BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OCONOMOWOC CITY EMPLOYEES UNION,
LOCAL 1747, AFSCME, AFL-CIO**

and

CITY OF OCONOMOWOC

Case 73
No. 58847
MA-11077

(Saturday Hours)

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, P.O. Box 551, Menomonee Falls, WI 53052-0551, appearing on behalf of Local 1747.

Michael, Best & Freidrich, LLP, by **Attorney Ronald S. Stadler**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202-4108, appearing on behalf of the City of Oconomowoc.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Oconomowoc City Employees, Local 1747, AFSCME (hereinafter referred to as the Union) and the City of Oconomowoc (hereinafter referred to as either the City or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute regarding the assignment of a bargaining unit member to work Saturdays from April 15th through October 15. The undersigned was so designated. A hearing was held on October 3, 2000, in Oconomowoc, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The hearing was not transcribed. The parties submitted post hearing briefs the last of which was received on November 1st, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties agree that the issues before the Arbitrator are:

1. Did the City violate the Labor Agreement when it scheduled one employee from the Parks Department to work on a Saturday and have another day off during the Monday-Friday workweek during the period from April 15 through October 15?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE II - MANAGEMENT RIGHTS

2.01 - Rights. The Union recognizes that, except as hereinafter provided, the City has the right to manage and direct the work force. Such rights include, but are not limited to, the following:

a. To determine the number of departments and the type of services to be provided;

b. To introduce, change or eliminate equipment, machinery or processes;

c. To hire, promote, lay off or transfer employees in accordance with the terms of this Agreement;

d. To discipline or discharge employees for just cause;

e. To establish reasonable rules and regulations, and to direct the job activities of employees;

f. To schedule hours of work and overtime in accordance with the terms of this Agreement;

g. To abolish and/or create positions, provided that the Union will be notified in advance and permitted to bargain the wage rates of new positions;

h. To subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted, and further provided that no present employees shall be laid off or suffer a reduction of hours as a result of such subcontracting.

2.02 - Exercise of Rights. The City agrees that it will exercise the rights enumerated above in a fair and reasonable manner. Further, nothing contained in this Article shall be construed as divesting an employee of rights granted elsewhere in this Agreement or under statutes, and the rights contained herein shall not be used to discriminate against any employee or to undermine the Union.

ARTICLE VI – HOURS OF WORK

. . .

6.02 - Parks and Recreation Department. The regular workday shall be eight (8) hours and the regular workweek shall be five (5) eight (8) hour days or forty (40) hours for the Parks and Recreation Department. Overtime pay at the rate of time and one-half (1 1/2) shall be paid for all time above eight (8) hours per day and forty (40) hours per week. The daily work schedule shall be 7:00 a.m. to 12:00 noon and 12:30 p.m. to 3:30 p.m., Monday through Friday.

. . .

ARTICLE VII - OVERTIME - CALL-IN PAY

7.01 - Overtime Premium. Time and one-half (1 1/2) will be paid for any hours worked by full-time employees over the regular schedule of hours and time and one-half (1 1/2) will be paid for all hours worked over forty (40) hours per week by regular part-time Water Utility employees. In the computation of overtime, holidays and other days off for which the employee receives pay shall be considered as time worked. In lieu of payment for overtime, an employee may elect to receive compensatory time off during the calendar year for each hour of overtime worked, up to twenty-four (24) hours per year. Such election must be made in writing prior to January 1 of each year, provided, however, that if an employee elects to receive compensatory time off, but such time off is not taken during the calendar year, such compensatory time off not taken will be paid in the following January at the rate in effect on the previous December 31. Compensatory time off must be taken in an eight (8) hour segment (one eight (8)

hour segment may be split into two (2) four (4) hour segments - either the first four (4) hours or the last four (4) hours of the workday) and at a time mutually agreed upon between employee and his department head. The employee must give one (1) week's advance written notice to his/her department head of the proposed compensatory time off date, unless a shorter notice is mutually agreed upon.

. . .

7.03 - Overtime Scheduling. When overtime work becomes available, employees within the bargaining unit shall be given an opportunity to perform such work before non-bargaining unit employees are called in. Overtime shall be distributed on a departmental basis, with departments being defined as Department of Public Works, Parks and Recreation Department, Waste Water Treatment Plant, Water Utility (excluding Meter Readers), and Meter Readers. When overtime work becomes available in one of the departments noted above, the opportunity to work such overtime shall first be offered to the employees regularly assigned within that department. In the event that all employees within the department are already working or are unavailable to work, such overtime may then be offered or assigned to employees from other departments.

