

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF BROWN DEER**

and

**NORTH SHORE SUBURBAN EMPLOYEES, LOCAL 1486, MILWAUKEE  
DISTRICT COUNCIL 48, AFSCME, AFL-CIO**

Case 67  
No. 61309  
MA-11887

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Appearances:

Podell, Ugent & Haney, S.C., by **Attorney Donna L. Billman**, 611 North Broadway, Suite 200,  
Milwaukee, WI 53202-5004, on behalf of Local 1486.

Davis & Kuelthau, S.C., by **Attorney Mark L. Olson**, 111 East Kilbourn Avenue,  
Suite 1400, Milwaukee, WI 53202-6613, on behalf of the Village.

**ARBITRATION AWARD**

Pursuant to the 2001-03 collective bargaining agreement between the Village of Brown Deer (Village) and North Shore Suburban Employees, Local 1486 (Union), the parties requested that the Wisconsin Employment Relations Commission designate an arbitrator to hear and resolve a dispute between regarding the proper interpretation of Article IX Hours of Work, Premium Pay and Overtime. The undersigned was so designated. A hearing in the matter was held on October 22, 2002, at Brown Deer, Wisconsin. A stenographic transcript of the proceedings was made and received on October 29, 2002. The parties submitted their initial post-hearing briefs by November 26, 2002, which were thereafter exchanged by the Arbitrator. The parties reserved the right to file reply briefs, which were received by the Arbitrator on December 12, 2002. The record was then closed.

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

## **ISSUES**

The parties were unable to stipulate to an issue or issues for determination in this case. However, they stipulated to allow the Arbitrator to state the issues in her Award based upon the relevant evidence and argument in the case, as well as the parties' suggested issues. The Union suggested the following issues:

Did the Employer violate the collective bargaining agreement when it unilaterally elected to turn overtime into compensation time for the Grievant during the pay period ending April 13, 2002? If so, what is the appropriate remedy?

The Village suggested the following issues for determination:

Did the Employer violate the provisions of Article IX, Section 8, of the 2001-03 contract when the Village Manager provided compensation to the Grievant in the form of compensatory time for work she performed on April 10 and 11, 2002, when the work had not been approved in advance by the Village Manager? If so, what is the appropriate remedy?

Having considered the parties suggestions, as well as the relevant evidence and argument in this case, the Employer's issues (although somewhat argumentative) more reasonably state the dispute between the parties and they shall be determined herein.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE IX**

#### **Hours of Work, Premium Pay, and Overtime**

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#### **Section 3 – Overtime Equalization**

Overtime shall be distributed as equally as practical.

(a) Employees in the Public Works Department and the Water Department

telephoned to report to work who do not answer the telephone or who are unwilling to report to work shall be charged with the overtime hours as though they had reported and worked. An employee who is not going to be

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at home and who so advised the respective Superintendent in advance in writing, shall not be so charged. Once all employees of the Department where the overtime has arisen have been telephoned, other bargaining unit employees shall be called in, provided there is work available which the employee can do. If the force is still insufficient, the Village shall be free to resort to other means.

- (b) Water Utility standby pay shall not be counted as overtime.
- (c) A record of each employee's overtime account shall be posted and updated on a bi-weekly basis with a copy provided to the Union Steward. Errors on this posting shall be brought to the appropriate supervisor's attention during this two (2) week period.

. . .

#### Section 8 – Overtime

Time and one-half shall be paid for all work performed by bargaining unit employees for work over eight(8) hours per day or forty(40) hours per week, and for all work performed on Saturday. Sunday and holiday work shall be compensated for at double time. The overtime rate shall be determined by multiplying the employee's hourly rate of pay by 1.5 or 2.0, respectively. Overtime must be approved in advance by the Village manager or his/her designee.

. . .

#### Section 12 – Compensation time

Compensatory time off may be used by all employees in order to provide an alternate form of compensation for overtime hours worked. Compensatory time off shall be granted in the same way as overtime pay; one(1) hour of overtime work will accumulate one and one half hours of compensatory time off or if overtime worked on Sunday or holiday at two(2) hours of compensatory time off for each hour of overtime worked. Compensatory time off may be used in lieu of receiving overtime pay. Those clerical employees who are entitled to overtime pay may elect to earn and use compensatory time off in lieu of overtime pay. Employees will not earn compensatory time off until after they have worked more than eight(8) hours on a given work day or more than 40

hours in a given work week.

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Department Head supervisors shall have the authority to grant compensatory time off, within reasonable limits, for their employees. All use of compensatory time off must be approved in advance by the employee's Department Head supervisor. When rendering decisions on the use of compensatory time off, Department Head supervisors shall take into account the amount of earned but unused vacation leave.

