven (7) days of having turned in the card. That is seven calendar days, since, if a provision in the contract calls for working days to be used, that is specifically set forth, e.g., Article 3.06. The record is clear that Leick originally submitted an overtime card on April 21, which was denied on April 22, 1999. While that overtime card was timely denied, Leick, believing it was denied because of an incorrect overtime code, resubmitted the card on April 22 or 23 with a different code. According to the provisions of Article 6.01, the latest he would have had to have been notified of a change in the amount of overtime claimed would have been April 30. His overtime card was denied on May 4, clearly outside the seven day limitation. Further, Sec. 6.01 states that it is when the employee is notified of the proposed change, not when the overtime card is denied, that governs that provision. It was undisputed that Leick was notified of the proposed change (a denial) more than seven days after having submitted the card. According to the clear and unambiguous language of 6.01, no change in the amount of overtime claimed could be made, and Officer Leick's overtime card should be paid as submitted.

Next, the Union asserts that Sec. 6.04 requires that the Grievants be paid the three hours call-in time for the phone calls they received on April 21. Section 6.04 clearly states that employees will be compensated for a minimum of three hours for any call-in time worked on a scheduled work day. There is no dispute here that the officers were called at home on a scheduled work day. While the City contends that no substantial work was performed, there is no reference in Sec. 6.04 as to the amount of work that needs to be performed in order to qualify for call-in pay and the language of the provision and the testimony would also suggest otherwise. Section 6.04 sets forth specific exceptions where call-in pay will not be paid. Those provisions suggest that even if an officer is on-site for whatever reason and engaged in police business, the Department would have to pay a call-in, the exception being if the officer is in in-service training. There is no reference to requiring substantial work or any specific amount of time, but simply requires that the officer be engaged in police business. Those provisions show that an officer would expect to receive call-in pay if he is engaged in police business, even if he on-site, much less being at home. That directly contradicts the testimony of Chief Lewis that call-in pay is for the inconvenience of coming down to the Department and having to change clothes, etc. Instead, the minimum call-in pay provision was designed to compensate officers for the inconvenience of being contacted during their off time regarding police business.

The uncontroverted testimony was that the City has on numerous occasions brought up the possibility of placing *de minimis* language in Sec. 6.04, but has been unsuccessful. That testimony shows that the parties do not believe that there is a *de minimis* rule. This is further demonstrated by the Gruba grievance. Until the present exception was negotiated, officers received a three-hour call-in for being engaged in police business even when they were on-site and engaged in in-service training. That is less of an inconvenience than being engaged in police business off-site, yet officers still received call-in pay. There is no dispute that officers DuBois and Leick were contacted at home on April 21, 1999 regarding police business. Even though both officers were scheduled to work that evening and their observations could have been obtained when they came in, Lt. Brodhagen found it necessary to contact them immediately, rather than waiting until they reported for work.

Minimum call-in pay is designed to compensate officers for being contacted regarding police business outside of their normally-scheduled work day. The uncontroverted testimony of the Union's chief negotiator since 1973 until the present, was that Sec. 6.04 was placed in the Agreement because supervisors would have questions about paperwork, and rather than waiting for the officer to report to duty, would call him at home with the questions. Had the parties intended or agreed to a *de minimis* rule, such language would have been placed in the Agreement. The City should not now be able to obtain through arbitration what they are unable to obtain in negotiations.

The City attempts to bring in the federal Fair Labor Standards Act with regard to the *de minimis* rule. While that Act sets minimum standards which must be followed, parties can agree to provide employees with benefits above those minimums, as they have done here.

The Union also asserts that the types of calls that these officers received at home regarding investigations have been paid in the past. The Kaminski grievance settlement in 1995 involved a similar situation where an officer had a telephone conversation regarding an investigation and was paid call-in time for that telephone conversation. While the City attempts to discredit the relevance of that settlement by saying it is unaware whether it is a similar situation, the only evidence as to the situation in the Kaminski grievance is Detective Darm's testimony that the situations were similar. Also, the City has failed to provide any evidence that it has denied any such payment of call-in time for these types of situations. Such information would seemingly be readily available to the City.