7.04 - Equalization. It shall be the policy of the Employer to equalize overtime as much as possible among employees within a particular job classification. A list stating the accumulated overtime hours of each employee shall be maintained and posted on the bulletin boards at the City Garage, the Parks and Recreation Department, the Waste Water Treatment Plan and the Water Utility.

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ARTICLE XXII - GRIEVANCE PROCEDURE

. . .

22.02 - Arbitration. In the event that any grievance has not been resolved in one of the two (2) preceding steps, the grievance may be appealed by the Union to arbitration by written notice thereof to the City Administrator. Upon receipt of the appeal, the City Administrator and the Union representative shall meet and attempt to agree upon a neutral arbitrator. If within the ten (10) days after the first meeting the parties have not been able to agree upon a neutral arbitrator, either party may request the Wisconsin Employment Relations Commission to: (1) appoint an arbitrator, or (2) submit a panel of arbitrators from which the parties will alternately strike names until one arbitrator remains. The arbitrator so selected shall hear the dispute and shall render a written

decision which shall be final and binding upon the parties. Costs of arbitration shall be divided equally between the Union and the City. In rendering his decision, the Arbitrator shall have no authority to add to, subtract from, or modify the provisions of this Agreement.

. . .

ARTICLE XXIV - AMENDMENT

24.01. This Agreement is subject to amendment, alteration or addition only by a subsequent written Agreement between, and executed by, the City and Union where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

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BACKGROUND

The Employer provides general governmental services to the people of Oconomowoc, Wisconsin. Among these services is the operation of a public park system. The Union is the exclusive bargaining representative for employees in the City's DPW, Parks and Recreation Department, Waste Water Treatment Plant and Water Utility.

Article VI of the collective bargaining agreement sets the hours of work for employees in the Parks and Recreation Department: "The daily work schedule shall be 7:00 a.m. to 12:00 noon and 12:30 p.m. to 3:30 p.m., Monday through Friday." In negotiations over the 1987-88 collective bargaining agreement, the parties entered into a side bar agreement regarding Saturday work:

> The parties agree that notwithstanding the provisions of Section 6.02, the City may, at its option, schedule one employee in the Parks and Forestry Department to work on Saturday and have another day off during the Monday through Friday period as part of the regular forty (40) hour workweek during the period from April 15 through October 15, inclusive, provided, however, that no employee working in the Parks and Forestry Department as of December 1, 1986, will be required to work such workweek, but such employee may voluntarily agree to work such workweek. The City may, however, require any employee hired, promoted or transferred into the Parks and Forestry Department after December 1, 1986, to work such workweek.

This agreement was restated as a Memorandum of Understanding in the 1989-91 contract, and again in 1991 as part of the 1992-93 contract. In the latter agreement, the Memorandum also set forth the City's promise to offer a Section 125 plan, so that employees could opt to have insurance premiums and co-payments paid with pre-tax dollars. The Memorandum was not attached to the contracts after the 1992-93 agreement. The Section 125 plan, referenced in the MOU, was put into effect and remains in effect to the present time. It is not mentioned in the body of the collective bargaining agreement.

In negotiations over the 1994-1996 labor agreement, no reference was made to the MOU, the Saturday work schedule or the Section 125 plan. In negotiations for the 1997-1999 contract, the City included a proposal to attach the 1991 MOU to the contract. The notes of an October 1996 negotiating session kept by the Union's then-staff representative, Sam Froiland, include a notation: "Re: MOU, don't attach old 12/19/91 MOU, Dave will write up current practice." Froiland's notes from a subsequent bargaining session in December do not mention the MOU or the write-up of the existing practice, but after listing insurance, wages, comp time, vacation, classifications and duration, the notes say "Other items on City's agenda, other than housekeeping items, City drops."