The use of compensatory time off is limited to a maximum of 56 hours per year. No employee may accrue compensatory time off if the balance of earned but unused compensatory time off is 56 hours. 56 hours is the maximum accumulation that can be carried at any one time. Any overtime worked following the accumulation of 48 hours of compensatory time must be compensated with the [sic] time and one-half pay. Carryover compensatory time shall be permitted, with prior approval of the Village Manager. Such carryover of compensatory time must be requested from the Village Manager no later than December 15 in order for such compensatory time to be carried over from one year to the next.

The use of compensatory time off may not be disruptive to the delivery of services to the public or to the smooth functioning of the organization. Compensatory time off should not be used in those instances where the employee's absence would pose an additional work load burden on fellow employees. The Department Head will make a reasonable decision regarding disruption of service delivery. Vacation use by other employees, which has already been scheduled, will receive priority consideration over the use of compensatory time off.

When Compensatory time off is used, it is the responsibility of the Department Head to make arrangements with fellow employees to cover the absent employee's area of responsibility during the absence, in much the same way as an absence due to illness or vacation.

Department Head supervisors shall be responsible for maintaining records on the accumulation and use of compensatory time off for their employees. For the purposes of earning and using compensatory time off and maintaining records thereof. [sic] Department Heads shall use a 12-month period beginning on January 1 and ending on December 31.

The accumulation and use of compensatory time off shall be reflected on the employee's bi-weekly time sheets. Overtime hours worked should be shown as "comp" hours on the right side of the time sheet. The use of compensatory time

off should be shown as “comp” hours on the left side of the time sheet

. . .

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### FACTS

The Grievant, Peg Duehring, has been employed by the Village for the past 13 years. At the time the instant grievance arose, Duehring was employed as an Administrative Assistant in the Park and Recreation Department (Park and Rec) located in the basement of the Village Hall. Duehring's immediate supervisor at all times relevant hereto has been Virginia Goode, Department Head of Park and Rec. Russell Van Gompel has been employed by the Village as Village Manager since 1998.

In 2001, Duehring was allowed to carry over 55.14 hours of compensation time pursuant to Article IX, Section 12, and she carried that amount forward without change until the pay period ending March 16, 2002. On February 18, 2002, Village Manager Van Gompel issued the following memo to Park and Rec Department Head Goode, which read in relevant part as follow:

. . .

In light of the proposed reduction in Shared Revenue from the State of Wisconsin, I instructed Department Heads to minimize the use of overtime to emergency situations.

You are instructed to discontinue the use of overtime in your department unless you have prior authorization from me.

If you have any questions, please contact me.

This memo was not distributed to bargaining unit employees. In addition, this memo was undisputedly a departure from Van Gompel and his predecessors' past practice over at least the prior 13 years of delegating the authority to approve overtime to Village Department Heads. Van Gompel issued the above memo following then-Wisconsin Governor McCallum's proposal to eliminate shared revenue from the State budget in early 2002, which Van Gompel felt would seriously affect the Village's ability to pay mounting costs for overtime. Van Gompel stated herein that he also told Department Heads (at a meeting with Department Heads) of his decision to change the past practice regarding authorization of overtime. 1/ The Village never notified the Union of this change in past practice.

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*1/ The Village did not proffer any evidence herein to show that Goode was present at the Department Head staff meeting about which Van Gompel testified. Goode did not testify herein. The Governor's proposal to eliminate shared revenue never became a reality.*

On February 20, 2002, at 5:31 p.m., Department Head Goode e-mailed Van Gompel the following message:

. . .

I received your memorandum, dated February 18, 2002, on the use of overtime. I am requesting your authorization for the use of overtime for Peg Duehring for this evening for the purpose of taking 4<sup>th</sup> of July minutes.

Please advise. Thank you.

Despite the fact that the above-quoted e-mail was sent after business hours on the day that the overtime was to be worked, Van Gompel granted the authority for Duehring to work the extra hours on February 20<sup>th</sup> and she received overtime pay therefor.

During the pay period ending March 16, 2002, Village records show that Duehring worked 3.75 hours of comp time (which equaled 5.63 usable hours). Also during this pay period, Duehring used 7.25 hours of comp time which resulted in her accumulation of total compensatory time hours of 53.52 hours, down from the prior total of 55.14 hours.

On Friday, March 22, 2002, at 5:03 p.m., Department Head Goode sent the following e-mail to Van Gompel concerning overtime use in her Department:

. . .

I am requesting up to 5 Hours Overtime for Peg Duehring on **Saturday, March 23**. These are tasks that need to be completed through Thursday, March 28.

Summer Program Flier, 3 Deposits, Summer Staff Confirmation Letters,  
Senior Citizens Club Membership List and April Senior Newsletter

Please confirm. Thank you.

On Monday, March 25, 2002, at 9:31 a.m., Van Gompel responded to Goode's e-mail of March 22, as follows:

. . .