While there was evidence that these types of call-ins regarding investigations are not very common practice, that is because management knows that if it contacts an employee at home regarding police business, the employee is entitled to call-in pay. This is further demonstrated by the memorandum from Chief Lewis to all employees dated January 6, 2000. While the memo is dated after the incident in question, it shows that management believes that if officers are contacted at home regarding a case, they would be subject to receiving overtime. Though it indicates it needs to be approved by a supervisor, the call in question was made by the supervisor who approves overtime. It is reasonable to assume that if that supervisor calls you at home, he would be approving the overtime, and further questioning by the employee would not be necessary.

The Union is not asserting that every phone call made to an officer at home is subject to call-in pay under Sec. 6.04; rather, it is only when an officer is called at home and engaged in official police business that the provision applies. Union President Darm testified as to the distinction between one being questioned regarding work-related activities he performed, as opposed to being offered overtime or a different position in the Department. The distinction is logical, and one that is easily made.

The City attempts to argue that what occurred was not a call-in, but simply calling an officer to determine whether a call-in would be required. While that argument might, at first blush, seem reasonable, if the supervisor asks all of the questions of the employee that he needs to ask regarding the investigation, there would not be any need for a call-in of that officer. That is what occurred in this case. Regardless of the number of questions asked, if the officer is contacted at home regarding their work as a police officer, especially if the consultation is regarding a current investigation, they should be compensated.

The City also attempts to argue that just because some officers do not submit time cards for overtime earned, no officers can do so. It is the decision of the officer whether he/she feels they should submit an overtime card for their time. There may be a number of reasons why an officer does not submit an overtime card. Whatever those reasons are, it does not preclude another officer from submitting overtime for the same type of work performed. The Kaminski grievance demonstrates that these types of phone calls have been made in the past as a call-in. The only evidence produced by the City that calls at home were made and not compensated was the testimony of Lt. Brodhagen. Why Lt. Brodhagen chose not to submit the overtime cards is his decision, but it should not disallow other officers from submitting overtime cards.

As to the timeliness of the grievances, Officer DuBois' grievance was denied by Lt. Van Schyndle on April 29, 1999. DuBois testified that he received the denial on that date. This was on his regular shift, which was the night shift starting at 10:15 p.m., and outside the normal working day. His grievance was filed on May 18, 1999. Even if April 30 is counted as the day Officer DuBois knew of the event giving rise to the grievance, his grievance was filed within fifteen (15) working days (the 15 working days would have ended on May 20, 1999.) However, April 30 should not count, as that is the day he would have been notified, and one would begin counting with the first working day following notification for the purpose of counting 15 working days. Thus, the grievance would have had to have been filed on or before May 21, 1999. Either way, the DuBois grievance was timely filed.

With regard to Officer Leick's grievance, the time for filing the grievance would have begun sometime after May 4, 1999, the date on which Lt. Van Schyndle denied the overtime card. Leick testified he was not certain when he was informed of the denial, and therefore the precise beginning date of when he knew of the event giving rise to the grievance cannot be determined with specificity. With officers working a 5-3 schedule, it is possible that Officer Leick did not receive the denial until May 8, 1999, had he been on his three days off. The City has the burden of showing that the filing was outside the time limit, and it has failed to meet its burden. There has also been no showing by the City that it has been in any way disadvantaged or prejudiced by the time the grievances were filed.

In its reply brief, the Union asserts that the City has raised the issue of the Grievants' overtime cards being invalid because they were corrected and resubmitted. This is the first time that issue has been raised and there was no indication prior to the City's brief that resubmitting corrected overtime cards was improper. To the contrary, management treated the resubmitted cards just as they would a new request. Management also took more than a week to return the resubmitted cards as denied, and it should not now be rewarded for misleading the officers. Therefore, the date that must be used for computing the time to file a grievance is the date the officers were notified of the denial of the resubmitted cards. Thus, they are timely.

In denying that it in any way violated the timelines in Article 6.01, the City again attempts to use the date of the denial of the original overtime cards, rather than the resubmitted cards. Again, it is the latter that must be considered. As Leick resubmitted his card on April 22 or 23 and the denial was dated May 4, 1999, it is clearly outside the clear seven day requirement set forth in 6.01. It is the clear language of 6.01 that governs, even if it is contrary to prior practice.

