BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LA CROSSE CITY EMPLOYEES UNION, LOCAL 180, SEIU

and

CITY OF LA CROSSE

Case 308
No. 59675
MA-11375

(Jeff Blanchard Grievance)

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, LLP, by **Attorney James G. Birnbaum**, appearing on behalf of the Union.

Mr. James W. Geissner, Director of Human Resources, City of La Crosse, appearing on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the La Crosse City Employees Union, Local 180, SEIU, (herein the Union) and the City of La Crosse (herein the City) were parties to a collective bargaining agreement dated January 7, 2000 and covering the period January 1, 2000 to December 31, 2001, and providing for binding arbitration of certain disputes between the parties. On February 12, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on the City's failure to offer overtime to Jeff Blanchard (herein the Grievant) on December 11 and 12, 2000, instead of less senior employees, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute. The parties waived any procedural objections to arbitration and a hearing was conducted on May 17, 2001. The proceedings were not transcribed. The parties filed briefs on July 23, 2001, and reply briefs on August 10, 2001, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

> Did the City violate Article 12, the contract as a whole, a specific agreement, or past practice when it failed to call in the Grievant for overtime on December 11 and 12, 2000?
>
> If so, what is the appropriate remedy?

The City would frame the issues as follows:

> Did the City violate Article 12 – Overtime of the collective bargaining agreement when a fellow Union employee offered overtime to a less senior employee rather than to the Grievant, Jeff Blanchard?
>
> If so, what is the appropriate remedy?
>
> Did the City violate the Collective bargaining agreement when it offered the Grievant the opportunity to work five (5) hours of overtime at a mutually convenient time in response to his grievance?

The Arbitrator frames the issues as follows:

> Did the City violate the collective bargaining agreement and/or past practice when it failed to offer overtime to the Grievant on December 11 and 12, 2000?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 12
OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1 ½) times their regular rate of pay for services rendered and hours worked over and above their regular scheduled work week. In no case shall time and a half be authorized for services less

than forty (40) hours in one week. For employee's on a 37 ½ hour work week, overtime shall be at straight time case or compensatory time for the first ½ hours of weekly overtime.

. . .

ARTICLE 19
RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

. . .

ARTICLE 28
ENTIRE AGREEMENT

The foregoing constitutes an Entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

BACKGROUND

The La Crosse City Employees Union represents city employees in a wide variety of departments, including employees stationed at the City's Municipal Service Center. The collective bargaining agreement between the Union and the City provides for the payment of overtime at one and one-half times an employee's normal rate for work in excess of 40 hours per week. The agreement does not, however, specify how overtime is to be assigned. Rather, the parties have adopted the practice of allowing the bargaining unit employees in each department to determine whether overtime is to be offered according to seniority within job classifications or within the department. Prior to May 6, 1999, the Municipal Service Center Employees utilized job seniority in offering overtime. On that date, however, the employees voted, with the acquiescence of management, to adopt a form of strict departmental seniority,

whereby overtime would be offered, in order of departmental seniority, to the employees minimally qualified for the job to be done. Since that time, departmental seniority has been the prevailing practice in determining preference for overtime.

The Grievant, Jeff Blanchard, has been employed by the City of La Crosse since 1974. For the past 22 years, he has worked at the Municipal Service Center, first as a driver of a service truck and more recently as a Building Maintenance Engineer. He is currently third in seniority among the employees at the Municipal Service Center. Since the shift to departmental seniority, he has been offered overtime for work outside his classification, sometimes accepting it and sometimes refusing it. Occasionally, he has been called-in to work as a mechanic at the Service Center, to service the City's equipment during snow removal operations.

