BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**EAU CLAIRE CITY EMPLOYEES LOCAL 284,
AFSCME, AFL-CIO**

and

CITY OF EAU CLAIRE

Case 253
No. 61225
MA-11858

(Grievance No. 2001-9)

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.

Mr. Jeff Hansen, Assistant City Attorney, City of Eau Claire, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide Grievance 2001-9. Hearing on the matter was held on August 22, 2002 in Eau Claire, Wisconsin. The hearing was not transcribed. The parties filed briefs by October 25, 2002. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union frames the issue as follows:

> In light of Arbitrator Richard McLaughlin's award dated November 27, 2001, did the City violate the contract when it denied the grievants two hours of call-in overtime pay on November 14, 2001? If so, what is the appropriate remedy?

The City frames the issues as follows:

> Did the City violate the collective bargaining agreement or the award of Arbitrator McLaughlin dated November 27, 2001 when it paid one hour, rather than two hours of overtime to the grievants for their additional work on November 14, 2001?

Having reviewed the record and arguments in this case, the undersigned finds that the following issue is appropriate:

> Did the City violate the collective bargaining agreement when it paid one hour of overtime rather than two hours of recall overtime to the grievants for their work on November 14, 2001 before 8:00 a.m.? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2001-2004 collective bargaining agreement contains the following pertinent provisions:

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.
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> . . .
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> *Section 5*. Employees who are recalled to work after the completion of their regular work day by their supervisor shall receive a minimum of two (2) hours pay for each call.

BACKGROUND

Early on January 18, 2001, ten Street Division employees were called at home by City representatives and told to report to work to salt and sand the roads. The employees did as directed and reported to work around 6:30 a.m. Their normal start time is 8:00 a.m. The City subsequently paid these employees at the overtime rate for the time that they had worked before 8:00 a.m. when their regular workday started. The Union contended this payment was incorrect, and should have instead been two hours of recall overtime pay. It subsequently grieved the matter. On November 27, 2001, Arbitrator Richard McLaughlin issued an arbitration award resolving that grievance. Therein, he framed the issue thus: "Did the City violate the contract when it did not pay ten workers two-hour recall overtime pay for January 18, 2001? If so, what is the appropriate remedy?" He answered that question in the affirmative, sustained the grievance and ordered a remedy.

FACTS

Steve Lemke is a serviceman in the City's Wastewater Collection Division. He routinely goes into work early at the City's central maintenance facility to drink coffee and talk with his co-workers. He usually arrives at work around 7:00 a.m. at which point he clocks in. Although he is clocked in, he normally does not do any work until 8:00 a.m. because that is when his workday officially starts. Additionally, even though he is clocked in, he is not in pay status until 8:00 a.m. His normal work hours are 8:00 a.m. to 4:00 p.m. He and co-worker Steve Loehnis, another serviceman, worked their regular schedule on November 13, 2001. (Unless noted otherwise, all dates hereinafter refer to 2001).

The next day, November 14, Lemke went into work about 7:00 a.m. per his normal routine. Also, per his normal routine, he clocked in when he arrived at work, even though his workday was not scheduled to start until 8:00 a.m.

Around 7:30 a.m., Wastewater Collection Superintendent Jeff Pippenger received word that a city truck had spilled sludge onto a city street. Pippenger knew that the sludge needed to be cleaned up, so he went looking in the facility for someone to go out and do it. Pippenger found Lemke in the staging area and asked him to respond to the spill, to which Lemke replied that he would. Pippenger testified that his exact words to Lemke were as follows: "Do you want an hour of overtime? We've got an emergency sludge spill that needs to be cleaned up." Pippenger further testified that the reason he remembers exactly what he said to Lemke is because that is what he always says when he asks an employee to start work before 8:00 a.m. Lemke then left the building and got a jet-vac truck to respond to the sludge spill. While he was still in the parking lot, Lemke encountered co-worker Steve Loehnis who was just arriving at work. Lemke quickly told Loehnis about the sludge spill and asked him to accompany him to the site and clean it up. Loehnis responded in the affirmative and got in the truck with

Lemke. Before leaving the parking lot at 7:45 a.m., Loehnis did not clock in or check with a supervisor about whether they wanted him to help Lemke clean up the spill. No supervisor asked Loehnis that day to go with Lemke to help clean up the sludge spill, or to start work early that day. Lemke and Loehnis responded to the sludge spill and cleaned it up.

Lemke and Loehnis were subsequently paid one hour of overtime for the work they performed on November 14 before 8:00 a.m. They took the position that that rate was incorrect, and that they should have instead been paid for two hours of recall overtime.