We need to sit down and talk about requesting and utilizing overtime. These are

tasks that need to be completed during regular working hours. In addition, it is not practical to send a request at 5:03 p.m. on the day before the request and expect that an answer can be provided. This request is denied.

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After receiving the e-mail from the Village Manager, Goode told Duehring that her (Goode's) request for overtime hours for Duehring on March 23<sup>rd</sup> had been denied. 2/

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*2/ Duehring does not receive the e-mails that are sent between Van Gompel and her supervisor Goode. In addition, Duehring does not have access to Van Gompel's calendar or work schedule on a regular basis.*

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On March 30, 2002, Duehring finished preparing and submitting her bi-weekly time records for the prior pay period. Although, Duehring had originally claimed five hours of overtime for March 23, Duehring crossed off the five hours of overtime she had claimed for March 23 and placed five hours in non-paid status for March 23 prior to handing in her bi-weekly time record for the pay period ending March 30, 2002. Duehring stated she did this because she knew Van Gompel had already denied Goode's overtime request. Van Gompel signed Duehring's bi-weekly time record for that pay period because Goode was on vacation. 3/

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*3/ Normally, the employees' bi-weekly time records are signed by their Department Head Supervisors, not the Village Manager.*

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It should be noted that Duehring did not file a grievance regarding Van Gompel's denial of overtime for her work on Saturday, March 23, 2002. Duehring admitted herein that she was aware that Van Gompel had to approve overtime in advance of its being worked due to Van Gompel's denial of her overtime for March 23<sup>rd</sup> and she admitted that as of March 23<sup>rd</sup>, she knew that her Department Head no longer had the authority to approve overtime.

On March 28, 2002, at 3:35 p.m., Duehring sent the following request directly to Van Gompel for overtime work the evening of March 28, as well as the following Saturday morning. Duehring sent this e-mail directly to Van Gompel because her immediate supervisor, Department Head Goode, was on vacation at the time. The e-mail read in relevant part as follows:

. . .

I am continuing to work on minutes and will need the rest of the day to do so.

Our summer program flier is due to our graphics art person by first thing Monday morning, timesheets are due by 10:00 am Monday, and 3 deposits need to be completed. There are many more tasks at hand, but this is what I find

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necessary to complete. Due to the holiday tomorrow, I need extra time to complete these tasks and since Ginny is out of town, I am requesting extra time. I am able to stay after hours tonight or come in on Saturday morning.

Please advise.

. . .

On Thursday, March 28, 2002, at 5:29 p.m., Van Gompel responded to the Duehring's e-mail of that same day, as follows:

. . .

In light of Ginny being on vacation, I will authorize overtime use/pay up to 8 hours. This is not to be viewed as a permanent authorization of overtime. As I stated to both you and earlier in a memo to Ginny, the use and pay of overtime must have prior approval by me. I will be discussing overtime issues with Ginny when she returns from vacation.

It is undisputed that Van Gompel never disciplined Department Head Goode for her failure to follow his instructions contained in his February 18<sup>th</sup> memo and in his later e-mails to Goode, regarding the authorization and use of overtime. Van Gompel stated herein that he merely spoke to Goode regarding the matter during her evaluation.

On April 10, 2002, at 4:39 p.m., Department Head Goode sent Van Gompel the following memo requesting that Duehring be allowed to work overtime on April 10 and April 11:

. . .

I am requesting overtime hours for Peg Duehring for the following dates:

Wednesday, April 10 – Continue Preparation of Softball League  
Materials and Begin 4<sup>th</sup> of July Committee Minutes (2 Hours)

Thursday, April 11 – Issuance of Softball League Materials and  
Assistance at Softball Managers' Meeting (2 Hours)

Please confirm. Thank you.

Duehring stated that Goode asked her to work extra hours prior to sending the above-quoted e-mail and that she had agreed to do so. At the time Goode sent the e-mail to Van Gompel, Duehring was unaware that Van Gompel had already left the office for a conference

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out of the office and would not return until April 15, 2002. 4/ Duehring did not receive authorization from Van Gompel before she worked the extra hours listed above on April 10 and 11, 2002.

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*4/ The Village submitted Van Gompel's calendar from his palm pilot which failed to indicate that he would be absent on the afternoon of April 10, but did show his attendance at a conference in Wisconsin Dells on Thursday, April 11 and Friday, April 12, 2002.*

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On or about April 13, 2002, Duehring prepared and submitted her bi-weekly time record to Department Head Goode and Goode signed it. On that document, Duehring claimed two hours of overtime pay for April 10 and two hours of overtime pay for April 11. 5/

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*5/ On this record, it shows that Duehring claimed and received overtime pay for two and one-half hours worked on April 3, and two and one-half hours worked on April 6. No documents were placed in the record regarding whether Van Gompel approved the five hours of overtime that Duehring worked on April 3 and April 6.*

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After Van Gompel received this bi-weekly time record, he denied Duehring's request (approved by Goode) for the four hours of overtime pay for April 10 and 11, noting on the bi-weekly time record that those hours should be paid as comp time. Van Gompel failed to otherwise notify either Goode or Duehring that he had changed Duehring's bi-weekly time record after its submission. Duehring found out Van Gompel had denied her overtime for April 10 and 11 when she received her paycheck on April 15<sup>th</sup>.