The Union further argues that the resubmitted cards should be treated as new requests. Under the City's theory, it could result in an officer making an error on an overtime card, and then being denied the opportunity of correcting the error when it was denied for that mistake. Also, 6.01 does not state the card has to be the original card, but rather, "an" overtime card.

The City also attempts to distinguish between being "called in" to the station, and being called at home to do police work. That distinction does not hold. Even Chief Lewis stated that officers can be, and have been, paid for being called at home. The Union reasserts that the City's reliance on the *de minimis* rule under the FLSA is misplaced, as there is no such rule set forth in 6.04. The City has also not proved a clear past practice regarding a *de minimis* rule, and in fact, bargaining history and the exceptions set forth in Sec. 6.04 would seem to prove otherwise.

Finally, the City attempts to assert that there was no agreement to pay for phone calls to officers at home. To the contrary, the record is full of references from Union witnesses, as well as the Chief, that phone calls to officers at home have been paid.

City

The City first takes the position that the two grievances must be dismissed as untimely. If an agreement contains clear time limits for filing and prosecuting grievances, failure to observe them generally will result in a dismissal of the grievance if the failure is protested. Elkouri and Elkouri, *How Arbitration Works*, 5th Ed., p. 276. Section 3.06 of the Agreement clearly states that grievances must be filed "within fifteen (15) working days after he/she or the Union knew or should have known of the event giving rise to such grievance. . ." Section 3.04 sets forth the consequence of failing to timely file the grievance, "Failure of the party to file or appeal a grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. . ."

The "event" that gave rise to these grievances was Lt. Brodhagen's denial of the overtime cards, which occurred, and was communicated to both officers, on April 22, 1999. Applying the fifteen days under Sec. 3.04 from the date of the actual receipt of the denial

(April 22), the deadline for filing the grievances would have been May 13, 1999. As Leick's grievance was filed on May 28 and Officer DuBois' grievance was filed on May 19, they were both untimely. The Chief promptly protested the tardiness of the grievances in his initial denial of each grievance. Further, it is clear that the parties have strictly adhered to the timelines and have arbitrated in that regard in the past. Under the circumstances, it is not necessary to proceed to the merits, and the grievances should be dismissed.

There is no evidence to support a claim that the City has violated the timelines in Sec. 6.01, or in any way extended or waived compliance with the grievance timelines. The City questions the relevance of Sec. 6.01 to the grievances, since both officers filed their overtime cards on April 21 and received their denial on April 22. Clearly it is the denial that is the event that is the basis of these grievances, in that they are grieving that they did not get overtime payment for April 21.

While it appears the Union is arguing that the resubmission of the overtime cards triggers a second set of timelines, there is nothing in the Agreement that allows for the resubmission of overtime cards, nor is there anything that addresses the timely filing or review of resubmitted overtime cards. That being the case, the Union apparently is relying on a past practice. The party asserting the past practice bears the burden of proving its existence. There is no evidence in this record of a past practice regarding the resubmission of overtime cards or the effect of resubmission. To the contrary, Chief Lewis testified on cross-examination that he did not believe there was anything in the Agreement which would allow an extension of timelines by resubmitting overtime cards, that he does not believe that the denial of the second submission of overtime cards would result in a different timeline, and that the extension of a new timeline for a grievance as the result of resubmission of a time card has not occurred while he has been Chief. Further, the Union's suggested procedure of allowing resubmission of overtime cards could lead to the absurd result of an individual repeatedly changing and resubmitting the card after it has been denied until a timeline has been missed, or a supervisor has inadvertently approved it. The intent of the language in Sec. 6.01 regarding the seven-day turnaround was to secure a prompt response to the overtime request in the first instance, and thereby ensure either timely payment or the timely commencement of the grievance process. There is no provision in the Agreement warning the City that if it reviews an overtime request, it may be both extending the timelines for a grievance and becoming the subject of a second application of the seven-day requirement. Also, the express wording of Section 6.01 illustrates that the seven-day provision does not apply in this case. That provision states that "No change in the amount of overtime claimed shall be made" unless the employee is notified of the proposed change within seven (7) days of submitting the overtime card. In this case, management made no change in the amount of overtime claimed, rather, it was denied without change.