On December 11 and 12, 2000, the City experienced a snowstorm and Street Superintendent Randy Hinze determined that two extra mechanics needed to be scheduled to night shifts on those days to service the equipment, if necessary, during the snow removal. Ordinarily, the task of contacting the employees would fall to the Garage Supervisor, Jim Oestreich. Oestreich, however, was on vacation, so Hinze instructed the Maintenance Shop Lead Worker, Jim Sieber, to call in the extra workers. Sieber contacted two shop mechanics, each of whom was less senior than the Grievant, who ended up being kept working beyond their shifts. The extra work resulted in 5 1/2 hours of overtime being paid to each of the two workers. The Grievant filed a grievance on the grounds that, under the Department's strict seniority policy, he was the senior qualified mechanic and should have been entitled to the overtime hours. The City denied the grievance and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the discussion section of the award.

POSITIONS OF THE PARTIES

The Union

Under Article 7 of the contract, any employee who works beyond normal hours is entitled to overtime. Since May, 1999, the employees at the Municipal Service Center have elected to allocate overtime on the basis of strict seniority provided the employee is minimally qualified to perform the required tasks. The City is aware of, and has acquiesced in, this practice. The validity of this practice is also buttressed by two precedential grievance settlements, wherein the City recognized the principle of strict seniority in overtime allocation in settling the claims of Union members Gary Thrower and Sue Wierman. Further, there is longstanding past practice which supports the application of strict seniority in offering overtime. This is reflected in Union Exhibit #13, which lists nine separate cases wherein employees were compensated for the City's failure to offer them overtime on the basis of strict seniority.

It is undisputed that the Grievant was not offered available overtime on December 11 and 12, 2000, although he was the senior qualified employee. The evidence establishes that during the Grievant's 27 years of employment he has been consistently been offered available overtime for mechanic work and, in cases where the required duties were unusual, he has been informed of the requirements beforehand and given the option of accepting the hours if he felt himself competent for the task. On December 11 and 12, there were no unusual requirements and the City's Garage Supervisor testified he would have called the Grievant in had he been there. The Grievant's qualifications are well established. He has formal training in mechanics and has been called-in to do similar work in the past. Both the Garage Supervisor and Maintenance Lead Worker testified that the Grievant was capable to do the work required and no Supervisor has ever suggested to the Grievant in the past that he is unqualified for such work. The City suggests that there may have been extraordinary unanticipated mechanical needs requiring more expertise than the Grievant had, thereby justifying passing him over for a less senior, but more qualified mechanic. This does not explain why, then, the Grievant has been offered mechanic work in the past, because unplanned for contingencies may always arise. The more credible explanation is that the Grievant was initially passed over in error and the City is now attempting to mischaracterize him as unqualified to cover its mistake.

In such a case, the only appropriate remedy is to compensate the Grievant for the lost overtime, not, as the City suggests, to offer him overtime work in the future. This is not only established by a long line of arbitral precedents (citations omitted), but is also compelled by the particular circumstances of this case. Overtime is inconsistent in the Municipal Service Center, especially overtime for snow removal emergencies, so there is no telling when the next opportunity for overtime might arise, or that the Grievant would be available to work when it did. Further, overtime is governed by strict seniority, so qualified employees more senior than the Grievant would have to be offered the work first, which they might accept. If they did not, then the opportunity would fall to the Grievant as a matter of right, regardless of any settlement. Payment for lost overtime is a remedy recognized by the parties in the past in a number of similar instances, and only in unusual circumstances not existing here have the parties agreed to the alternative of offering future overtime work. To do otherwise rewards the City for its conduct by allowing it to disregard the principle of strict seniority with impunity, since there is no penalty for doing so.

The City

The City has a responsibility to the thousands of people who use its streets on a daily basis to make sure that they are as safe as possible. In the event of a snow emergency, this means making sure that all the City's snow equipment is properly maintained. On December 11 and 12, 2000, the City had 32 pieces of snow removal equipment in service and needed two fully qualified mechanics available to perform any necessary repairs, which could include replacing a clutch, repairing a transmission, or welding a broken part, tasks for which the Grievant is not qualified. The record indicates that in the past he has only been assigned to

do such tasks as assisting with changing tires, replacing snow plow blades, or repairing windshield wipers or plow chains. In fact, he has only been called in when the defined work was deemed to be within his capabilities.