Van Gompel admitted herein that he was unaware whether Goode had had a staff meeting with her employees to explain the changed Village policy regarding overtime authorization and usage following his February 18, 2002 memo. Van Gompel stated that the contract does not contain any verbiage allowing the Village to deny overtime for financial reasons and that Duehring had no contractual responsibility to go over her supervisor's head and ask Van Gompel directly for approval for overtime pay. Van Gompel stated that it was Goode's responsibility to get approval in advance from him for Duehring's overtime work. Duehring stated that she grieved Van Gompel's denial of overtime pay for April 10 and 11 because the request for overtime was timely made and because Van Gompel had had plenty of time to review it and rule upon it in advance, yet he failed to do so. 6/

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6/ Union Steward Deborah Gerth testified herein that she processed Duehring's grievance with Department Head Goode, per the contract, and that Goode told her that she (Goode) had been unaware that Van Gompel had changed Duehring's overtime hours on her bi-weekly time record for the

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period ending April 13, 2002, as Van Gompel had never talked to Goode about it or indicated that he had denied those overtime hours prior to Duehring receiving her paycheck. Gerth also stated that contrary to the requirements of Article VI, Grievance Procedure, Section 1, (b), the Village Manager never met with Duehring and Gerth in an attempt to discuss and settle the grievance.

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## POSITIONS OF THE PARTIES

### The Union

The Union argued that the contract language is clear on its face, that it must be enforced as written and the Arbitrator must give the contractual words their ordinary meaning as a different intent was not clearly expressed by the parties. Therefore, in the Union's view, no arbitral interpretation of the contract language in dispute in this case is necessary. Thus, Union urged that the Employer violated the labor agreement when it unilaterally turned the Grievant's overtime into compensatory time. Indeed, the Employer has inappropriately attempted to read into the contract provision at issue, Article IX, Section 12 – Compensation Time, the provisions of Article XII, Section 8, which are not in dispute in this case.

Here, the Grievant, Peg Duehring, had the right to "elect to earn" comp time or overtime pursuant to Section 12 of Article IX. In the Union's view, Section 8 of Article IX cited by the Employer does not demonstrate that the employee must get the Village Manager's approval for overtime in advance, only that the Village Manager "must receive the approval for overtime from the employee's supervisor." Although the Village Manager told Department Heads that he alone should authorize overtime after January 1, 2002, there was no evidence that Duehring received this directive or knew of it at that time.

In the instant case, Duehring's department head, Ginny Goode, told Duehring she was needed to work extra hours during the week ending April 13, 2002. Duehring agreed to work extra hours and after she had done so, she marked her time sheet with her election to receive overtime. Duehring thus reasonably expected to receive overtime, based on her past 13 years of work with the Village given the fact that Goode approved her time sheet. To claim that the employee could be denied her election to be paid overtime because the contract also requires approval of overtime before it is taken, in the Union's view, is to charge the employee with the supervisor's duty. The Department Head Supervisor is the one who is responsible to get prior approval for overtime, not the employee. Thus, the Union argued that Duehring should not be penalized for her supervisor's failure to follow instructions.

The fact that Duehring once asked the Village Manager for overtime approval when her

supervisor was out of town, in the Union's view, does not demonstrate that Duehring had any on-going duty to assure that she had gained approval for her election of overtime thereafter. In all the circumstances, the Union asserted that it would be inequitable to penalize Duehring

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because her department head failed to follow the Village Manager's directions to supervisors regarding the approval of overtime. The Union also contended that the Village should not be allowed to argue that the appropriate contract provision, Section 12, is ambiguous by suggesting that Section 8 must be read into Section 12. Therefore, the Union sought an award that the Village pay Duehring the appropriate number of hours of overtime plus interest and that the Arbitrator issue a cease and desist order for future activity.