Throughout the 1980's, an employee in the Parks Department worked a Saturday schedule by mutual agreement with the City. That employee retired in 1989, and the City hired Dave Simonis to replace him. Simonis worked weekends for several weeks, with offsetting time off during the week. The City then went to a system of soliciting volunteers to work weekends, and paid the time at overtime. This went on until 1995 or so, when the employees went to management and asked them to set up a more predictable procedure. A five-man rotation was established for weekend work, and this system continued until March of 1999, with the employee working an average of four hours of Saturday overtime each week. At that time, the City sought volunteers for the rotation and no one volunteered. A memo was issued announcing that employees would be designated to work Saturdays from April 15 through October 15, with a weekday off during the normal Monday-Friday workweek. The memo cited the Memorandum of Understanding as authority for the assignment and the flexing of hours. A grievance was filed challenging the City's right to assign an employee to weekend work as part of his 40 hour workweek. The grievance was denied and the City designated a number of employees in 1999 and 2000 to work Saturdays. All of the employees designated came to the Parks Department after December 1, 1986.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that the City violated the clear terms of the collective bargaining agreement by scheduling an employee for Saturday work and that the 1991 Memorandum of Understanding cannot excuse the violation. The language of Article VI could

not be clearer. The workweek is 7:00 a.m. to 12:00 noon and 12:30 p.m. to 3:30 p.m., Monday to Friday. Any work outside of those hours must be paid as overtime. The City's failure to pay overtime for work on Saturdays is a blatant violation of this clear provision.

The City's citation of the old MOU is misplaced. The MOU directly conflicts with the contract and if it is to be given any effect, there must be overwhelming evidence that the parties intended to amend the contract and intended that amendment to continue in effect indefinitely. The contract, by its terms, requires that any subsequent amendment be stated in writing and be executed by both parties. Plainly, the MOU was effective in 1987 through 1993, when it was specifically negotiated. In 1994 and thereafter, the parties did not negotiate any extension of the MOU, did not attach it to the contract and, until this grievance, did not attempt to apply it to any employee. Instead, overtime was paid for Saturday work. It is evident that the MOU ceased to have any effect at the expiration of the 1991-1993 contract. The history of bargaining and the practice of the parties from 1994 through the date of this grievance compel this conclusion.

The absence of the MOU from the 1994-96 and 1997-99 agreements cannot be attributed to a mutual mistake or any form of misdealing by the Union. The City prepared the drafts of those agreements, and if there is any blame for the current dispute, it lies with the City. For its part, the Union views the absence of the MOU as the natural consequence of the City's failure to renew the side agreement in negotiations. Indeed, in October of 1996, the parties discussed the issue of the MOU, with the City proposing to attach it to the 1997-99 contract, and the parties agreeing that Dave Simonis would write up a description of the then-current practice – the rotation of weekend overtime among five employees. At a subsequent meeting in December, no action was taken on this issue, and the City announced that it was dropping the bulk of its proposals. Having specifically raised the issue, and having failed to obtain agreement, the City cannot now claim that the MOU continues to have any effect.

The City's argument that the MOU creates both the Saturday work exception and the Section 125 plan, and that the continued existence of the Section 125 plan necessarily means that the Saturday exception likewise continues, has a surface appeal, but is not analytically sound. Granting that the Section 125 plan was created by the same document as the Saturday exception, and that it continues, there is nothing about the Section 125 plan that directly conflicts with the other terms of the collective bargaining agreement. The Section 125 plan was offered by the City on its own initiative, and was not demanded by the Union. The plan may be mentioned in the MOU, but it was not a quid pro quo for the Saturday exception, and there is no tie between the two. It continues to exist despite the expiration of the MOU because both parties have acquiesced in its existence, as an extra-contractual benefit.

At one time, the MOU did have the effect of modifying Article VI. That time has passed. The Saturday schedule of hours has not been used since the early 1990's when the MOU was still renewed with each version of the contract. The parties have not agreed to renew the MOU since the 1991-93 contract, and have behaved as if it was no longer in effect.

The Union intended that it no longer have effect, and if the City intended otherwise, it was incumbent on the City's bargainers to achieve that result at the negotiating table. They have failed to do so, and the Arbitrator must find that the clear language of Article VI governs this dispute. It follows that the City has violated the contract.

As a remedy, the Union proposes that the hours worked on Saturdays in 1999 and 2000 be compensated at time and one half, and that the employee be compensated for the eight hours during the normal Monday-Friday workweek that he was forced to take off under the City's unilateral system. Employees are entitled to work a normal schedule, and are entitled to time and one half for Saturday work. Both of these entitlements have been impaired by the City's actions, and both violations must be remedied. Additionally, the Union proposes that employees who were compelled to use vacation time to avoid Saturday work be credited with that vacation time. In the alternative, the Union proposes that the Arbitrator reinstate the status quo ante, by ordering the City to provide six hours of pay per week to each man who worked the Saturdays, to reflect the earnings that would have been realized under the rotations system – 40 hours at straight time and four hours at time and one-half.