As to the application of Sec. 6.04, the City notes that it applies to "any call-in time worked on a scheduled work day. . ." In this case, the officers were not "called in" to the station, and were not required to put in any "time worked." Lt. Brodhagen's testimony that call-in is when an employee is called at home and asked to report to the station and perform some work is consistent with the plain words "call" and "in", as those words are defined in *Merriam Webster's Collegiate Dictionary*. The Union's argument ignores the existence of the word "in" in the phrase "call-in time worked" and is contrary to the accepted principle of contract interpretation that each word and phrase in the contract is to be given meaning, if at all possible. The word "in" has meaning, and should not be rendered surplussage.

There was also no "time worked" under the plain meaning of that contract term. The respective phone calls to the officers were of less than two minutes duration in one case, and less than three minutes in the other. It is uncontroverted that the purpose of the calls was to determine whether it was necessary for them to be called into work. After asking them very brief questions regarding what, if anything, they had observed, and upon their response, it was determined it was not necessary to call them in and the conversations were ended. That does not reasonably translate to "call-in time worked". The calls made to the Grievants are analogous to other phone calls commonly initiated by management without any claim of overtime, e.g., calls to offer overtime, inform officers of changes in court dates, or pass on information on departmental events. The commonly-accepted practice between the parties has been that such phone calls have not been considered "time worked" for purposes of overtime. The City finds it difficult to distinguish between a call of less than two or three minutes to someone to determine if they would like to work some overtime, and a call of similar duration by management to see if they need to call someone in for overtime.

Further, the amount of time spent on the phone calls was *de minimis* and would not even be compensable under the Fair Labor Standards Act. In determining whether otherwise compensable time is *de minimis*, courts will consider

> . . .(1) the practical administrative difficulty of recording the additional time;
>
> (2) the aggregate amount of compensable time;
>
> (3) the regularity of the additional work. LINDOW V. UNITED STATES, 738 F.2D 1057, 1062, (9th Cir., 1984).

There is considerable case law holding that periods of ten minutes or less are *de minimis*. LINDOW V. UNITED STATES, SUPRA. In this case, 2-3 minutes is an insignificant amount of time and such calls are rarely made. Thus, they are *de minimis*, and are not compensable.

Assuming *arguendo*, that the call-in time language is not clear and unambiguous, the burden would be on the Union to prove that custom and practice of the parties requires the payment of three hours call-in pay for the short duration telephone calls. The Union has failed to show that any practice exists that compels that conclusion. The Union's long-time negotiator specifically stated he knew of no agreement that deals with calling an officer or talking to officers at home. He also could not recall whether there may exist some interpretation dealing with calling people at home, but stated there may be. The only other evidence produced by the Union in that regard was the 1995 Kaminski grievance settlement. While the matter involved a phone call, no one could testify as to the duration of the call or its nature, or whether the settlement was packaged with other grievances. Further, a single incident does not establish a "practice". SCHILLER MANUFACTURING CORP. 10 LA 617 (1948). The uncontroverted testimony of Lt. Brodhagen and Chief Lewis was that in the last three years there has been a consistent practice of denying any pay for these phone calls. The Union offered no evidence to rebut that testimony. As there is no express contractual language supporting the Union's claim, and no tacit agreement between the parties in that regard, and given the uncontroverted, consistent practice for the last three years of denying such claims, the Union has failed to prove that the Grievants were entitled to call-in time for the phone calls.

In its reply brief, the City asserts that in order to uphold the Union's argument that Sec. 6.01 was violated, the Arbitrator would have to ignore the clear and uncontroverted evidence that the overtime claim was denied in its entirety within twenty-four hours of the claim. The Union's argument pretends that the first denial did not occur or for some reason, had no effect. The Union offers no evidence to show that the resubmission of the overtime card claiming the same overtime on a different ground somehow requires a second denial. The only evidence concerning the effect of resubmission of an overtime card is the Chief's testimony that it has never extended the timelines for filing a grievance in his memory. As there is no language in the Agreement dealing with the resubmission of overtime cards, there can be no implied requirement of a second denial of the same overtime. Under the City's interpretation, the officer's interest in a prompt response is secured along with the ability to appeal any wrongful denial and the City's interest in being able to act with finality is also protected.