### **The Village**

The Village urged that Article IX, Section 8, requires that overtime "must be approved in advance" by the Village Manager or his designee. In this case, the Village Manager's memo of February 18, 2002, clearly revoked his prior delegation to Department Head Supervisors to authorize overtime. It is also clear that on February 20, 2002, Department Head Goode sent an e-mail to the Village Manager acknowledging her awareness of the Village Manager's February 18<sup>th</sup> memo and its meaning. In addition, the Village noted that on Friday, March 22, 2002, at 5:03 p.m., Department Head Goode requested overtime authorization for Duehring to work the next day, Saturday, March 23<sup>rd</sup>. As the Village Manager was not at work to pre-approve the overtime, he denied it upon his return to the Village office on March 25<sup>th</sup>. Goode then informed Duehring that her overtime for March 23<sup>rd</sup> had been denied and Duehring then changed her own time sheet to reflect that the hours she worked on Saturday, March 23<sup>rd</sup> should be non-paid.

The Village urged that the above facts as well as the fact that Duehring did not grieve the Village Manager's denial of overtime for her work on March 23<sup>rd</sup> showed that Duehring had no right to rely upon any prior "practice" whereby Goode had authorized overtime payments. In addition, the Village noted that on March 28, 2002, Duehring requested overtime approval directly from the Village Manager, two days before she was to work the overtime, in the absence of her supervisor. In his e-mail okaying the overtime, the Village Manager made it clear to Duehring that his authorization of Duehring's overtime was "not to be viewed as permanent authorization . . . ." It is in this context that Goode's request of the Village Manager for Duehring to work overtime on April 10 and 11, sending an e-mail to the Village Manager on April 10<sup>th</sup> at 4:39 p.m. requesting same, must be analyzed.

The Village argued that the contract language is clear and unambiguous and that Article IX, Section 8, which controls the instant case, clearly states that overtime must be approved in advance by the Village Manager or his designee. The Village noted that Duehring knew that the Village Manager had changed the Village policy regarding the authorization of overtime when she was denied overtime for her work on March 22<sup>nd</sup>. In addition, the Village

urged that employees may only elect to receive compensatory time if they have received prior approval to work overtime under Article IX, Section 12. In this regard, the Village noted that Article IX, Section 12, states that the employee must be “entitled to overtime pay” before the employee can elect to receive compensatory time rather than overtime. Thus, acceptance of

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the Union’s arguments herein would abrogate the condition precedent (prior authorization of overtime) which alone can trigger the employer’s right to elect to receive compensatory time.

Furthermore, the Village noted that where a labor agreement requires pre-approval of overtime, failure to comply with the need to receive prior approval can be grounds for discipline of the employee. In this regard, the Village cited CITY OF DULUTH, 113 LA 1153 (NEIGH, 2002). Thus, the Village urged that the contract language and past practice would have allowed the Village Manager to discipline Duehring for her failure to receive prior approval for overtime or deny her payment for the time worked. Despite this fact, the Village Manager did not discipline Duehring or deny her payment but treated her fairly and paid her by granting her some compensatory time and some overtime. In all the circumstances of this case, Duehring was not entitled to rely on Goode’s approval of her overtime work on April 10 and 11.

In addition, the Village Manager’s approval of compensatory time, in this case four hours, does not entitle Duehring to elect to take any portion of it as overtime. Here, under the labor agreement, Duehring could only elect compensatory time if overtime had already been approved in advance. This did not happen in this case. Therefore, Duehring is not entitled to elect to convert any portion of the compensatory time granted her for April 10 and 11 to overtime pay.

Further evidence in support of the Village’s claims can be found in Section 12 of Article IX which states “compensatory time shall be granted in the same way as overtime pay.” Thus, the Village contended that prior approval must be given by the Village Manager or his designee and only thereafter may the employee make the one-way choice or election to convert authorized overtime into compensatory time. The Village noted that the overtime Duehring worked on April 10 and 11 was like the overtime she worked on March 23<sup>rd</sup>, when the Village Manager denied her overtime request. There, Duehring conceded that the time she worked should be unpaid and she failed to grieve the situation. By failing to grieve the March 25<sup>th</sup> denial of overtime by the Village Manager, Duehring and the Union acknowledged the Village Manager’s discretion to deny same and this put Duehring on clear notice that any future attempts by her to bootstrap unauthorized extra work time into overtime pay would be denied. As Duehring’s attempts to distinguish the April 10 and 11 extra work from the time she worked on March 23<sup>rd</sup> are not persuasive. The Village therefore urged that the grievance be denied.

**In Reply**

**The Union**

The Union noted that the responsibility to gain prior approval for overtime pay was Duehring's supervisor's responsibility and Goode's failure to gain such prior approval for Duehring's work on April 10 and 11, 2002, did not give the Village the right to violate the

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contract. Although the Village argued that the central issue in this case is whether Duehring had the Village Manager's prior approval to work overtime on April 10 and 11, this is a misstatement of the issue, in the Union's view. Rather, the central issue in this case is whether the Village violated the contract by changing Duehring's election to be paid overtime after her supervisor had approved that overtime. Although the Union admitted that Duehring had been told by the Village Manager before April 10 that she needed to gain prior approval for overtime, the Union noted that Duehring never received a copy of the Village Manager's memo to Village Supervisors and that she was never specifically instructed by the Village Manager to get advance approval for overtime.