They subsequently grieved the City's failure to pay them two hours of recall overtime for their work on November 14 prior to 8:00 a.m. The City denied the grievance. The grievance was then processed through the contractual grievance procedure and was ultimately appealed to arbitration.

This was not the first time that employees who were already on site started work early. It has happened before. What follows is a listing of previous instances where employees who were already on site started work before 8:00 a.m.

In the following instances, the employees who were already on site and started work early were paid one hour for doing so. First, Lemke and Loehnis started work early on July 3, 2001. In that instance, they were paid one hour of overtime for their work prior to 8:00 a.m. They did not grieve that payment. Second, Lemke started work prior to 8:00 a.m. on November 16, 1999. In that instance, he requested two hours of overtime for his work that day, but his supervisor, Jeff Pippenger, disallowed the request. After his request for two hours of overtime was disallowed, Lemke changed his time sheet to request one hour of overtime for the occasion. That request was granted. Lemke did not grieve that payment. Third, Bob Horlacher, the president of the union, testified that he has started work before 8:00 a.m. on several occasions and when he did, he was paid one hour for doing so. Fourth, Supervisor Pippenger and his predecessor, Mike Barnhardt, both testified that in all the instances where employees who were already on site started work before 8:00 a.m., the employees were paid one hour of overtime for their work prior to 8:00 a.m. – not two hours of overtime. Barnhardt held that supervisor job for seven years, and Pippenger has held it for the last six years.

The only testimony which differed from the foregoing pattern of employees getting paid one hour of overtime for early starts when they were already on site came from bargaining unit employee Bruce Troutman. When he was on the sewer crew several years ago, he also started work early on several occasions when he was already on site. He testified that in all those instances, he wrote down two hours on his time sheet, and he assumed he was paid two hours of overtime for his work on those occasions. Pippenger testified that when he reviewed Troutman's time sheets between 1996 and 2000, he could not find any instance where

Troutman was paid two hours of overtime for early work (i.e. starting work before 8:00 a.m). Following the arbitration hearing, the parties notified the arbitrator in writing that they had investigated Troutman's 1996-2000 payroll records to determine whether he was paid one hour or two hours of overtime for early work when he was already at the shop, and that they "agree[d] that the results of this investigation were inconclusive. . ."

Both the City's current Human Resources Director, Dale Peters, and his predecessor, Everett Foss, testified that the recall provision in the parties' collective bargaining agreement has previously applied to just those factual situations where an employee left work for the day and was called back in to work to perform additional work, and has not applied to factual situations where an employee was already at work. Foss held that job for 23 years, and Peters has held it for the last seven years.

POSITIONS OF THE PARTIES

Union

The Union contends that the City violated the collective bargaining agreement when it failed to pay the grievants two hours of recall overtime for their work prior to 8:00 a.m. on November 14, 2001. According to the Union, that work fell within the scope of the recall provision. It elaborates on that contention as follows.

As was just noted, the Union sees this case as a recall case, so it therefore relies on the recall provision found in Article 14, Section 5. In its view, that provision is applicable here because of the following record facts: on November 13, the two employees involved herein finished their regular shift at 4:00 p.m. and then went home. The next day, November 14, before their regular shift started at 8:00 a.m., they started work early. Specifically, Lemke was asked to start work early by his supervisor (Pippenger) and Lemke, in turn, asked Loehnis to help. As the Union sees it, it is self-evident from these facts that these two employees were recalled to work prior to the official 8:00 a.m. start of the work day, so the recall provision should apply.

In the Union's view, it is not trying to plow new interpretive ground here concerning the recall provision. It avers that Arbitrator McLaughlin accepted the Union's argument in this regard in a recent case between the parties. The Union believes that the McLaughlin Award is *res judicata* and controlling herein. According to the Union, that award stands for the proposition that the Employer has to pay recall pay anytime an employee works after the completion of a regular day, but prior to the start of the next work day. Building on that premise, the Union submits that there are numerous similarities between the facts in the McLaughlin case and the facts in this case. First, the Union maintains that in both cases, all the employees were from the same local and were covered by the same collective bargaining

agreement. Second, the Union asserts that in both cases, all the employees had finished their normal shifts on the previous day and had gone home. Third, the Union avers that in both cases, all the employees were then recalled to perform work "after the completion of their regular work day." Fourth, the Union contends that in both cases, all the employees were asked by their supervisors to perform work due to unforeseeable circumstances. Fifth, the Union maintains that in both cases, all the employees were on unpaid personal time when their supervisors asked them to work. As the Union sees it, these factual similarities should be sufficient for this case to be controlled by the McLaughlin Award.

