BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE CITY EMPLOYEES, LOCAL NO. 284, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

CITY OF EAU CLAIRE

Case 250
No. 60034
MA-11493

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing for Eau Claire City Employees, Local No. 284, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jeff Hansen, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702-5148, appearing on behalf of City of Eau Claire, referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance captioned by the parties as No. 2000-14. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 15, 2001, in Eau Claire, Wisconsin. The hearing was not transcribed. The parties filed briefs by October 18, 2001.

ISSUES

The parties' statements of the issues are not identical, but essentially stipulate the following issues:

Did the City violate the contract when it failed to pay one hour of overtime for the Union committee that met with management on November 7, 2000?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

PREAMBLE

Both parties to this agreement are desirous of reaching an amicable understanding with respect to the employee-employer relationship that is to exist between them, and enter into an agreement covering rates of pay, hours of work, and conditions of employment, as well as procedures for reducing potential conflict.

Both parties to this agreement will cooperate so that there will be a harmonious relationship and all negotiations and grievance processing will be considered business of the City and shall be conducted during regular hours of work when possible with no loss of wages for the employees who are participating.

. . .

Article 14 – OVERTIME

Section 1. Employees shall receive one and one-half (1½) times their regular hourly rate of pay for all hours worked in addition to their regular standard work day and/or the standard work week, and a minimum of one (1) hour shall be paid for all overtime. For the purpose of computing overtime pay, vacation, holidays, sick and injury leave shall be considered as time worked.

Article 29 – GRIEVANCE PROCEDURE

. . .

Section 7. Employees shall be entitled to any representation that they choose in processing grievances. Employees shall be entitled to two representatives at the

supervisor level, three representatives at the department head level, and four representatives at each management level thereafter. Grievants shall not be counted as representatives. When investigating and processing a grievance, employees and their representatives shall, when possible, be released from work without loss of pay. Employees and grievants who attend meetings for purposes of grievance settlement shall give their immediate supervisors at least one (1) working day's notice of said meetings when possible.

BACKGROUND

Jim Fletty, Al DeSouza and Bob Horlacher are the named grievants. The parties do not dispute the facts underlying the grievance. Brian G. Amundson, the Public Works Director summarized those facts in a memo dated December 22, 2000 (references to dates are to 2000, unless noted otherwise), which states:

> This memorandum is in response to a grievance dated December 11, 2000, which was the result of an oral grievance on November 15, 2000. The oral grievance was reduced to writing, and a second step request was received by the Department Director on December 15, 2000.
>
> ***Description of Grievance***
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> A grievance meeting took place between 3:30 p.m. and 4:30 p.m. on Tuesday, November 7, 2000, between Union members and Street Division supervisors. The Local 284 employees were denied overtime pay for the time period after 4:00 p.m. The Union feels that this is a violation of Article 29, Section 7 of the contract.
>
> ***Review***
>
> A meeting was held on November 7, 2000 between three (3) Union representatives, Mike Barnhardt, Street Maintenance Manager and Russ Nemitz, Street Supervisor. The purpose of the meeting was to discuss a grievance with respect to the method used by management for permitting time-off during the 9-day gun deer hunting season. The meeting started at 3:30 p.m. and ended at 4:30 p.m. The Union employees were paid regular time for the 30 minutes between 3:30 p.m. and 4:00 p.m., but were denied overtime compensation for the 30 minutes between 4:00 p.m. and 4:30 p.m.

Decision

> The Contract indicates that when processing a grievance, the employees and their representatives shall, when possible, be released from work without loss of pay. The employees were released from work at 3:30 p.m. to attend a grievance meeting. The regular work day ended at 4:00 p.m. and after that time the employees were conducting Union business, not working nor scheduled to work, as they had already been released from work at 3:30 p.m. Review by the Department Director did not find evidence of a contract violation and therefore the grievance is respectfully denied.

The Union's written confirmation of the oral grievance lists Article 29, Section 7 as the contract provision governing the grievance, and the written grievance adds the Preamble.

The balance of the background is best set forth as an overview of witness testimony.

Bob Horlacher

Horlacher is currently Union President, and has worked for the City for roughly thirty years. He noted that the Preamble was placed into the labor agreement in 1968 and has not been changed since. The parties had, at one time, bargained at night. City bargainers questioned the wisdom of the approach, and the parties mutually agreed that the Preamble indicated bargaining should occur during work hours. From that time on, the parties bargained during regular hours. In a proposal dated April 8, 1998, the City proposed to "place a period after the word 'relationship'" in the second paragraph of the Preamble. This would have changed the parties' practice, but the Union did not agree to this proposal.

Barnhardt schedules grievance meetings at 3:30 p.m., without regard to the complexity of the issues involved. Horlacher expressed doubt that the matters to be discussed on November 7 could be handled within thirty minutes. He believed Barnhardt schedules meetings for one-half hour without regard to the issues needing discussion. In the past, meetings have lasted beyond 4:00 p.m., but seldom beyond 4:10 p.m. Horlacher has left meetings at 4:00 p.m. in the past without any forewarning. Mediation sessions during bargaining have extended past 4:00 p.m. without the Union claiming overtime. Horlacher thought the November 7 meeting was proceeding productively, and intended to stay until its completion. He did not question Barnhardt regarding overtime, and neither Barnhardt nor Nemitz offered it. Horlacher did, however, expect to get paid, including the one hour minimum.