The Union argued that the cases cited by the Village were not on point. Regarding CITY OF DULUTH, SUPRA, the Union noted that the employee involved in that case had two supervisors while Duehring only had one. In addition, Duehring is only required to gain approval of overtime pay from her supervisor. Duehring had the right to assume that Goode had received Van Gompel's approval. In the UNIVERSITY OF ILLINOIS, SUPRA, cited by the Village, the employee repeatedly punched in early or stayed late without any approval from management. Here, Duehring understood that she had to have advance approval to work overtime and she received this from her supervisor who was responsible to get approval from the Village Manager. Had Duehring gone over Supervisor Goode's head to get the Village Manager's advance approval, this could have constituted insubordination.

Although the Union admitted that the Village Manager had the right to approve or deny overtime requests, the Union distinguished the Village Manager's denial of overtime pay to Duehring for work she performed on March 23, 2002, on its facts from his denial of overtime pay for work Duehring performed on April 10 and 11. In the former case, Duehring had not handed in her time sheet on which she had elected overtime before the overtime was denied by the Village Manager. Therefore, Duehring did not believe, based on the facts of the March 23<sup>rd</sup> situation, that she had a grievable case. In the latter case, Duehring was following her supervisor's request and okay to work extra hours. In addition, the Union urged that the Village's argument that Duehring could have been disciplined for working overtime and denied comp time for the extra time she worked was a baseless argument. On this point, the Union noted that the law does not allow for such an outcome.

The Union sought that the grievance be sustained, that Duehring be made whole by payment of overtime pay to her for the hours that the Village Manager credited her with compensatory time and that a cease and desist order for the future issued against the Village.

### **The Village**

The Village argued that the Union's arguments focused too narrowly on the phrase in Article IX, Section 12, "may elect to earn," ignoring the rest of that Section. In this regard, the Village noted that the Union's construction of the contract renders the rest of Sections 8

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and 12 of Article IX meaningless. As such, the Union's interpretation of the language in this case is improper under well-accepted rules of contract construction. In addition, the Union's construction of the contract fails to give proper weight to the word "entitled" in Article IX, Section 8 — which the Village argues means to furnish with a right or claim.

Article IX, Section 8, details how employees become entitled to overtime. Thus, Article IX, Section 8, requires that employees work 8 hours per day and more than 40 hours per week or that they work on a Saturday or Sunday and that they have approval in advance to work overtime from the Village Manager or his/her designee. Thus, the Union's argument in this case mischaracterized the Village as reading Section 8 into Section 12. Rather, the Village arguments herein are in accord with appropriate arbitral construction and interpretation, that one must read the contract as a whole and not isolate parts of the contract, that where there is a condition precedent in a contract clause (that must be met before another contract clause can be satisfied) these two clauses must be read together. Thus, the condition precedent in Section 8, is whether the employee has received advance approval from the Village Manager or his designee to work overtime prior to the working of that extra time and this condition must be satisfied before the employee is entitled to elect to receive compensatory time in lieu of overtime pay. Here, Duehring had no right to elect overtime pay because she never received advance approval to work overtime from the Village Manager or his designee. As the election in Section 12 is only from approved overtime to compensatory time if the employee is otherwise entitled to overtime, Duehring had no right to make any election in this case.

The Village argued that the Village Manager had the sole authority to designate or revoke his designation of an Article IX, Section 8, "designee" pursuant to Article XVII, Section 4, and his management rights. Therefore, the Village Manager's February 18, 2002 memo to Department Head Supervisors clearly revoked their authority, which he had granted in the past, to act as his designee for purposes of granting overtime pay. The Village noted that both Goode and Duehring fully understood the meaning of the language contained in the Village Manager's February 18<sup>th</sup> memo as demonstrated by their subsequent e-mails and their actions.

Thus, the Union's assertion that Duehring did not know of the need for advance approval or the consequences of a failure to gain same is not supported by the evidence. In this regard, the Village noted that Duehring knew at least by March 25, 2002, when the Village Manager denied Duehring overtime pay for her extra work done March 23<sup>rd</sup>, that Supervisor Goode no longer had the right to grant overtime pay and that the Village Manager had the sole right and authority to grant overtime pay in advance of the work being done. In addition, the Village noted that Duehring admitted that she had a conversation with the Village Manager in which he confirmed that he was the sole authority capable of granting overtime in

the Village and that this was also confirmed to Duehring through the Village Manager's e-mail to her. In addition, the Village found it important that Duehring never grieved the denial of overtime pay for her work done on March 23<sup>rd</sup>.