The City

The City takes the position that this is a straightforward case. The parties have contract language setting the normal hours of work for the Parks Department. They also have a Memorandum of Understanding that allows the City to assign one employee to work a Saturday instead of one day in the normal Monday through Friday schedule, during the period from April 15th through October 15th each year. The Memorandum was first negotiated in 1987, and was signed again in 1990 and 1991. In the 1991 version, in addition to the Saturday work exception, the parties created a new benefit, a Section 125 plan. This 1991 version was attached to the 1992-93 collective bargaining agreement, but nothing in its terms tied the MOU's duration to the contract, and there is no expiration date. After the 1992-93 contract, the MOU was not renegotiated and was not attached to any successor agreement. Neither was there anything in the terms of any successor agreement terminating the side letter. To the contrary, the members of the bargaining unit continue to receive the benefits of the Section 125 plan provided for in the MOU.

The City dismisses the Union's apparent belief that the MOU evaporated when it ceased to be attached to the collective bargaining agreement. The MOU was a separate and binding agreement. It was expressly negotiated and voluntarily signed. In return for the Saturday work agreement, the City provided employees with a Section 125 plan. There was no expiration date contained in the MOU, and since the Section 125 plan continues in full force and effect, it is obvious that it never expired. The Union has proposed side letters in negotiations which contained duration clauses, and it clearly knows how to limit the duration of a side agreement when it intends to do so. Neglecting to staple a side agreement to the contract is not one of the available methods. If the Union wished to terminate the Saturday

work MOU, it was incumbent on its bargainers to take some action to accomplish that end. The Union cannot plausibly argue that MOU simply went away of its own accord at some undefined point.

While the City has not always exercised its right to require an employee to flex his schedule to work Saturdays as part of the normal workweek, that decision does not in any way diminish the underlying right. The MOU expressly states that "The City may, at its option, schedule one employee" to work Saturdays. The MOU anticipates that the City may elect not to schedule an employee for Saturdays, and the City's decision to instead use a voluntary rotation system for a period of years is completely consistent with the terms of the MOU. The City went to the rotation system because of complaints from the bargaining unit. This good faith attempt to satisfy employee concerns should not now be used to deprive the City of a right it bargained for across the table.

The MOU gives the City the right to select an employee to work a Saturday schedule, and promises employees the right to participate in the Section 125 plan. There is no expiration date on the MOU, and the Section 125 plan remains in force. There is neither a legal basis nor an equitable basis on which to conclude that the MOU has expired. Accordingly, the grievance must be denied in its entirety. Even if a contract violation was proved, the City asserts that the record is not adequately developed as to which employees, if any, worked on specific Saturdays and that no monetary remedied is justified.

DISCUSSION

The Merits

This case turns on a single question: Did the Memorandum of Understanding expire with the expiration of the 1991-1993 collective bargaining agreement? Article VI is absolutely clear as to the normal workweek and the obligation to pay a premium for hours outside of the normal Monday-Friday, 7:30 to 3:30 schedule. Working an employee on Saturdays for straight time wages and scheduling him off for a day during the regular workweek, is obviously inconsistent with the contract. The only basis for finding otherwise is if the parties expressly agreed to allow an exception to Article VI. The Memorandum of Understanding provides such an exception. If it expired on December 31, 1993, the City violated the contract by working employees on Saturdays in 1999 and 2000. If it did not expire, the City did not violate the contract.

The Memorandum itself is silent as to duration. The principal argument for its continued vitality is that the Section 125 plan established by it remains in effect, and the MOU is the only contractual basis for such a benefit. The principal arguments for expiration are that by attaching it to the contracts in 1987-89, 198-91 and 1992-93, the parties demonstrated the

manner in which they indicated its continuation, and the fact that the City felt the need to propose that it be attached to the contract in negotiations over the 1997-99 contract, failed to secure the Union's agreement, and did not attach it to the contract. 1/

1/ I do not see any significance to the voluntary systems used from 1990 to 1998 and have given them no weight in deciding this case. The voluntary systems arose at a time when the MOU was unquestionably in effect. They were in response to employee complaints. The MOU specifically provides that the City has the option of requiring one employee to work a Saturday work schedule, and the necessary implication is that they may assign Saturday work on a different basis if they choose. The fact that the City decided it could staff its weekend needs in a manner more acceptable to the employees than that provided in the MOU says nothing about whether it continued to have the option of falling back on the MOU if it wanted.