Having just noted these similarities between the facts in the McLaughlin case and the facts in this case, the Union acknowledges the following factual difference: in this case, the employees did not get called at their homes and get asked to come in to work; instead, they were already at work and Lemke was asked, in person, to start work early. According to the Union, that factual difference should not result in a different outcome in this case than there was in the McLaughlin case. The Union notes in this regard that at the hearing, the City admitted in their opening statement that it was upset with the McLaughlin Award. In the Union's view, the City's denial of recall pay in this instance was nothing more than a blatant attempt to circumvent that award, and shows the City's resentment and frustration with it.

Next, the Union argues that if the arbitrator does not find the McLaughlin Award applicable here, it will lead to an absurdity. The absurdity the Union is referring to is this: had no employees been at work early on November 14, then management would have had to call employees at their homes and told them to report to work to perform the emergency work. The Union avers that if that had happened (i.e. the Employer had called the employees at home), there is no question that the City would have paid them two hours of overtime recall pay.

With regard to the City's past practice argument, the Union contends that in this case there is a mixed practice. To support that assertion, it relies on the letter which Staff Representative Steve Day sent to arbitrator following the hearing which indicates in pertinent part that "the parties agree that the results of [their] investigation were inconclusive. . ."

The Union argues in the alternative that even if the City did prove that a practice exists of paying just one hour of overtime to those employees who start work before 8:00 a.m., such a practice should not justify reading the recall provision (Section 5) out of existence.

The Union asks that the arbitrator sustain the grievance and order that the City pay the grievants two hours of recall overtime (less the amount of overtime they were already paid).

City

The City contends it did not violate the collective bargaining agreement when it did not pay the grievants two hours of recall overtime pay for their work on November 14 prior to 8:00 a.m. It is the City's position that the two employees were contractually entitled to just one hour of overtime, which is what they were paid. It elaborates on this contention as follows.

First, the City addresses the question of which contract provision applies here. The City avers that the contract provision applicable here is Article 14, Section 1. Building on that premise, the City notes that that section specifies, in pertinent part, that a minimum of one hour is to be paid for all overtime. The City submits that what happened here was that the grievants simply extended their workday by 15 minutes by starting work early, so their work that day is covered by Section 1. That being so, the City believes those employees are contractually entitled to just one hour of overtime pay (pursuant to that section).

The City maintains that the Union's reliance on Article 14, Section 5 (the recall provision) is misplaced because that section does not apply here. In support of that notion, it maintains that Section 5 is intended to provide extra pay to employees who are recalled back to work after completing their regular work day and punching out. It avers that did not happen here because the grievants were not recalled to work in any sense of the word. In its view, that result should be self-evident from the following facts: First, they had already reported to their place of employment in preparation for their workday and one (Lemke) had even punched in. Second, they were there of their own volition and not at the special request of the City. Third, they had not been called or summoned from home or anywhere away from the workplace. The City asserts that under these circumstances, Section 5 does not apply here because the employees were not recalled to work.

Next, the City disputes the Union's assertion that the McLaughlin Award is controlling herein. In its view, extending the McLaughlin decision to this case is an untenable stretch unsupported by the facts in this case, the contract language, and his decision. First, the City argues that a reading of the McLaughlin decision shows that the fact situations in that grievance and the instant case are profoundly different. To support that premise, it notes that in the prior case, ten employees were telephoned at home and called in early to work. In this case though, no such telephone call or summons call took place in any form or fashion; instead, the employees had already reported to the workplace. Second, aside from this factual difference, the City contends that the text of that decision does not support the Union in this instance. To support that premise, it notes that McLaughlin specifically found that a recall under Section 5 refers to a phone call received by an employee after the completion of their regular workday. Third, the City asserts that the Union seems to have forgotten the reasoning it used in the McLaughlin case. It notes that in that case, the Union said that the two-hour

recall provision (Section 5) was intended to compensate workers for the "higher inconvenience" of being called at home late at night or early in the morning to come to work outside of normal hours. This was different, the Union told McLaughlin, than the inconvenience of having to work in addition to a regular work shift. The City points out that this argument was noticeably absent in this case. In the City's view, what the Union wants the arbitrator to do is leapfrog from the McLaughlin fact situation to this case, even though it does not match their prior argument. It asserts that there was no "higher inconvenience" in this case, as there was no call in. Rather, there was simply a request for an employee who had already arrived at his work site and had actually punched in (Lemke) to start work 15 minutes early. As for Loehnis, the City points out that he was not even asked to go to work early by a supervisor; instead, he went on his own volition.