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Thus, in the Village's view, Duehring had an obligation to determine if overtime pay would be authorized before she worked extra hours given her knowledge of Village policy on and after March 25<sup>th</sup>. Indeed, common sense demanded that Duehring make sure that Goode had gotten advance approval for her overtime work on April 10 and 11, given the fact that Goode's request for overtime of the Village Manager was made at the last minute via e-mail, as had occurred regarding Duehring's work on March 23<sup>rd</sup>.

Finally, the Village noted that when an employee fills out a time sheet, it is not inalterable. Thus, the Village Manager's refusal to approve overtime after the fact on Duehring's time sheet was fully within his authority. Based on the above, the Village urged that the grievance be denied and dismissed in its entirety.

### DISCUSSION

The initial question in this case is which section or sections of Article IX is/are applicable to this case. In the Arbitrator's view, the facts and circumstances of this case require a conclusion that both Article IX, Sections 8 and 12, must be considered and analyzed in this case. In this regard, I note that on the face of this dispute both compensatory time and overtime are relied upon by the parties in arguing their cases. Here, the Union has asserted that Duehring was entitled to elect overtime pay for extra work she performed on April 10 and 11, 2002, while the Village has resisted this approach and asserted that the Village Manager had the authority to change Duehring's overtime pay election and grant her compensatory time, in part, for the work she performed on April 10 and 11. In addition, I note that Section 12, relied upon by the Union, refers to and describes how compensatory time may be used and granted by specific reference to overtime work and overtime pay provision of Article IX, Section 8. Thus, an analysis of both Sections 8 and 12 is necessary in this case.

A second initial question raised herein is whether Duehring knew or should have known, prior to April 10, that Van Gompel had rescinded his practice of delegating to Department Head Supervisors the authority to pay employees overtime pay for extra work performed at the Supervisor's request. 7/ The facts herein clearly show that Duehring's Department Head Supervisor, Ginny Goode, had received Van Gompel's February 18, 2002 memo regarding his new policy concerning the approval and payment of overtime. Goode's e-mail to Van Gompel on February 20, 2002, also demonstrated that she understood Van Gompel's memo and its terms. In addition, it is undisputed that Duehring knew, as early as March 25, 2002, that Van Gompel had changed the Village past practice regarding overtime authorization and payment, when Department Head Goode informed Duehring that Van Gompel had denied Goode's March 22, 2002, e-mail request that Van Gompel authorize overtime pay for Duehring on Saturday, March 23<sup>rd</sup>.

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*7/ I note that paragraphs 2 and 4 of Article IX, Section 12, state under what circumstances a department head supervisor has the authority to grant employees compensatory time off. These paragraphs of Section 12, are not relevant to this dispute.*

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Thereafter, Duehring also demonstrated her understanding of the changed policy when, on March 28, before the end of the work day, Duehring e-mailed Van Gompel and requested to be paid overtime pay for work she intend to do that evening. In addition, I note that Van Gompel in his March 28<sup>th</sup> responsive e-mail (authorizing the requested overtime pay for Duehring) warned that his authorization of that overtime should not be “viewed as a permanent authorization of overtime” and Van Gompel confirmed his prior statements to both Duehring and Goode that “the use and pay of overtime must have prior approval by me.” In these circumstances, there can be no doubt that Duehring knew on or before March 28<sup>th</sup> that Van Gompel, not Goode, had the sole authority to authorize overtime pay and that such authorization had to be received prior to the work being performed. This is so despite the fact that Duehring never received Van Gompel’s original February 18<sup>th</sup> memo to Department Head Supervisors announcing his decision to change the Village’s past practice regarding the delegation of the right to approve overtime. 8/

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*8/ The lack of clarity and definition in Van Gompel’s February 18<sup>th</sup> memo is troubling but not fatal to the Village’s arguments in this case. Van Gompel wrote in his memo of minimizing the use of overtime and limiting it to “emergency situations” and he failed to define emergencies in the memo. However, Van Gompel made clear in the memo that his prior authorization for overtime would be required in all future cases.*

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An analysis of Article IX, Sections 8 and 12, is appropriate at this juncture. Section 12 is a rather typical provision which allows employees to elect to earn and use compensatory time instead of taking overtime pay for extra hours they have been authorized to work. The first and third sentences of Section 12, state that comp time may be used as an alternative form of compensation in lieu of receiving overtime pay. The second sentence states that compensatory time “shall be granted in the same way as overtime . . . .” This second sentence then continues after a semicolon to describe that compensatory time will be granted at the same rate as overtime is earned. Sentence four of Section 12 then states that clerical employees “who are entitled to overtime pay may elect to earn and use compensatory time off in lieu of overtime pay.”

