

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LA CROSSE CITY EMPLOYEE'S UNION, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, LOCAL 180**

and

CITY OF LA CROSSE

Case 311
No. 60115
MA-11521

(Grievant Maria Italiano)

In the Matter of the Arbitration of a Dispute Between

**LA CROSSE CITY EMPLOYEE'S UNION, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, LOCAL 180**

and

CITY OF LA CROSSE

Case 312
No. 60116
MA-11522

(Grievant Dan Stremcha)

Appearances:

Davis, Birnbaum, Marcou, Seymore & Colgan, LLP, by **Attorney James G. Birnbaum**, 300 Second Street North, Suite 300, La Crosse, WI 54602-1297, appearing on behalf of the City.

Attorney Peter B. Kisken, Deputy City Attorney, 400 La Crosse Street, La Crosse, WI 54602-3396, appearing on behalf of the City.

ARBITRATION AWARD

La Crosse City Employee's Union, Service Employees International Union, AFL-CIO, Local 180, hereinafter the Union, with concurrence of the City of La Crosse, hereinafter the City, requested the Wisconsin Employment Relations Commission to designate a member of its staff to serve as an arbitrator to hear and decide two a grievance disputes concerning Grievants Maria Italiano and Dan Stremcha and in accordance with the grievance and arbitration procedure contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On October 18, 2001, the grievances were consolidated for hearing and a hearing was held in La Crosse, Wisconsin. The hearing was not transcribed. On December 13, 2001, and upon receipt of the last of the parties' written reply briefs, the record was closed.

On the basis of the record submitted, the Arbitrator issues the following Award.

ISSUES

The parties did not agree on a statement of the issues. The Union would state the issues as follows:

1. Did the City violate Article 12 of the Agreement, the Non-scheduled and Emergency Overtime Policy for Water Department Distribution Employees per Article 19, past practice, and the Agreement as a whole, when it failed to offer overtime to the Grievants the week of April 16, 2001?
2. If so, what is the appropriate remedy?

The City would state the issues as follows:

1. Did the City violate the specific terms of the Agreement by failing to compensate the Grievants for work which they never performed based on their claim of seniority for overtime, during a city-wide emergency flood watch, when there was no contract language providing for overtime based on seniority?
2. If so, what is the appropriate remedy?

The Arbitrator frames the issues for determination as follows:

1. Did the City violate Article 19 when offering flood patrol work to Water Distribution Department employees during the week of April 16, 2001, resulting in a loss of overtime to the Grievants?
2. If so, what is the appropriate remedy?

PERTINENT AGREEMENT 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 regularly scheduled work week. . . .

. . .

**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.

. . .

PERTINENT COUNTY RULE AND POLICY

**Non Scheduled and Emergency Overtime
Policy For Water Department Distribution
Employees**

02/02/95

Whenever the events of the day make it necessary to call employees off their assigned jobs to work on a job that was not planned for that day and the work is not completed by the end of the workday the employees who responded to the call and become involved with the new job will be given the opportunity to stay on the job until the work is complete. If additional employees other than those who responded to the call are needed they will be asked by seniority.

In the event that it becomes necessary to work late on a job that was assigned to a crew at starting time or any other time during the day and it was not intended for the work to involve overtime the crew working on the job will be given the opportunity to stay on the job.

Whenever a call comes in shortly before the end of the workday and only one employee is needed for the call it will be given to the employee who is on call.

Any other overtime will be by seniority with the exception of the employee who is on call that person will always be given the opportunity to work.

AMENDMENT PERTAINING TO CALL OUT PERSON

11/20/95

There may be times when distribution employees are scheduled to work different hours.

When this happens and a person is needed for a call the people who are working will be called first.

If they are unable to take the call because of appointment scheduling or it is likely to involve overtime then whoever is on call will be called out.

BACKGROUND

The City of La Crosse is a municipal employer which operates a Water Department, hereinafter the Department, and is responsible for maintaining the City's water system. There are 19 employees in the Department that are represented by the Union. The Department organizes its employees into two divisions: the Distribution side and the Pump House side. Grievants Italiano and Stremcha hold the positions of Meter Reader I and II, respectively, and work in the Distribution side of the Department. Stremcha has been employed in the Department longer than Italiano and, therefore, has more seniority than Italiano.