The City disputes the Union's argument that the language of Sec. 6.04 directly contradicts the testimony of Chief Lewis that the reason for call-in pay is the inconvenience to the officer of having to come down to the station, changing clothes, etc. It is such inconveniences without any, or short notice, that is one of the principal reasons for call-in time provisions. There can be other inconveniences, such as specifically addressed in 6.04 pertaining to engaging officers in police business on-site during in-service training. That

language is not only consistent with the City's position, but supports it. The City's position is

that when an officer is significantly inconvenienced by being required to perform significant work, without notice, while off-duty, the officer is entitled to call-in time, regardless of whether the officer is required to come in to work, or required to work at home. However, a brief inquiry concerning whether an officer would like to work overtime or to determine whether the officer should be called in to work overtime has not been compensable.

The City asserts that the Union has exaggerated the evidence in a number of areas. It relies on the testimony of the Union's chief negotiator, and proclaims that his uncontroverted testimony shows that when negotiating concerning Sec. 6.04, the parties did not believe there was a *de minimis* rule. Reading the testimony shows that the Union has argued there has never been a *de minimis* rule. It is also clear that there have been several discussions by the parties in an effort to clarify Sec. 6.04, inasmuch as there has been an ongoing disagreement as to the meaning of this section. The witness admitted he was not aware of an agreement on the meaning of the section, and Lt. Brodhagen testified that during his tenure as a union member, it was debated even within the Union. The Union relies on the same testimony to assert that Sec. 6.04 was inserted into the Agreement because supervisors would call officers at home regarding questions as to paperwork, rather than waiting for them to return to duty. The testimony does not say that. While the Union undoubtedly had its motivation for its interpretation of Sec. 6.04, there is no indication of any agreement or understanding regarding what the call-in language meant. As stated above, there has never been an agreement as to what the call-in provision meant since it was placed in the contract. While it is true that management has been unable to negotiate a *de minimis* rule to be expressed in the Agreement, it is equally true the Union was never able to negotiate a clear, unambiguous call time provision.

While the Union asserts that the Fair Labor Standards Act sets a minimum and that the parties can agree to provide employees with benefits above that minimum, as Union witness Parins testified, there has never been an agreement concerning the meaning of the minimum call-in rule. Thus, there is no agreement to pay the officers above the *de minimis* standard.

The City also asserts that there may be an implied agreement as to the meaning of Sec. 6.04, in that for the last five years there has been a clear policy and practice of denying overtime for calls. The Chief has communicated his interpretation to the employees at least three or four times in each of the last three years. Lt. Brodhagen testified that he has made approximately one call every three weeks in circumstances similar to this case for the last three years, totaling something in excess of 50 such calls. In all of those cases except one, which was denied, officers did not even file an overtime card. This uncontroverted testimony strongly suggests that there has been an understanding between the parties for at least the last few years that brief phone calls asking officers about cases are not considered eligible for call-

in pay. The Union relies on the settlement in the Kaminski grievance, acknowledged to be a

one-time payment for a telephone call, as establishing a practice of paying call-in for a phone call. There is, however, no evidence as to why the case was paid, the nature or length of the call, etc. The City does not dispute that call-in may apply where a considerable period of time is spent on the phone working on a specific case.

The City also disputes that the Chief's memorandum issued in 2000 somehow establishes that phone calls from third parties regarding cases are entitled to three hours of call-in time. That memo speaks in terms of overtime, and does not address the issue of whether actual overtime pay or minimum call-in pay would be paid for such contacts by third parties, and certainly does not establish a rule regarding phone calls such as these.

The Union's attempted distinction between a call to offer overtime as not being subject to overtime, and a phone call to an officer the result of which he is engaged in "official police business" entitling him to overtime, is not persuasive. Offering an officer an opportunity to come in to work overtime constitutes official police business and there is no basis upon which to conclude that calling to find out if it is necessary to call in an officer is different. The Union argues, contrary to the evidence, that Lt. Brodhagen did not simply contact these individuals to see if it was necessary to call them in. While the Union attempts to construe the phone conversations as lengthy discussions, they were not.

The Union's characterization of the City's position as, "because some of the officers do not submit time cards for overtime earned, no officers are allowed to submit overtime cards for overtime earned", ignores the evidence as to the existing practice.