The above quotations demonstrate that it is impossible to understand Section 12 without referring to Section 8. In the Arbitrator’s view, there would be no reason to include the word “entitled” in sentence four of Section 12, unless the parties thereby intended the reader to refer back to Section 8 to find the various, necessary prerequisites for overtime entitlement, including the Village Manager’s pre-approval thereof. Therefore, the language of the effective agreement makes clear that overtime pay is the rule or norm, while compensatory time is the

exception, requiring employees to take action in order to elect to receive compensatory time off instead of overtime pay. It is significant that the language of Section 12, makes no reference to employees having the right to elect overtime pay. Contrary to the Union's assertions, the election can only go one way under Section 12 – from approved overtime to compensatory time, not *vice versa*.

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Thus, the phrase in Section 12, which refers to employees “who are entitled to overtime pay” requires reference back to Section 8, to determine how an employee becomes “entitled” to overtime. And this reference back to Section 8, necessarily requires that employees have prior approval by the Village Manager or his designee to be entitled to receive overtime pay for extra hours worked before the employee can elect to take compensatory time in lieu of overtime payment. Significantly, I note that no evidence of bargaining history or past practice was proffered herein to show that the phrase “who are entitled to overtime” should have a different meaning than described above.

The Union argued that Goode's request of Van Gompel to grant overtime for Duehring to work on April 10<sup>th</sup> and 11<sup>th</sup> was distinguishable from the extra work Goode requested Duehring perform on March 23<sup>rd</sup>. In the Arbitrator's view, the facts surrounding Van Gompel's denial of overtime on these occasions were similar. In both instances, Duehring did not receive notice of Van Gompel's approval of overtime pay for her work before she worked those extra hours. Duehring's failure to gain advance approval from Van Gompel for overtime pay on these occasions requires a conclusion that Duehring was not entitled to overtime pay therefor. 9/ This conclusion is bolstered by the fact that Duehring knew from e-mails, as well as through her interaction with Goode and Van Gompel, that Goode could no longer approve overtime and overtime pay for her and that Van Gompel's approval in advance for her overtime was required. That Duehring was fully aware of the new process of approval for overtime authorization and payment is also bolstered by the fact that Duehring voluntarily changed her bi-weekly time record to list the hours she worked on March 23<sup>rd</sup> as non-paid; and that Duehring failed to grieve or otherwise object to Van Gompel's denial of overtime pay for her work performed on March 23<sup>rd</sup>.

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*9/ I note that evidence showed that Van Gompel's calendar was not available to either Goode or Duehring regarding his absence from April 10 through 14 and that they were unaware of his absence on April 10<sup>th</sup>.*

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The facts of this case also show that Goode requested overtime for Duehring by sending an e-mail to Van Gompel at 4:39 p.m. on April 10<sup>th</sup>, the day that Duehring was to stay late and work the overtime. Duehring never received notice either from Goode or Van Gompel that Van Gompel had approved overtime for the hours/dates Goode requested before she worked the extra hours. Given her knowledge of the new Village practice concerning overtime, it was not reasonable for Duehring to believe that Goode's request that Duehring work extra hours on April 10<sup>th</sup> and 11<sup>th</sup> would, without more, result in her receipt of overtime pay for the extra

work involved. 10/

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*10/ Due to factual differences, the cases cited by the Village were instructive but not controlling in reaching the result herein.*

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The final question in this case is whether Van Gompel violated the labor agreement by deciding to compensate Duehring with compensatory time for four hours of work she performed on April 10 and 11 without prior approval for overtime. 11/ In this case, although Van Gompel had not authorized Duehring to work overtime before she worked extra hours on April 10<sup>th</sup> and 11<sup>th</sup>, Van Gompel later agreed to pay Duehring five hours of overtime pay and credit her with four hours of compensatory time in order to compensate her for the time she worked on April 10<sup>th</sup> and 11<sup>th</sup>. As I have found no violation of the labor agreement in Van Gompel's treatment of Goode's request for overtime to be paid to Duehring for work to be done on April 10<sup>th</sup> and 11<sup>th</sup>, Van Gompel's voluntary agreement, after the fact, to compensate Duehring for the extra hours she worked April 10<sup>th</sup> and 11<sup>th</sup>, even though she failed to receive prior approval for overtime payment, did not violate the labor agreement and therefore I issue the following

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*10/ As of April 13, 2002, Duehring had accrued 59.52 hours of compensatory time. Paragraph 3 of Section 12, Article IX, provides that employees may only use or carry over 56 hours of compensatory time per year and that they must be paid at time and one-half for "any overtime work following the accumulation of 48 hours of compensatory time." This provision is not before me in this case.*

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### AWARD

The Employer did not violate the provisions of Article IX, Section 8 of the 2001-03 contract when the Village Manager provided compensation to the Grievant in the form of compensatory time for work she performed on April 10 and 11, 2002, when the work had not been approved in advance by the Village Manager. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 31<sup>st</sup> day of January, 2003.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator

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