The City is situated adjacent to the Mississippi River and has a system of sand dikes along its North Side to protect those homes against flooding. The dikes were originally erected during the record flood in 1965 by some 225 activated National Guardsmen and consist of 20,000 cubic yards of sand. The dikes have remained over the years in the event of future flooding conditions.

During the month of April, 2001, a great deal of rain fell in the City causing the worst flooding conditions there since the flood of 1965. On April 13, 2001, the City's Board of Public Works distributed a letter by Mayor Medinger and Director of Public Works Caffrey to the residents of the City's North Side. The letter stated that the river is expected to crest the following week at just over 16 feet, that the North Side homes are expected to be below the projected river's crest, and that people should evacuate their homes if the river reaches over 15 feet. It further stated that the stability of the sand dikes cannot be guaranteed with the projected crest and that "[i]f the dike system should fail, water levels could rise very rapidly with strong currents and threaten property and lives."

On Monday, April 16, 2001, at about 11:00 a.m., the Board of Public Works met and decided to request volunteers to patrol the dikes so as to assure that the dikes would not breach. It was determined that the patrols needed to be around the clock on three shifts and that two people were needed on each shift for each of the four different sections of dikes for a total of twenty-four volunteers. It was also decided that these twenty-four people would come from the City's Inspection, Engineering, and Water Departments, with seven from the Water Department, and that patrols would begin at 1:00 p.m. that same day.

Shortly after the above meeting on April 16, 2001, a legal pad was passed around to employees present at the Distribution side office for those interested in patrol duty. All who signed up were told that they would be paid for patrolling at their regular rates, including overtime, if the additional hours from patrol duty resulted in more than a 40-hour work week. The Grievants were not present to sign up for patrol duty. Grievant Italiano was on vacation on April 16, 2001, and Grievant Stremcha was working outside of the office area that day.

At about 1:00 p.m. on April 16, 2001, individuals who had signed up for dike duty patrol were given a tour of the dike system and were instructed to watch for rising water levels and for potential breaches in the system. Breaches were commonly found where damage to the dikes had been done by animals seeking higher land and burrowing into holes or soft spots. The instructional tour lasted about 45 minutes. The dike duty patrols then commenced and continued around the clock. Employees performed patrol work through April 23, 2001. All those in the Department who did patrol work received overtime at the overtime rate and pursuant to Article 12.

On May 3 and 10, 2001, Grievants Italiano and Stremcha filed their respective grievances. Each alleged that less senior employees were offered hours for dike patrol work and that they were not given this opportunity resulting in a loss of overtime and in violation of the "Non Scheduled and Emergency Overtime Policy For Water Department Distribution Employees," hereinafter the Policy, and the Agreement. The Parties thereafter advanced their dispute through the collective bargaining procedure to arbitration.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The Union

The Union's brief can be arranged into five parts.

Express language.

Article 19 requires that the City make work rules that are "reasonable." The Non-scheduled and Emergency Overtime Policy for Water Department Distribution Employees, hereinafter the Policy, constitutes the City's written rule regarding overtime in emergency situations. The Policy expressly and unambiguously states that "[a]ny other overtime will be by seniority . . ." This language is broad and applies to all Water Department Distribution employees. Therefore, when the City failed to assign overtime by seniority to the Grievants during the week of April 16, 2001, the City disregarded the Policy and in violation of Article 19 of the Agreement.

The City's argument that the Policy does not cover the flooding conditions during the week of April 16, 2001, unduly narrows the Policy's express and broad language that "any other overtime will be by seniority." Such a construction of the Policy is unreasonable. Further, the City's reasoning, i.e., that it did not follow seniority in the assignment of overtime because the circumstances constituted an emergency, is not a justification, but an admission. The Policy is the emergency overtime policy.

The proper application of the Policy was admitted by City Engineer Randy Turtenwald. According to employee James Christen's testimony, on the morning of April 16, 2001, Turtenwald stated to City Director of Public Works Patrick Caffrey that "we are going to have to go by seniority to work on flood duty." This statement was never challenged in the record by Turtenwald and, therefore, is uncontested. Although Caffrey testified that he did not recall that meeting or Turtenwald's alleged statement, which is understandable given the other circumstances occupying Caffrey's attention that day, Caffrey admitted that he may have said that he didn't want any trouble with the Union regarding the assignment of overtime for this work. Caffrey would not have made such a statement had there not been a specific mention by Turtenwald of how overtime would be assigned.