DISCUSSION

Timeliness

The City raised the issue of whether the grievances were timely filed. Section 3.06, Step 1, provides, in relevant part:

> (1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she or the Union knew or should have known of the event giving rise to such grievance.

Section 3.04, COMPUTATION OF TIME, provides, in relevant part:

> 3.04 COMPUTATION OF TIME. The days indicated at each step should be considered a maximum. Days shall mean working days Monday through Friday, excluding holidays. The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. . .The time limits may be extended by mutual consent.

Read together, those provisions require that the grievant or the Union's representative file the grievance, in writing, within 15 working days (as defined in Sec. 3.04) of when the grievant or the Union knew or should have known of the event giving rise to the grievance, or the grievance will be deemed waived, unless the time lines have been extended by mutual consent.

The parties dispute when events giving rise to the grievances occurred. The City asserts the time to file a grievance started running when the Grievants' original overtime cards were denied (April 22nd), while the Union asserts it should begin the day following the day upon which they were notified that their resubmitted overtime cards were denied. It is concluded that under the circumstances, it was the notification of the denial of the resubmitted overtime cards that triggered the timeline for filing a grievance. While both parties attack the other's position on this point by arguing that if taken at its extreme, it could produce an absurd result, those are not the circumstances presented in this case. There is no indication that either of the Grievants were doing anything other than correcting the overtime code they had used on their original overtime cards. There is also no indication that anyone in management viewed the resubmitted cards as being invalid on that basis alone. Further, Officer DuBois was subsequently given an "overtime card review form" by Lt. Van Schyndle to further explain and justify his claim for overtime on April 21st. The Grievants, especially DuBois, could reasonably assume that the denial of their requests for overtime on April 21st were being reconsidered, and Lt. Van Schyndle's note of April 29, 1999 on DuBois' resubmitted card would seem to confirm that was the case. That was no longer the case, however, once they were notified that their resubmitted overtime cards were denied.

With regard to DuBois, Lt. Van Schyndle's denial is dated April 29, 1999 and DuBois testified that is the date he received it. Pursuant to Section 3.04, Saturdays, Sundays and holidays are excluded in computing the 15 working days (as opposed to using the individual's work schedule to compute "working days"). April 30th was the first day and the fifteenth "working day" was May 20, 1999. The record indicates DuBois' written grievance (Joint Exhibit 4) was received by the Chief on May 19th. Therefore, Officer DuBois' grievance was timely filed.

Lt. Van Schyndle's denial of Leick's resubmitted overtime card is dated May 4, 1999 and Leick's testimony was that he had "no idea" as to the date he received the denial. Contrary to the Union's claim, that does not necessarily place the May 4 date in doubt, as Leick did not state that he did not receive the denial on that date. This leaves the May 4, 1999 date on the denial uncontradicted in the record as the date Leick knew or should have known his overtime had been denied. May 5, 1999 would have been the first working day after the denial, and excluding weekends and holidays, the fifteenth working day was May 25th. The record indicates that Leick's grievance was dated May 27 and received by the Chief on May 28, 1999. Therefore, Leick's grievance was not timely filed.

Section 6.01

As this issue was raised only with regard to Officer Leick and his grievance has been found to be untimely, this issue is no longer before the Arbitrator.

Section 6.04

Although the City initially argued that the wording of Sec. 6.04 is clear and unambiguous in that it only applies to when an officer is called to come "in" to work, it subsequently conceded that "when an officer is significantly inconvenienced by being required to perform significant work, without notice, while on duty, that officer is entitled to call-in time. . .regardless of whether the officer is required to come into work or required to work at home." Further, the City's own witnesses acknowledged that if the telephone call to an officer at home was of sufficient duration and regarding police business, it would be appropriate to pay the officer. (Tr. pp. 104-105, 128). The City asserts that the call to Officer to DuBois on April 21, 1999 was only to determine whether it was necessary to call him in and was not of sufficient duration to qualify for call-in pay under Sec. 6.04. Conversely, the Union asserts that as long as the call is regarding police business (other than certain calls, e.g., offering overtime opportunities or notifying them of promotion results), there is no minimum duration that must be met under Sec. 6.04.