There has been no violation of the overtime language contained in Article 12. That language only explains how overtime is to be compensated, which is not in dispute. It says nothing about how overtime is to be assigned. Further, there has been no violation of the contract as a whole. Article 19 – Reservation of Rights, states that the City retains all rights to manage the City, except as expressly set forth in the contract. Article 25 – Amendment Provision, provides that the contract can only be amended by a written agreement by the parties. Article 28 – Entire Agreement, is the "zipper clause" which states that no verbal agreement shall supercede the provisions of the contract. The contract does not specify how overtime is to be assigned, nor is there any written agreement between the parties amending the contract to provide for seniority to prevail in assigning overtime. Thus, there has not been a violation of the contract. The Union has cited "non-precedential" settlements in support of its position, but they may not be considered for the very reason that they are non-precedential and were never intended to have any future effect. The grievance should, therefore, be denied.

In Reply

The Union

The City's culpability is clearly established by the testimony of its own supervisor, Jim Oestreich, who stated that had he been on duty the nights in question, he would have called the Grievant in. The City fallaciously suggests that there was an emergency on December 11 and 12, but the evidence, including testimony from Jim Sieber and Randy Hinze, a management witness, establishes that the situation was routine and that Hinze did not mention any special circumstances or requirements when he told Sieber to schedule two mechanics on those nights.

The City also apparently denies the existence of a binding past practice of assigning overtime by seniority. Nevertheless, this practice is acknowledged in the City's answer to the grievance (Joint Exh. #3) and was testified to by numerous witnesses on behalf of both the Union and the City. The City cannot reasonably deny the existence of this established practice.

Finally, it is clear that the Grievant was qualified to perform the assigned tasks. It has been established that the situation was routine and that the Street Superintendent did not refer to any special needs or circumstances when he told Jim Sieber to call in extra mechanics. Further, Sieber testified that he believed the Grievant was qualified to perform the necessary tasks and both he and the Grievant testified that the Grievant had been called-in in the past to do the same type of work. Indeed, at no time in the past has anyone suggested that the

Grievant was not qualified to perform these functions. The City is attempting to subtly alter the existing practice by suggesting that only employees classified as mechanics are qualified to perform in snow removal situations, but this is clearly refuted by the factual record. The City should not be allowed, through arbitration, to eliminate or alter a mutually accepted practice for assigning overtime and the grievance should be sustained.

The City

The Union relies on numerous misstatements of fact in arguing its case. Article 7 is silent as to how overtime is to be assigned and City witnesses testified that the practice is that only employees fully qualified to perform the defined task are called for overtime. The Union may have voted for use of strict seniority, but management has the right to assign work to qualified employees. On the night in question, the Highway Superintendent determined that two fully qualified mechanics were needed and ordered them called. It is also ridiculous to suggest that after their shifts were completed the mechanics should have been sent home and the Grievant called-in to continue the work. This was a situation of work continuation, not defined overtime. In work continuation situations, the worker on duty is routinely assigned the overtime work.

The non-precedential grievance settlements cited by the Union are also not germane because they do not address the central issue of management's right to define and assign work. Further, Sieber did not make a mistake in not calling the Grievant, as alleged, he merely followed the instructions of Superintendent Hinze. Also, snow emergencies cannot always be predicted accurately in advance and, therefore, the perceived needs of the moment should not be questioned after the fact. Finally, the Grievant only had a brief history of performing mechanic work, not a lengthy one, as the Union has alleged.