Past practice.

The City has a past practice of following the Policy for all emergencies since the policy's adoption on February 2, 1995, and as evidenced by the testimony of James Geissner, Director of Personnel.

It is undisputed that employees less senior than the Grievants in the same department were intentionally offered work on dike duty during the week of April 16, 2001, resulting in the loss of overtime to the Grievants. Therefore, the City violated its past practice for the assignment of overtime work in emergency situations when it failed to offer overtime to the Grievants during the week of April 16, 2001.

No exigent circumstances.

The Union does not dispute that there could be exigent circumstances in which the City would not follow its own emergency overtime policy. Examples include a dike breaking and a wall of water coming down the Mississippi with no notice. However, the record does not establish such circumstances.

In this case, the flood stage projections had been already made the week prior to April 16, 2001, as evidenced by Union Exhibit 3, and by Mayor Medinger's notice, dated April 13, 2001. Moreover, the City's sign-up sheet for dike duty was not promulgated until after the Board of Public Works meeting on April 16, 2001, suggesting that the City had sufficient opportunity and time to follow its emergency policy. Further, there was no emergency within an emergency which justifies the City's intentional disregard of the Policy. Moreover, Turtenwald's admission that seniority would have to be followed for the assignment of dike duty work is additional evidence that these were not exigent circumstances. Because the City had sufficient notice, therefore, there were no exigent circumstances.

The City's reason for not offering the Grievants overtime was not because the City did not have time to follow seniority, but because they had other work assignments that the City considered a higher priority. In this case, the City had ample notice of the impending flood situation and more than an ample opportunity to follow the established "emergency" overtime Policy. Therefore, the circumstances in this case do not amount to exigent circumstances and do not justify a deviation from the Policy.

The Policy is intended to cover emergencies. Emergencies do occur as part of the daily expectation of Water Distribution employees. These emergencies can threaten property and, perhaps, even life. That is why the parties negotiated a policy for how the City is to assign overtime in these emergency situations.

Much of the City's evidence regarding April 16, 2001, was to establish a true emergency. However, and as seen in the City's written answers to the grievances, it wasn't the lack of time to assign the Grievants the work. Rather, it was a deliberate intentional act on the priority of assignment. These written answers to the grievances undercut the City's argument regarding an emergency or exigent circumstances.

City's asserted reasoning and pretext.

The City's reason for not offering overtime to the Grievants is unsupported by the facts, is unreasonable, and is a transparent attempt at a *post facto* justification.

As stated in the City's answers to the grievances, it did not offer overtime to the Grievants because of the Grievants' alleged predetermined work schedules. (It should be noted that the City's additional reasons, i.e., that the Grievants did not request overtime and that the Grievants were not trained for dike duty, were not asserted until the arbitration hearing.) However, it is uncontroverted that less senior employees in the department were trained and capable of performing each of the Grievants' scheduled duties. Further, the City did not offer an explanation as to why the Grievants, who both work a first shift, were not offered to work a second or third shift on dike duty. In addition, the City also gave no explanation for why Grievant Stremcha was not offered dike patrol on the weekend of April 20-21, 2001, when Stremcha's schedule takes appointments only on week days and not on weekends.

It is unreasonable for the City to ignore its own emergency overtime policy simply because it prefers one employee to perform a task which other employees are able to perform. To permit this would gut the overtime seniority policy.

During the arbitration hearing, the City asserted new rationales for its actions. Such rationales, because of their timing, should be viewed as pretext.

First, the City now asserts that the Grievants were not assigned because persons performing dike duty had to be trained. However, and as evidenced by the testimony of Assistant Director of Public Works Anthony Hutchens, such training amounted simply pointing out the dike system. Further, and as evidenced by the testimony of Hutchens and Water Utilities Manager Mark E. Johnson, there was no prior experience, no specialized training and no intensive training required to perform such duties. The best evidence of the City's speciousness when asserting the need for training is that the City assigned dike duty to Tammy Roellich, a clerical employee on the Pump House side of the Water Department who works exclusively in a clerical environment. Roellich had no prior training in dike duty and no experience in the field of any Water Distribution activity. The City has failed to explain why the Grievants could not have performed as successfully as Roellich in dike duty work.