Mike Barnhardt

Barnhardt has scheduled grievance meetings at 3:30 p.m. for roughly the past five years, and has conducted perhaps twelve such meetings. Some meetings have gone beyond 4:00 p.m., and it is difficult to predict when they will. During the meeting on November 7, the Union presented a grievance the City had not anticipated discussing. Barnhardt's flexibility in scheduling meetings is limited by productivity concerns. Morning meetings can separate crew members, and adversely impact work performance. Setting meetings late in the afternoon minimizes these adverse consequences. Barnhardt acknowledged he can end meetings when he wants, and that he can receive overtime on an hourly basis for meetings that extend beyond 5:00 p.m. Horlacher did not question whether the Union representatives would be paid for staying at the meeting, and Barnhardt did not offer any comment on whether their time would or would not be compensated.

Dale Peters

Peters has served as the City's Director of Human Resources since January 1, 1985. He plays an active role on the City's negotiating team. The 1998 proposal was not offered to address the Union's right to overtime for processing grievances.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union argues that the second paragraph of the contract's Preamble "does not preclude the payment of overtime for grievance meeting" but "encourages such grievance handling to be done during regular hours of work when possible." Due to the late scheduling of the November 7 meeting, it was impossible to complete the meeting during regular hours. The Preamble demands that meetings not produce a loss of wages, and contractual overtime is inextricably linked to wages.

Barnhart has the contractual authority to schedule grievance meetings earlier in the day; to stop the meeting at the close of regular hours; or to continue the meeting without authorizing payment. That he did not select one of these options cannot be held against the Union. That Barnhart is paid overtime for attending meetings beyond the close of his shift should play some role in the interpretation of the labor agreement.

The Union also argues that "the City is simply trying to get by unilateral action what it failed to gain in bargaining." The City tried, without success, to eliminate the second paragraph of the Preamble during "negotiations for the July 1, 1998 contract." Grievance arbitration should not be a vehicle for undercutting bargained language.

The Union concludes that "the Arbitrator should sustain the grievance." As the appropriate remedy, the Union seeks an order that "the City . . . pay each of the three Union officers one hour of overtime for the meeting they attended on November 7, 2000."

The City's Brief

After an overview of the evidence, the City asserts that the Union's position "is not . . . consistent with the contract language or past practice." Under Article 29, Section 7, the Union's grievance team "had been 'released from work' . . . to perform union duties." Thus, they were not "'working' when the meeting went past 4:00 p.m." Thus, they were not eligible for overtime under Article 14, Section 1.

That "union representatives have participated in these meetings past the 4:00 p.m. quitting time in the past without complaint or request for overtime" affords further reason to deny the grievance. They were not required to stay beyond 4:00 p.m., and thus put in the time after the close of their regular shift on a voluntary basis. Because the City did not assign them to stay at the meeting, this voluntary effort cannot be compensated with overtime.

Barnhart testified that most grievance meetings can be completed in one-half hour, and this is why he sets the meetings at 3:30 p.m. This fully complies with the directive of the Preamble. None of the employees suffered any loss of wages, and thus the Preamble has no bearing on their claim. The Preamble's silence on the issue of overtime cannot be held against the City.

Because the contract language and past practice "reinforces management's decision" it follows that the "the grievance should be dismissed."

DISCUSSION

The issue and underlying facts are essentially stipulated. The number and breadth of applicable contract provisions complicate the grievance. Those provisions are the Preamble's second paragraph, Article 14, Section 1 and Article 29, Section 7.

The relationship of these provisions and their bearing on the grievance is not clear and unambiguous. There is some evidence of past practice and bargaining history to address the ambiguity. Evidence of bargaining history is, however, of limited value. It underscores the Union's concern that the City is attempting to secure through arbitration what it could not win in bargaining. However, the deletion proposed in 1998 has no affect on the grievance. Even if the Union had agreed to the deletion, Article 29, Section 7 poses the same interpretive dispute by demanding grievances be processed "when possible" during regular work hours.

The applicable language supports the Union's view that its committee is eligible for overtime by staying until 4:30 p.m. The Preamble's second paragraph establishes this by stating "grievance processing will be considered business of the City." As such, the work can be compensated by overtime. This turns the eligibility analysis to Article 14, Section 1.

The first sentence of Article 14, Section 1 makes overtime available for "all hours worked" beyond the regular workday or work week. The City's argument that the committee was not "working" after 4:00 p.m. lacks a solid contractual and factual basis. Article 29, Section 7 states the committee "shall . . . be released from work" and Article 14, Section 1 limits overtime payment to "hours worked." Neither affords the City a persuasive defense against the overtime claim. The final sentence of Section 1 establishes that time spent in non-work status can be summed to determine overtime pay. For example, time spent on "injury leave" is "time worked" when calculating overtime. Beyond this, it is evident the City considers grievance processing time worked by a supervisor. This falls short of binding the City regarding the labor agreement, but establishes that treating grievance processing as time worked is neither unknown nor unpersuasive to City management.