After the 1992-93 contract, the parties never expressly agreed to continue or renew the MOU. Nor can it be the case that the MOU independently continued *ad infinitum* after it was last executed in 1991. Unlike side agreements that seek to clarify the applications of ambiguous contract language, and are thus tied to the underlying contract provision, the MOU in this case directly contradicts a provision of the contract. It is itself a collective bargaining agreement, and public sector labor agreements in Wisconsin cannot have a duration of more than three years. 2/ If the MOU remains in force, it must be because the parties intended that it automatically renew itself with each new collective bargaining agreement.

2/ ". . . The term of any collective bargaining agreement shall not exceed 3 years." Section 111.70 (3)a(4), Stats.

Intent is a question of fact. The evidence of intent in this case is inferential, and it cuts both ways. The 1991 MOU has two sections. The first paragraph provides the exception to Article VI at issue here. The second paragraph provides for a Section 125 plan. The Section 125 plan continues in effect, and the reasonable inference from this is that the MOU continues in effect.

Balanced against the inference of the Section 125 plan is the history of attaching the MOU to the contract when it was intended to be effective. The act of physically attaching a side agreement to a contract is clear evidence that the parties intended to continue it, at least for the contract term. A reasonable implication of the failure to attach it to a successor agreement is that it is not longer in effect. That is certainly not conclusive. Had, for example, the parties failed to attach the MOU but continued to allow Saturday to be scheduled as a regular work day for one employee under successor contracts, the evidence of the practice

would easily outweigh the failure to staple the letter to the agreement. That type of evidence is not present here, since the City voluntarily abandoned the Saturday schedule in favor of voluntary weekend overtime in the early 1990's.

By itself, the failure to attach the MOU to the contract might not outweigh the continuation of the Section 125 plan as evidence of the parties' intent. However, the significance of attaching the MOU to the contract is considerably bolstered by the evidence of what occurred in bargaining in 1996 for the 1997-99 contract. According to the AFSCME staff representative's bargaining notes, the City expressly proposed in that round of bargaining to attach the 1991 MOU to the new contract. The Union disagreed, and the contract was resolved without further discussion of the issue and without attaching the MOU. This suggests two things. First, that both parties saw significance to the attachment of the MOU to the contract. If it made no difference and both parties understood that the MOU renewed automatically whether it was attached or not, there was no reason for the City raise the question. More to the point, the fact that the Union refused to attach the MOU and suggested that it would make a substantive counter-proposal, and that the issue was not resolved thereafter, indicates that City was put on notice as of that time that the Union was not agreeing to renew the MOU. Since the question before me is whether the parties intended to automatically renew the side letter with each new labor agreement, the fact that the City asked the Union to indicate agreement by attaching the MOU to the 1997-99 contract, and the Union declined, strongly suggests that they did not mutually intend automatic renewal.

It remains the case, of course, that the Section 125 plan is still in effect, even though it is provided for by the Memorandum of Understanding and should have expired if the MOU expired. The response to this is quite simply that there has been no dispute as to the Section 125 plan. The City has not sought to terminate it and the Union has not objected to its continuation. It does not conflict with any provision of the collective bargaining agreement, and does not need a separate written agreement to remain in effect. It requires only acquiescence. Having remained in effect on mutually agreeable terms for over seven years past the MOU which introduced it, the Section 125 plan has the status of an extra-contractual benefit established through custom. The implication of the 1991 MOU having lapsed is that the City may, upon giving notice, terminate the Section 125 plan at the end of the current labor agreement, and put the onus on the Union to either negotiate for its continuation or lose the benefit.

In concluding that this side letter did not automatically renew, the Arbitrator would stress that he is not attempting to articulate any set of rules governing side letters and MOU's generally. The decision here is driven by the specific evidence of what the parties intended with respect to renewal or expiration of the 1991 MOU. Here, the parties indicated agreement on the MOU in a particular way, by attaching it to a series of contracts. Their subsequent behavior, in failing to attach it to successor agreements, then discussing it in negotiations, disagreeing over the Employer's proposal to once again attach it to the contract, and settling that round of negotiations without attaching it, indicates that physically attaching the MOU to

the contract had significance to these parties. The evidence of intent is inferential, but in this case the most reasonable inference from that evidence is that there was not a mutual agreement to automatically renew the 1991 MOU whenever a new contract was signed. Accordingly, I conclude that MOU was no longer in effect in 1999 and 2000 when the City assigned an employee to work Saturdays at straight time from April 15 to October 15.