Second, the City now asserts that the Grievants never asked to work overtime. However, and as evidenced by the testimony of the Grievants, the Grievants had no opportunity to ask for such overtime and they were not aware that overtime was available, particularly on the weekend of April 16, 2001. Most importantly, any attempt by the Grievants to request such overtime would have been futile as evidenced by the City's argument that the Grievants had prescheduled appointments that could not be changed.

Third, the City now asserts that dike duty is not bargaining unit work. However, it is undisputed that bargaining unit employees were paid for dike duty work. More importantly, Turtenwald's statement that the City had to follow strict seniority and Caffrey's statement that he did not want any union trouble in the assignment of overtime for dike duty undercuts the City's assertion that dike duty is not bargaining unit work. It is important to again note that the City's assertion regarding bargaining unit work did not appear in the City's answers to these grievances. Therefore, such absence is further evidence of pretext.

Remedy.

The appropriate remedy is for the arbitrator to award overtime and/or the equivalent compensatory time at the Grievants' option. This optional approach is supported by Article 12, Section D, of the Agreement which permits employees to either take overtime pay and/or compensatory time off. The amount of overtime/compensatory time should equate what the least senior employee Tammy Roellich received in overtime, i.e., 24 hours, for that time period and for her dike duty work during the week of April 16, 2001.

The City

The City asserts that the grievances should be denied. It's brief can be divided into four parts.

Nothing in the Agreement on overtime by seniority.

The Agreement does not include any express language providing for overtime assignments by seniority. The absence of this language is clear and unambiguous that there is no such provision.

No past practice.

The Union has not met its burden in demonstrating a clear, consistent, long-standing and mutual practice of assigning overtime in a city-wide emergency in the Department by seniority.

Christen's testimony that he overheard Director of Public Works Caffrey state on April 16, 2001, that the City is going to have to go by seniority when assigning overtime for dike duty, does not have merit. According to Christen, Assistant Director of Public Works Tony Hutchens and Water and Utilities Manager Mark E. Johnson were present when Caffrey

made this alleged statement. However, both Hutchens and Johnson testified that they were not present at such a meeting. Further, Caffrey denied that he ever made such a statement. Therefore, Christen's testimony is not credible and it should be given little or no weight.

Union witness Roellich's testimony had nothing of import other than that water employees voluntarily signed up for dike duty and that anyone could do so. Those that did sign up made a list on a legal pad.

Union witness Graff testified that he received an orientation before commencing dike duty. In addition, Graff conceded that such work was voluntary and that work pursuant to the Policy is for "on call," which is not voluntary. Further, Graff testified that the Policy is only used for Department emergencies which involve the Department's infrastructure and that the Policy has never been used for anything other than a Department system emergency.

With regard to the Grievants, they both conceded that dike duty was voluntary and that neither expressed a desire to be assigned such work.

Thus, the Union's case regarding past practice consists of hearsay evidence, which has been rebutted, and mere general statements that the Grievants are entitled to overtime pay for work not performed, nor requested, for an emergency situation, based upon seniority which is not in the Agreement or any other document.

In contrast to the Union's case, City witness and Assistant Director of Public Works Hutchens testified that the April, 2001, flood was one of the worst in the history of La Crosse. Hutchens further testified that the flood's crest was forecast at one point to rise between 17 and 18 feet, the highest level since the 1965 flood. Moreover, Hutchens testified that the dikes were first installed following the 1965 flood, and that the dikes had not yet been tested with severe flooding since that time. He testified that in this case the flooding was an emergency situation and that the Governor of the State of Wisconsin and Federal Government had declared the situation an emergency.

Hutchens also testified that on April 16, 2001, he was present at a Public Works meeting where the Board of Public Works acted as the City's emergency response team. During this meeting, assignments were offered to Engineering, Inspection and Water Department employees because their normal work assignments could be postponed until after the emergency subsided. He testified that union and nonunion employees were used for dike duty and that it was vital to reuse the same employees over the weekend of April 21-22, 2001, because those people had a "before" and "after" view of the flood conditions.