The weakness of the City's position is that their reading of the governing provisions would be the same even if the reference "will be considered business of the City and" was removed from the Preamble's second paragraph. It is a fundamental goal of contract interpretation to grant meaning to all the terms of an agreement. The City's reading of the Preamble is essentially a policy view of the language, asserting that grievance processing is an ineffective use of overtime. However persuasive that policy view may be, it cannot support an interpretation of the contract that denies meaning to bargained language.

That the Union has established a contractual basis for overtime eligibility does not, however, establish that the requested overtime has a basis in fact. It is undisputed that Barnhardt did not offer, and that the Union representatives did not request overtime as a condition of staying beyond 4:00 p.m. The Union thus asserts that its contractual claim is so strong that the work involved did not have to be assigned.

Neither contract nor fact supports this claim. Union representatives have not made claims for meetings that extend a few minutes beyond 4:00 p.m., and Union representatives have left meetings at 4:00 p.m. without adverse consequences. The City asserts that this establishes a practice making time spent beyond 4:00 p.m. voluntary. However, the evidence falls short of establishing an understanding on this point. At most, the evidence demonstrates the parties' mutual willingness to treat time spent beyond 4:00 p.m. as a case by case occurrence. The City does not view Union termination of meetings lasting beyond 4:00 p.m. as insubordinate, and Union representatives acknowledge that the City can terminate meetings at 4:00 p.m. That the parties have been mutually willing to spend a little time beyond 4:00 p.m. to address grievances falls short of establishing a binding practice. Past practice evidence shows no more than that there is no practice that manifests a common understanding on the circumstances by which grievance processing becomes overtime eligible.

This focuses the grievance on the contract, and the contract does not support the Union's claim on this point. The final sentence of Article 14, Section 1 specifies those types of non-work time that must be included in the calculation of overtime. Significantly, grievance processing is not included. This makes the Union's assertion that the committee could qualify for overtime solely by operation of the contract unpersuasive.

Against this background, the Preamble's second paragraph must be reconciled with Article 14, Section 1 and Article 29, Section 7 on a case by case basis. Clear management assignment to Union representatives to stay beyond 4:00 p.m. authorizes overtime payment. In the absence of such an assignment Union representatives are free to leave at 4:00 p.m. without adverse consequences. Prior to leaving, Union inquiry regarding the availability of overtime should afford the parties the mutual opportunity to consider the desirability of proceeding beyond 4:00 p.m. In the absence of clear direction, arbitral requirement of overtime demands facts demonstrating City conduct that undermines agreement provisions.

Such facts are not present here. There is no evidence the post 4:00 p.m. discussion could not have been put off until regular hours. There is no evidence any member of the committee lost regular wages or an overtime opportunity by attending the meeting. Nor does the evidence indicate setting the meeting for 3:30 p.m. establishes an abuse of discretion. The City cannot act to force grievance processing outside of regular hours without violating the Preamble's second paragraph. However, the evidence does not establish such an abuse. Rather, it indicates the discussion went beyond the grievance Barnhardt anticipated addressing.

Because Barnhardt has the authority, it would have been preferable that he expressly end the November 7 meeting or offer overtime for its continuance. However, his failure to do so is less than a persuasive basis to order overtime through arbitration. The parties' past willingness to stray beyond 4:00 p.m. undercuts this conclusion. Beyond this, the Union representatives could have resolved any doubt on the point by putting the issue before

Barnhardt. Horlacher indicated he expressed doubt on whether the meeting could be completed in thirty minutes, but the timing and clarity of this expression of doubt is unclear. The City's authority to assign overtime can not be abrogated in the absence of clear evidence of an abuse of discretion.

Under the broad language of the Preamble, resolution of any doubt concerning the assignment of overtime should come after an across-the-table request rather than an after the fact grievance filing. Cooperation in a bargaining relationship demands that differences be aired at the table before arbitration. To sustain the grievance on its facts could encourage a level of gamesmanship that falls outside the spirit of the language of the Preamble.

In sum, the Union has persuasively shown that the Preamble's second paragraph makes time spent processing grievances beyond regular hours eligible for overtime payment. The City must assign or authorize meeting time beyond regular hours to constitute "hours worked" under Article 14, Section 1. In the absence of evidence of a specific assignment to stay after regular hours, no overtime payment is necessary unless the Union can demonstrate that the City's failure make the assignment constitutes conduct undermining the Preamble's second paragraph. In this case, the evidence does not meet this standard and no payment is required.

AWARD

Although the agreement makes time spent in grievance processing after 4:00 p.m. eligible for overtime, on the facts posed by this grievance, the City did not violate the contract when it failed to pay one hour of overtime for the Union committee that met with management on November 7, 2000.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 27th day of November, 2001.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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