The City's arguments are equally flawed. The Wieman settlement it cites is not on point because, unlike the present case, the Grievant was undoubtedly qualified to perform the overtime work. The assertion of past practice is dubious in that it does not meet the criteria for establishing a past practice set forth by Arbitrator Richard Mittenthal, which are: 1) clarity and consistency of the pattern of conduct, 2) longevity and repetition of the activity, 3) acceptability of the pattern, and 4) mutual acknowledgement of the pattern by the parties. See MITTENTHAL, Past Practice in Administration of Collective Bargaining Agreements, 59 MICH. LAW REV. 1017 (1961). The Grievant was also not qualified to perform all the mechanic functions that might have arisen during a snow and ice emergency, not had he been regularly called-in in the past to do so, as the Union argued. In fact, the Grievant had only been called-in a few times in the previous 19 months, and then only to do routine tasks. Superintendent Oestreich did not believe the Grievant was fully qualified to perform all mechanic functions and testified that, if asked, the Grievant would probably have agreed with that assessment. The Union has mischaracterized Oestreich's testimony by contending that he supported its position, but, in fact, Oestreich, while inconsistent on some points, was clear that he did not

believe the Grievant to be qualified to perform all mechanic functions. It is the Union which has attempted to confuse the issue with its post facto argument that because no problems arose beyond the Grievant's capabilities, therefore he was qualified to fill the position.

The City acted in good faith by offering the Grievant the opportunity to work overtime in the future to make up for the hours lost, even though it believes there to be no ultimate liability here. That this is a reasonable proposal is supported by CITY OF SUPERIOR, CASE 120, NO. 51023, MA-8466 (GRECO, 9/2794). This assertion is further supported by a comparison of the prior settlements set forth in Employer Exhibit #4, the majority of which support the City's position. If the Union wants overtime to be offered by strict seniority to minimally qualified employees, it must bargain for it at the table.

DISCUSSION

Substantively, this case presents two discrete questions to be answered in addressing the underlying issues. The first is, what, if anything, is the controlling procedure for the allocation of overtime to members of the bargaining unit? If the answer is that there is none, the inquiry ends because at that point any rational overtime policy utilized by the City would be allowable under its management rights. If an agreed procedure can be identified, however, either through contractual language or binding practice, then the second question, whether such procedure was violated by the City in this case, comes to the fore.

It is apparent that up to 1999, overtime was offered according to seniority within job classifications. Thus, if overtime work were available for a custodian, for example, the hours would be offered first to all other custodians on the basis of seniority and only if the hours were not filled would they be offered to non-custodians. The parties agree on this point. Had this regime existed on December 11 and 12, 2000, there would have been no grievance because the overtime hours available were for mechanic work and the less senior employees who actually worked the hours are classified as mechanics, whereas the Grievant is not. This was not the case, however. On May 6, 1999, the employees in the Municipal Service Center, by majority vote, elected to abandon the practice of offering overtime by classification in favor of a modified form of strict shop seniority. Specifically, overtime was to be offered to the senior department employee who was minimally qualified to perform the necessary task, regardless of classification. There is no dispute on this point. The meeting was attended by management representatives, including the Street Superintendent, whose testimony corroborated the event. Furthermore, the Service Center employees have reaffirmed the use of shop seniority on at least two occasions, most recently on April 2, 2001 (Union Exh. #12). On that basis, therefore, the overtime hours should ostensibly have been offered to the most senior Service Center employee minimally qualified as a mechanic, which the Union argues is the Grievant.

The City raises a number of points in opposition to the validity of this practice. It argues that it is not bound by the bargaining unit's adoption of shop seniority as the basis for offering overtime because the practice is not contained within the collective bargaining agreement, nor in any other written agreement between the parties, and that the reservation of rights clause and "zipper" clause, contained in Articles 19 and 28 respectively, supercede any verbal agreement or past practice. In effect, the City maintains that it alone may define the work to be done and designate the employees to do it. The more broadly the task is defined, the greater the necessary qualifications of the employees. It asserts that**,** on the nights in question, it needed two fully qualified mechanics capable of performing the gamut of mechanic functions and, therefore, the Street Superintendent instructed the Maintenance Shop Lead Worker to reschedule two mechanics from the day shift to the night shift to fill the need, which was done. This resulted in overtime for the employees when they were offered the opportunity to work beyond their shifts. In this regard, the City also draws a distinction between scheduled defined overtime and unscheduled work continuation overtime, which it asserts is routinely assigned to the employee already at work, regardless of seniority.