City witness and Water and Utilities Manager Mark Johnson testified that his involvement in the April 16, 2001, meeting was to arrange for a continuous inspection of the dikes. He testified that during the meeting a decision was made to use employees primarily

from the Engineering and the Inspection Department for dike duty. However, and after all of the Engineering and Inspection people were assigned, seven more employees were needed to be on the list for dike duty by 1:30 p.m. on that same day. A decision was made to fill these seven spots from the Water Distribution Department because there were employees there without prescheduled appointments or other scheduled essential duties.

The dike patrol work was voluntary in nature. Johnson testified that the Grievants were not asked to perform dike duty because they were both scheduled to do meter readings and had other appointments. Further, Johnson testified that once the dike patrol work began, the same employees were needed to retain continuity. Moreover, and according to Johnson, there is nothing in the Agreement which gives the Department jurisdiction over the flooding of the Mississippi, and the Department has not previously been involved in issues of flooding. Johnson testified that the Policy applies solely to overtime issues related to the Department's infrastructure, such as water in the street or other types of water system emergencies.

City witness and Director of Public Works Caffrey testified that the 2001 flood was an emergency situation, that lives and property would be jeopardized if the dikes had breached, and that it was the worst flood since 1965. Contrary to Christen's testimony, Caffrey denied that he attended a meeting at 1:00 p.m. in the Engineer's Conference Room, and that on that date and time the Public Works meeting was still in session. Therefore, the conclusion that should be reached is that the meeting that Christen testified about never took place.

City witness and Director of Human Resources James Geissner testified that the 2001 flood was an emergency which involved various City departments and volunteers. This effort was under the overall direction of Mayor of La Crosse and with Caffrey as the flood coordinator. In addition, the City's Police Department used a reverse 911 system, door-to-door volunteers were enlisted, and dike patrols were used. Geissner testified that there is no language in the Agreement which applies to the 2001 flood and that the dike work performed is not bargaining unit work. Geissner also testified that the Policy applies only to Department emergencies such as a water main break and other situations in which the Department has jurisdiction.

Not bargaining unit work.

The Union has not supplied evidence that the volunteer work done on dike patrol is bargaining unit work. Both union and non-union employees played an integral part in the flood of 2001.

Emergency circumstances.

It is well settled arbitral principal that management's freedom to act may be expanded and managerial obligations may be narrowed if an emergency, an act of God, or a condition beyond the control of management is involved. The Union has not offered any testimony to support its argument that the 2001 flood was not an emergency. The City, on the other hand, has offered testimony that the 2001 flood circumstances was an emergency. Because of the emergency circumstances in this case, the City did not violate the Agreement or the Policy when it did not offer overtime to the Grievants for the week of April 16, 2001.

The Union's Reply

The City misstates Christen's testimony regarding what Christen overheard on April 16, 2001. The statement, "We are going to have to go by seniority (to work on flood duty)" is attributed to Turtenwald, not Caffrey as asserted in the City's brief. Following Turtenwald's statement, Caffrey uttered words that he did not want to have any trouble with the Union regarding this matter. It should be noted that Caffrey did not deny uttering words to that effect. Further, the City never called Turtenwald as a witness. Therefore, the record establishes the City's admission that it failed to follow seniority in the assignment of overtime under these circumstances.

The City's suggestion that there is no language which requires the assignment of overtime by seniority is not true. Article 19 provides for the promulgation of rules for this residual bargaining unit, which includes the Policy. This Policy was negotiated between the parties, was posted in the Department, and there are no other rules which apply to the issue of overtime assignment. It would be industrial chaos to conclude that the Policy is not a part of the Agreement.

With regard to the Emergency Doctrine, such a doctrine is confined to unforeseen circumstances where the exercise of discretion is not permitted. In this case, the "emergency" was both foreseen and the circumstances permitted discretion. Therefore, it should not be concluded that these circumstances fall under this doctrine and to abandon the negotiated Policy. Simply because there was a flood, and because the flood was in some circles labeled an emergency, such conditions do not establish by fact, law or reason why the City should not follow its own emergency Policy.

The grievances should be sustained and the Grievants should be awarded overtime and/or the equivalent compensatory time at the Grievants' option.