Next, the City makes a past practice argument. It contends that in the past, the City has paid employees who start work early one hour of overtime pursuant to Section 1 of the overtime provision. To support that contention, it cites the following record evidence. First, it relies on the testimony of the grievants' current and prior supervisor that for the past 13 years, they have used Section 1 of the contract to pay overtime for employees who had already reported to work and were then asked to work time in addition to their regular work day between 6:00 a.m. and 8:00 a.m. The City also relies on their testimony that recall pay under Section 5 was never authorized and they were not aware of any instances where Section 5 recall pay was used. Second, it relies on the testimony of the City's current and former Human Resources Director that for the last 30 years, the Section 5 recall pay provision has only applied to those factual situations where employees were called at their homes and told to come in to work; not to factual situations where the employees were already at work. Third, the City calls attention to the fact that the factual circumstances present here are identical to what happened on July 3, 2001, when the same two employees started working before 8:00 a.m. In that instance, the employees were paid one hour of overtime, not two hours, and they did not grieve.

The City submits that given the existence of the foregoing evidence, it was incumbent on the Union to prove their assertion that employees who started work early were paid two hours of recall overtime pay for doing so. The City argues that the Union failed to do that. According to the City, the Union did not provide any competent evidence that employees were paid two hours overtime for working less than that amount of time between 6:00 and 8:00 a.m. in situations where they had already reported to the workplace. The City stresses that the only testimony in support of the Union's contention was that of Bruce Troutman. While Troutman thought he was paid under Section 5 in the past for his early work, he provided no dates or instances where it had occurred. Additionally, after the hearing was over, the parties examined his time sheets and they agreed "that the results of this investigation were inconclusive." The conclusion which the City draws from this is that no proof exists to support Troutman's contention that he was paid two hours of recall overtime pay for his early work.

Based on the foregoing, the City submits that two hours of recall overtime pay was not warranted here. It therefore asks that the grievance be denied.

DISCUSSION

At issue in this contract interpretation dispute is whether the grievants were paid correctly for their work on November 14, 2001 before 8:00 a.m. They were paid one hour of overtime for that work. The Union contends they should have instead been paid two hours of overtime for that work in accordance with the recall provision. Based on the rationale which follows, I find that the grievants were not recalled to work on the day in question. Building on that notion, I further find that since they were not recalled to work, they were not entitled to two hours of recall overtime pursuant to Article 14, Section 5; instead, they were entitled to one hour of overtime pursuant to Article 14, Section 1, which is what they were paid. Thus, they were paid correctly.

I begin with a description of how this discussion is structured. Attention will be focused initially on the contract language cited by the parties. They relied on two contract provisions: Article 14, Sections 1 and 5. Those provisions will be addressed in inverse order. After that language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves an alleged past practice.

My discussion on the contract language begins with the following introductory comment. While the contract language has yet to be reviewed, it is noted at the outset that the two contract provisions involved herein are contained in the overtime article. Since both sides rely on provisions in the overtime article, it is apparent that the grievants' work on the day in question prior to 8:00 a.m. qualifies for overtime. That said, the real question in this case is how much overtime. The two contract provisions just identified specify different amounts: Section 1 specifies a minimum of one hour, while Section 5 specifies a minimum of two hours. Obviously, the question is which provision applies here: Section 1 or Section 5. The focus now turns to making that call.

I begin by looking at Section 5. That section specifies that "Employees who are recalled to work after the completion of their regular work day by their supervisor shall receive a minimum of two (2) hours pay for each call." This section provides that employees who are recalled to work receive extra pay for doing so. The amount of extra pay they get is a minimum of two hours. While the term "recalled" is not explicitly defined, its meaning can nonetheless be inferred from its usage: a recall occurs when an employee is called back to work after completing their regular work day.

That said, the dispute in this case is not over the meaning of Section 5; it is over its applicability to the instant factual situation. Simply put, does that clause apply here? I find it does not. Here's why. In his Award, Arbitrator McLaughlin found that in order for there to be a recall under Section 5, there had to be a phone call from the Employer telling the employee to come in to work. Thus, getting a phone call is a prerequisite to getting recall pay. In so finding, he opined as follows:

> The language of that section refers to a phone call summoning an employee to work. The reference to "recalled to work" has no apparent reference to a specific shift. Rather, it refers to a phone call received by an employee "after the completion of their regular work day." This is clarified by the closing reference to "each call.". . . [page 7]