The Union asserts that bargaining history supports its position that there is no minimum time worked requirement in Sec. 6.04. While the Union witness' testimony was unrebutted that the City has, at times, raised the issue of a minimum time requirement in Sec. 6.04 without reaching agreement with the Union, the witness could not give a time frame as to when such discussions occurred or recall who was involved in them. The witness also testified that there was already a call-in provision in the parties' Agreement when he first began representing the Union in negotiations. The testimony, as well as the grievance settlements offered by the Union, do demonstrate, however, that there has been an ongoing disagreement

as to the application of Sec. 6.04.

Both parties cite past practice in support of their respective position. The Union cites the settlement of the Kaminski grievance in 1995 and the settlement of the Grubba grievance in 1993. 1/ As to the latter, it is relevant to the question of whether an officer must be called

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1/ The Union also cites the Chief's memo of January 6, 2000 to all employees; however, that memorandum references calls from third parties to officers at home regarding cases and the need to obtain Department approval for such calls, and thus is not relevant to the issue in this case.

"in" to work to qualify for minimum call-in pay, but that is no longer in issue. The Kaminski grievance involved a call to the officer at home regarding an investigation, but the Union's witness could not say how long the call lasted. While Chief Lewis testified that the Department has not paid officers for calls to their home while off-duty since he has been in the Department and that he has made that policy known to the officers, he acknowledged he did authorize overtime in one instance where an officer was required to stand by on the phone for approximately 45 minutes at home to assist in locating a fingerprint. Lt. Brodhagen testified that on average, he has made one such call as in this case every three to four weeks for the past three years and has only had one officer even request to be paid for the call, which request he denied. Lt. Brodhagen conceded that if a call was of sufficient duration, it would be appropriate to compensate the officer in such a situation. Brodhagen also testified that on April 21st he made similar calls to three other officers besides DuBois and Leick regarding the Leicht fire, but those officers did not request to be paid. While the Union is correct in asserting that the failure of one officer to exercise his/her contractual right does not waive that right for others, the continued failure to claim a right where there is an ambiguity as to its existence, can be indicative that the parties do not view there to be such a right.

To the extent the evidence establishes there is a practice, it appears to be that officers have not been compensated for brief calls to an officer at home on off time, but that where the phone call has been of some significant duration, overtime has been authorized, albeit somewhat begrudgingly. This, however, returns the inquiry to the issue of whether a 2-3 minute call to an officer at home on off time is compensable under Sec. 6.04.

The City asserts that a 2-3 minute phone call to an officer at home is *de minimis* for purposes of Sec. 6.04. The Union asserts there is no wording in the provision referencing a minimum amount of time that must be worked in order for the provision to apply. The Union is correct that there is no express reference in Sec. 6.04 to a minimum amount of time that must be worked, however, the provision does refer to "call-in time worked." (Emphasis added). In other words, Sec. 6.04 does recognize that the officer must have "worked" in

order to qualify for call-in pay.

The question then is whether or not a 2-3 minute phone call during which the officer is asked questions of the sort to determine whether he should be called in to the station to immediately file a report 2/ was "time worked" within the meaning of Sec. 6.04.

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2/ Contrary to the Union's assertions, the record indicates those were the sorts of questions asked of Officer DuBois.

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From a review of the practice noted above, it appears that the parties have not considered such brief phone calls to be "time worked." The Union concedes that is the case with regard to phone calls to an officer to offer an overtime opportunity or to inform an officer of a promotion opportunity or the results of such, but asserts that when the call is regarding "police business", it is compensable under Sec. 6.04, regardless of its duration. The Union argues that such calls are distinguishable from the type of call DuBois received on April 21st, but offers no objective basis for the distinction. Further, DuBois testified that he had received calls at home to discuss the creation of a mounted unit, as well as operational details of the unit, and had not requested call-in pay for such calls.

Despite the Union's efforts to turn the phone call to Officer DuBois into something of consequence, the record indicates that the parties have viewed such brief phone calls to be a minor inconvenience and not of sufficient significance to amount to "time worked" under Sec. 6.04. For that reason, it is concluded that the City did not violate the parties' Agreement when it denied Officer DuBois' call-in pay for the phone call of April 21, 1999.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance of Officer Leick is denied as untimely.

2. The grievance of Officer DuBois is denied.

Dated at Madison, Wisconsin this 18th day of January, 2001.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc

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