The contract provides that the normal workweek is Monday through Friday, and that hours outside of the normal workweek are paid at time and one-half. By assigning an employee to work a five-day workweek including Saturday and excluding a weekday, the City violated Article VI.

The Appropriate Remedy

The City violated the contract each week that an employee was scheduled for Saturday work between April 15 and October 15 in both 1999 and 2000. The Union suggests that the appropriate remedy is to pay eight hours of pay to compensate for the weekday that the employee should have worked but was scheduled to be off, and four hours to compensate for each Saturday hour that was worked at straight time, rather than overtime. In the alternative, the Union proposes that the Arbitrator compensate the employees for the loss of the status quo ante, the rotation system under which they would have received forty six hours of pay – forty hours at straight time during the week and four hours at time and one-half on Saturdays. The City responds that the Union has not proved any specific damages to specific individuals.

With all due respect to the City's argument, there is no dispute that the City changed its approach to Saturday work in 1999, and worked employees on Saturdays at straight time. That is the essence of this grievance. While there are no payroll records in evidence to show specifically who was affected by the change, that does not mean that no remedy can be ordered. Clearly, a remedy must be limited to the employees actually affected, and that means those employees who actually worked Saturdays at straight time wages, with a scheduled day off during the normal Monday to Friday workweek. As to those employees, there are three plausible remedies that might be ordered:

1. The employees could be granted an additional four hours of pay per Saturday worked, in recognition of the fact that these hours were worked outside of the normal work schedule and should have been paid at time and one-half;

2. The employees could be granted an additional six hours of pay, in recognition of what they would have earned under the voluntary system followed in previous years;

3. The employees could be granted an additional 12 hours of pay per Saturday worked, in recognition of the fact that the Saturdays hours should have been paid at time and one half, and that the employees should have been scheduled to work an additional day during the normal workweek rather than being forced to have a day off.

Each of these possible remedies poses analytical problems. An order of four hours' pay is the minimum required, and it protects the right to time and one half for hours outside of the normal schedule. However, it fails to, in any way, recognize the additional violation caused by the order not to work a day during the normal workweek. The order of 12 hours' pay compensates for both the failure to pay time and one-half, and the refusal to allow the employee to work a normal five-day workweek. However, it also compensates for time not actually worked, and goes beyond what would normally be considered make whole relief. The order of six hours' pay attempts to replicate what would have been paid under the old system, but is not directly related to the hours actually worked in 1999 and 2000.

Faced with an imperfect choice of remedial options, I conclude that the payment of six hours of pay to each affected employees for each Saturday the employee actually worked, along with a prospective order to follow the terms of Article VI, is the most appropriate remedy. /3 Recognizing that the six-hour figure does not relate to the hours actually worked, it has the benefit of paying employees what they would have received but for the contract violation, and costing the City what it would have paid but for the contract violation. The City pays two hours of pay beyond the time actually worked, but this recognizes the second aspect of the contract violation – the involuntary imposition of a schedule different than that promised by the contract. Further, it denies the City the opportunity to have, by virtue of the contract violation, Saturday coverage at a lesser overall cost than it would otherwise have paid. The employee is not fully paid for the eight hours' of work lost during the normal workweek, but this recognizes that the forty-hour schedule was maintained and the weekday time was not actually worked.

3/ In constructing the remedy, I have not attempted to provide any compensation to employees who elected to use leave time to avoid working a Saturday. Reimbursement for such leave time would ignore the fact that the time was taken and paid. Further, it is entirely speculative to suppose that the employee took the time solely because of a distaste for Saturday work, and would not have used leave time at the same rate and roughly the same time had he or she not been assigned to a Saturday schedule.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The City violated the Labor Agreement when it scheduled one employee from the Parks Department to work on a Saturday and have another day off during the Monday-Friday workweek during the period from April 15 through October 15.

2. The appropriate remedy is for the City to:

a. Cease and desist from scheduling one employee from the Parks Department to work on a Saturday and have another day off during the Monday-Friday workweek during the period from April 15 through October 15.

b. Make the affected employees whole, by paying to each employee who was scheduled to work a Saturday as part of his or her normal workweek, and actually worked the Saturday, an additional six hours of pay at the employee's then-effective regular hourly rate of pay for each Saturday so worked.

Dated at Racine, Wisconsin, this 30th day of March, 2001.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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