In the case McLaughlin dealt with, the employees involved were called at home and told to come into work early. Here, though, that did not happen. Specifically, there was no phone call to the employees' homes telling them to report to work early. On the day in question, both employees had reported to work as if it was a normal workday which started at 8:00 a.m. From their perspective, it was a normal workday because, as just noted, they were not called at home and told to come in to work early. After Lemke arrived at work and punched in, Pippenger asked him if he would go and clean up the sludge spill. The key word in the previous sentence is "asked". Pippenger "asked" Lemke, rather than directed, because the regular work day had not yet started for Lemke (i.e. it was not yet 8:00 a.m.). Since it was not yet 8:00 a.m., Lemke did not have to do any work. Had it been after 8:00 a.m., and the regular work day had commenced, Pippenger could have simply directed Lemke to go clean up the sludge spill. Here, though, Lemke had a choice. He could have said no to Pippenger in which case his regular work day would have started at 8:00 a.m. However, by saying yes to Pippenger, Lemke knew that he was voluntarily starting his workday 15 minutes early. While there can be factual situations where an employee who starts work 15 minutes early is considered to have been recalled, this is not that factual situation. Once again, the reason it is not is this: Lemke was not called at home and told to come in to work early. My reading of the McLaughlin Award is that if Pippenger had called Lemke at home and directed him to come in to work early, then the outcome herein would have been different and that would have been a recall even if Lemke had started working at 7:45 a.m. – just 15 minutes before the start of the regular work day. However, in this case, Lemke's early start on November 14, 2001 was not a recall because he was not called at home and directed to come in to work. Consequently, the recall provision (Section 5) does not apply to this factual situation. The same conclusion applies to Loehnis. He was not called at home and told to come in to work either. Thus, he too was not recalled within the meaning of Section 5.

Since Section 5 is inapplicable here, the next question is which overtime provision is applicable. I find that the overtime provision which is applicable here is Section 1. As

previously noted, that section specifies that when an employee works overtime, they will be paid a minimum of one hour. In this case, the Employer paid the two grievants one hour of overtime pay for their work prior to 8:00 a.m. on November 14, 2001. Thus, they were paid in accordance with that contract provision.

In so finding, it is noted that this interpretation of the meaning of the contract's terms is consistent with the way it has been applied in the past. The following shows this. First, the instance involved here was not the first time Lemke and Loehnis started work before 8:00 a.m. The same thing occurred on July 3, 2001. In that instance, they were paid one hour of overtime for their work prior to 8:00 a.m. They did not grieve that payment. Lemke also started work prior to 8:00 a.m. on November 16, 1999. Although he subsequently requested two hours of recall overtime for his early start on that date, his supervisor, Jeff Pippenger, disallowed the request. He was paid one hour for his early start. He also did not grieve that payment. Second, the longtime president of the local, Bob Horlacher, testified that he has started work before 8:00 a.m. on several occasions. He acknowledged that when that happened, he was paid one hour for those early starts. Third, supervisors Pippenger and Barnhardt testified that for the last 13 years, in all the instances where employees who were already on site started work before 8:00 a.m., the employees were paid one hour of overtime for their work prior to 8:00 a.m. – not two hours of recall overtime. The only testimony which conflicted with the foregoing pattern of employees getting paid one hour of overtime for early starts when they were already on site came from bargaining unit employee Bruce Troutman. He testified that when he was on the sewer crew several years ago, and started work before 8:00 a.m., he would write down two hours on his time sheet and he assumed that is what he was paid (i.e. two hours of overtime for his work on those occasions). Pippenger testified he could not find any instance where Troutman was paid two hours of overtime for early work. Following the hearing, the parties jointly reviewed Troutman's time sheets to determine whether he was paid one hour or two hours of overtime for his early starts when he was already at the shop. After the parties completed their investigation, the arbitrator was notified in writing that the parties "agree[d] that the results of this investigation were inconclusive. . ." I interpret this statement to mean that Troutman's testimony that he was paid two hours of recall pay for his early starts was not substantiated. Since Troutman's testimony was not substantiated, there is no record evidence of employees getting paid two hours of overtime for early starts when they were already on site. However, as noted above, there is record evidence that in the past when employees were already on site and started work before 8:00 a.m., they were paid one hour of overtime pay for doing so. The Employer acted consistently with that pattern here. Hence, no contract violation has been shown.

In light of the above, it is my

AWARD

That the City did not violate the collective bargaining agreement when it paid one hour of overtime rather than two hours of recall overtime to the grievants for their work on November 14, 2001 before 8:00 a.m. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 27th day of November, 2002.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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