Adopting Arbitrator Mittenthal's definition of past practice, cited by the City, I find that the stated criteria are met in the parties' practice of allowing bargaining unit members, by department, to determine the method for allocation of overtime. In this case, the record indicates that the practice has been in existence for at least 27 years. Furthermore, this practice has been acknowledged by the City in writing on more than one occasion (cf; Jt. Exh. #3, Union Exh. #3). It is also uncontroverted that since 1999, the Maintenance Service Center has opted for the modified form of shop seniority described above. Management representatives attended the meeting at which the change was made and made no objection to it, nor did they dispute the employees' right to decide the issue. Subsequent to that time, the Garage Supervisor and Maintenance Shop Lead Worker, who assign overtime, have followed shop seniority in so doing. In fact, in its Step 2 grievance response, the City does not dispute the practice, but rather whether the Grievant met the minimum qualifications requirement.

For a variety of reasons, I am not persuaded that this well established practice is overcome by the contract provisions cited by the City. The reservation of rights language contained in Article 19 maintains the City's right to direct the workforce and lists a number of particular areas over which it retains authority. Allocation of overtime is not listed among them. While this would not ordinarily be problematic, inasmuch as the list is expressly not exclusive, where a clear practice of long standing exists, which is not inherently at odds with the language of the contract, it may be inferred that the parties' intent was that the practice would dictate the issue of overtime allocation. Likewise, the "zipper clause" set forth in Article 28 is very general in its application. Whereas it might well overcome an unwritten practice that was in direct contravention to a contractual provision, I do not find such to be the case here. Rather, it appears that the practice is one intended to bring clarity to an area the contract does not address. Furthermore, there is nothing in the factual record substantiating an existing distinction between what the City characterizes as scheduled defined overtime and work continuation overtime. In sum, therefore, I find that a binding past practice exists

regarding permitting the department employees to determine the manner of allocating overtime within their departments, and that within the Maintenance Service Shop the practice on the dates in question was to allocate overtime on the basis of shop seniority to any employee minimally qualified to do the assigned work.

The question which then arises is whether the Grievant was minimally qualified to perform the work. The City contends that he was not and upon this point turns the outcome of the grievance. The City's contention is that two fully qualified mechanics were required on the nights in question and for that reason the Street Superintendent directed the Maintenance Shop Lead Worker to reschedule two mechanics from first shift to third shift to fill the need, which he did. The City further points out that the Grievant, by his own admission, is unable to perform every task which a mechanic might be called upon to do and that, given the severity of the weather and the risks to public safety, nothing less than a fully qualified mechanic would do.

Again, based upon a close examination of the factual record, I find the City's arguments to be unpersuasive. The testimony of the Maintenance Shop Lead Worker, Jim Sieber, was to the effect that he was told by Street Superintendent Randy Hinze to reschedule two mechanics to third shift to deal with any problems arising with snow removal equipment during the nights in question. Hinze did not mention any particular job needs to Sieber, however, nor did there seem to be a snow emergency. Sieber's testimony on these points is uncontroverted and I find it to be credible. The reassigning of the two mechanics is not at issue. Rather, the dispute is that at the end of their regular shifts, Sieber kept them on to work overtime instead of calling out the Grievant. In the absence of the Garage Supervisor, James Oestreich, this was Sieber's call to make, and, on this point, Sieber testified that he made a mistake and that he should have called the Grievant. He further testified that he felt the Grievant to have been qualified to do mechanical work. In fact, the Grievant had been called-in for mechanic work during snow removal situations in the past. Further, no one in a supervisory capacity had ever previously challenged the Grievant's qualifications to perform mechanic work. Sieber's testimony on these last two points was corroborated by Hinze, although he stated that he would not have called the Grievant in. Sieber's testimony as to the Grievant's qualifications is further buttressed by that of Oestreich, who testified he would have called the Grievant first and given him the option of taking the overtime.