The City's Reply

The Policy does not apply.

The Policy does not apply to this case. City employees, including Water Distribution employees and employees from other City departments, were in effect "transferred" from their respective departments to do emergency flood service work during the week of April 16, 2001. According to Assistant Director of Public Works Hutchens, it was unknown whether this service would be for one or three weeks. Further, and according to Hutchens, employees were chosen based upon their department's ability to operate without them.

The Policy is expressly for emergency call-outs involving employees in the Water Distribution Department. Testimony at the hearing confirms that such emergencies involve the Department's infrastructure, such as a water main break. In this case, the City employees who performing the flood service work were not responding to a call, nor were they on call. They were volunteers. This is contrasted with the Policy, which, according to testimony at the hearing, is mandatory.

Alleged past practice.

The Union's past practice argument is undeveloped and unpersuasive. According to Union witness Graff, the Policy has never been used for anything other than an emergency involving the Department's infrastructure. There were no witnesses whose testimony supports the Union's theory of past practice.

With regard to City Engineer Turtenwald's alleged statement, even if it had occurred, which has not been proven by the Union, it has no impact on this case. Since Turtenwald works in the Engineers Department, and not in the Water Distribution Department, his statement would only affect employees in the Engineer's Department. Moreover, Director of Public Works Caffrey denied that Caffrey was present for such a meeting or that Caffrey made such a statement.

If the Union wishes to attribute a statement to an individual, it should bear the burden of producing that individual. Christen's recollection of such a statement is flawed. Contrary to Christen's testimony that this meeting took place on April 16, 2002, and that Hutchens, Johnson, and Caffrey were present for the meeting, Hutchens, Johnson, and Caffrey all testified that they were not present at such a meeting on April 16, 2001.

Alleged exigent circumstances and pretext.

With regard to the Union's argument on exigent circumstances, the City reiterates its position that the Policy only applies to infrastructural emergencies.

The Union's assertion that the circumstances did not constitute an emergency is conjecture and without basis in fact. There were no Union witnesses in support of this assertion. Further, anyone that lives on the banks of the Mississippi would concede that a forecast of the river's crest of over 17 feet constitutes an emergency. In addition, both the Governor of the State of Wisconsin and the Federal Government declared the situation an emergency. Hundreds of volunteers were called upon, there was substantial property loss, and there was the potential for substantial loss of life.

With regard to the Union's argument that the City acts were pretext, Assistant Director of Public Works Hutchens testified that management needed people for one to three weeks and that it was looking for employees who could be away from their departments for an unknown period of time. Moreover, Water Utility Manager Johnson testified that the Grievants were both scheduled for work and had other appointments. The Union's testimony on this point is not credible.

Article 19 of the Agreement provides that the City reserves the right to direct the work force. This right is expanded in situations involving an emergency, an act of God, or a condition beyond the control of management. Management must have the right to meet emergencies in an exceptional manner. VIRGINIA-CAROLINE CHEMICAL COMPANY, 42 LA 237 (KESSELMAN, 1964).

DISCUSSION

Article 19 of the Agreement states that the City is vested with the right "to make reasonable work rules." A work rule for these Water Department Distribution employees is the "Non Scheduled and Emergency Overtime Policy for Water Distribution Employees," i.e., the Policy, which calls for seniority when determining which employees are offered overtime hours. Thus, Article 19 incorporates the Policy as a "work rule" and the issue, as framed by this Arbitrator, is whether the City violated Article 19 when offering flood patrol work to Water Department Distribution employees during the week of April 16, 2001, thereby resulting in a loss of overtime hours to the Grievants.

Express language.

The Union asserts that "[a]ny other overtime will be by seniority . . ." in the Policy is unambiguous and broad and that it applies to all Department employees. I agree. The phrase "any other" widens the scope of the examples of overtime listed in the Policy and it clearly means that the City must follow seniority in situations not specified for these employees. I agree with the Union that if the work is done for the City and by bargaining unit employees, than the Policy covers it, unless there are exceptional circumstances.