The Grievant did testify that there are some mechanic tasks that he does not feel confident about, such as repairing clutches or transmissions and he has, in fact, declined mechanic work in the past when he didn't feel capable of doing the assigned work. Nevertheless, he has also accepted overtime general mechanic work during snow removal incidents in the past, which was the situation here, and presumably acquitted himself well, since no one criticized his work and his two immediate supervisors both testified that he should have been offered the hours, but for the Lead Worker's error. As far as the record shows, the City has no objective criteria for establishing minimum qualifications, such as testing, specialized training, etc., but has left the determination to the department supervisors who

actually assign the work. Under such circumstances, the fact that the Grievant has been called for and has accepted such work in the past, combined with the fact that prior to this grievance there has apparently never been a suggestion that he is not minimally qualified as a mechanic, constitutes *prima facie* evidence that, on the dates in question, he was minimally qualified as a mechanic under the department's standards. The City's assertion, after the fact, that the Grievant was unqualified does not adequately rebut the presumption created by its inconsistent prior actions. On that basis, therefore, I find that the grievance must be sustained.

It remains to determine the appropriate remedy. The Union maintains that the Grievant should be paid for the hours of overtime which were denied him, whereas the City argues that the Grievant should be offered the opportunity to work an amount of overtime in the future equal to that which was lost. In support of their positions, both sides cite past settlements where grievances have been resolved along the lines each proposes. The City further cites CITY OF SUPERIOR, CASE 121, NO. 51024, MA-8467 (GRECO, 9/2794), wherein the arbitrator awarded the future opportunity to work overtime as a remedy, in support of its position.

I am persuaded that in this case the appropriate award is to grant the Grievant monetary compensation for the hours of overtime lost. As the parties have demonstrated, the variety of past settlements in this bargaining unit cover the waterfront. There is, therefore, no precedential effect to be found either way. Nor is there any to be found in the award cited by the City. In CITY OF SUPERIOR, Arbitrator Greco went to some pains to distinguish the case upon its facts. He further explicitly stated that, due to the uniqueness of the case, the award was to have no precedential effect. In fact, so narrowly construed is it that it has been distinguished in subsequent proceedings within the same bargaining unit [cf; CITY OF SUPERIOR, CASE 142, NO. 53704, MA-9438 (JONES, 6/1196)]. In that subsequent case, Arbitrator Jones pointed out that offering future overtime work is sometimes awarded in cases where overtime is equalized within the bargaining unit, because through the process of equalization the overtime may ultimately be distributed equitably. Where, as here, however, overtime is determined by seniority, a guarantee of future work is not feasible. In the first place, as the Union points out, there is no way to determine, when, if ever, overtime would become available because, under the prevailing system, the hours would first have to be offered to employees senior to the Grievant, who might accept them. On the other hand, denying those hours to the senior employees to compensate the Grievant would likewise do an injustice to those employees. Inasmuch as this circumstance was created by the City's failure to follow the prevailing practice, it should, in turn, bear the resulting cost of its error. This would not be achieved by either awarding the Grievant future work that could not be guaranteed or by denying future work to other deserving employees in order to compensate the Grievant.

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

AWARD

By offering available overtime to less senior employees instead of the Grievant, the City violated the prevailing practice with respect to overtime allocation. It is ordered, therefore, that the City shall pay to the Grievant the equivalent of five and one half hours pay at one and one-half times his regular hourly wage as of the date of the violation.

Dated at Eau Claire, Wisconsin, this 6th day of November, 2001.

John R. Emery /s/
John R. Emery, Arbitrator

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