The Union also argues that the word “emergency” in the Policy means that the Policy includes all emergency situations. I disagree. I do not think that that word can be stretched to that extent. The word “emergency” appears only in the title of the Policy and nowhere else in the body of that document. On its face, “emergency” qualifies the word “overtime” in the title, but the combination of the two words “emergency overtime” is not otherwise illustrated or interpreted in the Policy’s text. By itself, and appearing only in the title, “emergency overtime” is ambiguous. Therefore, I will not read into the Policy that it is the overtime policy in emergency situations.

Regarding the Union’s allegation that City admitted its failure to follow the Policy, I do not find that evidence compelling. Union witness Christen testified that City Engineer Turtenwald stated to Director of Public Works Caffrey on April 16, 2001, and after a 1:00 p.m. meeting had ended, that the City would need to go by seniority when picking volunteers, whereupon Caffrey agreed and said that the City will have to go by the Union. Christen also testified that in attendance at that same meeting were management employees Hutchens and Johnson. However, Caffrey testified that he did not recall these statements and that he would have remembered had such a statements been made. Caffrey also testified, and under cross examination, that he did not recall Turtenwald ever saying to go by strict seniority and with regard to the patrol issue. Turtenwald was not available at the time of hearing and the City chose not to call him. Hutchens testified that he did not recall these statements and, regardless, at 1:00 p.m. on April 16, 2001, Hutchens was out patrolling the dikes. As to Johnson, he was at the hearing during Christen’s testimony. Johnson testified that Johnson was not there on April 16, 2001. In my opinion, the overall testimony does not support a conclusion that the City admitted its improper use of the Policy as of April 16, 2001.

Past practice.

Since the express terms of the Policy are ambiguous, I turn to the parties’ past practice to determine their intent.

The manner in which the parties have utilized the Policy supports a more restrictive interpretation of the word “emergency.” Union Steward Mark Graff testified that the Policy has been applied when responding to police and homeowner calls such as an open street manhole cover, water in someone’s basement, or questionable drinking water. Water Department Manager Mark Johnson testified that the Policy is used for events such as a water main break, a service leak, and water coming up from below the streets. Graff characterized these instances as those which involve the Water Department’s infrastructure. Johnson referred to these situations as water system emergencies. In either case, the parties have used the Policy in the past during specific kinds of emergencies. Therefore, a distinction must be made between those emergencies which have been met within the provisions of the Policy, and those emergencies which are unforeseen and which go beyond the Policy and Article 19.

Compare, VIRGINIA-CAROLINE CHEMICAL COMPANY, 42 LA 237, at 240 (KESSELMAN, 1964) (distinction made between those emergencies which are met within the provisions of the agreement and those emergencies going beyond the agreement).

Contrary to the Union's suggested assertion, Geissner's testimony does not establish a different past practice.

Emergency circumstances.

Inasmuch as the Policy does not cover emergencies within the broad sense of the term, it is necessary to determine whether the instant set of facts established an emergency as that term is more widely understood. If there was, and under certain limited conditions as explained below, then the City may have the ability to not follow seniority when determining overtime. If there was not an emergency, then the City's failure to follow seniority is a violation of the Policy's reference to "any other overtime."

It is generally acknowledged that management's freedom to act may be expanded in an emergency situation, but that such action is limited to unavoidable situations and, then, only for the amount of time necessary. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 737 (1997); see also, MILWAUKEE METROPOLITAN SEWERAGE DIST., WERC MA-6620 (ENGMANN, 8/92). The Union asserts that the City cannot rely on a claim of an emergency if the situation regarding patrol work was known in advance and the City was able to exercise discretion. I agree with this general assertion and add that in order for the City to not run afoul of an expanded ability to act in an emergency, that the City's acts must not go beyond the amount of time necessary.

The City asserts that on April 16, 2001, at about 1:00 p.m., the conditions necessitated the commencement of dike patrols and that those patrols needed to begin within a few hours. However, the Union asserts that the City knew about the flooding conditions prior to that time and, hence, the decision to use patrols outside of the Policy's system of seniority in the Water Department was avoidable. The Union points to flood stage projections that had been made the week prior to April 16, 2001, as shown by Union Exhibit 3, and as evidenced by the Mayor's notice dated April 13, 2001.

I am not persuaded by the evidence before me that the City could have made an earlier decision to conduct dike patrols. The Union's Exhibit 3 shows measurements of water levels, on dates from April 1, 2001, through May 31, 2001. For example, it states that on April 12 the river was at 12.52 footstage, on April 13, it was at 12.97, on April 14, it was at 14.09, on April 15, it was at 14.85, and on April 16, it was at 15.22. Nothing in Union Exhibit 3 makes projections of the river's flood stage and only actual measurements for each date are stated. I can surmise from this that the river was rising. But I cannot conclude from this that on a date prior to April 16, 2001, at a measured footstage, the City knew that dike patrols were needed or that the City should have been deciding to conduct dike patrols on an earlier date.

The Mayor's notice dated April 13, 2001, is similarly insufficient for me to conclude that the City had time to assess the dike patrol scenario prior to when it did on April 16, 2001. The river first went above 15 feet on April 16, 2001 (Union Exhibit 3), which was the measured point at which the notice was advising the evacuation of homes. I cannot determine from this that on April 13, 2001, when the river was measured at 12.97 feet, that the decision to patrol the dikes should have been or could have been made. Anthony Hutchens, the City's dike expert, testified that each 6 inches of increased height of the river makes the flooding condition significantly more difficult. When I compare the difference in the river's height between April 13, 2001, and April 16, 2001, the river rose 2.25 feet, or 27 inches. Thus, it is possible that the picture had significantly changed from April 13 to 16, 2001, and that City was waiting to see if the river would rise above 15 feet before it decided that dike patrols were necessary. In sum, I do not have enough evidence which would lead me to the conclusion that the City could have avoided the quick decision making that occurred on April 16, 2001, and which resulted in the City not following the Policy when offering overtime to Water Department Distribution employees.

I agree with the City that its decision to use and to continue to use the Water Department Distribution employees who had experience patrolling the dikes was reasonable. Although the Union is correct that the work of patrolling was not particularly complicated, this does not persuade me that the consistency of the work was unimportant. The consistency of knowing what to look for and having that experience after patrolling the dikes was extremely important in that inexperience could lead to a missed problem which could turn into a dike breach. According to Hutchens, any breach would be extremely difficult to stop. Therefore, I find the City's failure not to pull those employees less senior than the Grievants off of their initial patrol duty so as to offer patrol work to the more senior Grievants did not violate Article 19.

However, once the shifts had been established and the patrols were going forward with experienced people, I find that the City went beyond the time necessary to cover this emergency when, on April 19, 2001, it offered overtime to Tammy Roellich. Roellich, who has less seniority than both of the Grievants, received her first opportunity to do patrol work on April 19, 2001, because someone else who had signed up on April 16, 2001, had a conflict on April 19, 2001, and the City needed to fill that one person's patrol slot. At that point in time, it seems to me, the need for quick action was over. The patrols had been established three days prior and the City was in a position to look to the Policy to determine to whom to next offer patrol work. Therefore, the City should have been following the Policy by April 19, 2001, and it should have offered the one open patrol slot to the Water Department Distribution employee who was not already patrolling and who had the most seniority. In this case, that would have been Grievant Stremcha.

Remedy.

I agree with the Union that overtime and/or the equivalent compensatory time at Grievant Stremcha's option is consistent with Article 12, Section D, of the Agreement. Therefore, that Article should be followed. I also agree that Stremcha is entitled to an amount equal to what Roellich received, i.e., 24 hours, and which corresponds with what the City offered to Roellich to perform dike patrol during the week of April 16, 2001.

AWARD

Based upon the foregoing and the record as a whole, it is the decision and award of the undersigned Arbitrator that the City violated Article 19 when offering flood patrol work to Water Department Distribution employees during the week of April 16, 2001, resulting in a loss of overtime to Grievant Stremcha. Therefore, that grievance is sustained.

The City is directed to compensate Stremcha with 24 hours of paid overtime at that rate in effect for Stremcha on April 19, 2001, or, at Stremcha's option, the equivalent in compensatory time, and pursuant to Article 12, Section D. I shall retain jurisdiction until April 12, 2002, to resolve any disputes which may arise over the application of this remedy.

Regarding the grievance filed by Grievant Italiano, that grievance is denied.

Dated at Eau Claire, Wisconsin this 13th day of March, 2002.

Stephen G. Bohrer /s/

Stephen G. Bohrer, Arbitrator.