BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CITY OF FOND DU LAC EMPLOYEES LOCAL 1366,
AFSCME, AFL-CIO**

and

CITY OF FOND DU LAC

Case 181
No. 61947
MA-12112

(Walter Kloske Grievance)

Appearances:

Mr. Thomas Wishman, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Davis & Kuelthau, S.C., by **Mr. William G. Bracken**, Employment Relations Service Coordinator, on behalf of the City.

ARBITRATION AWARD

At all times pertinent hereto, the City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO (herein the Union) and the City of Fond du Lac (herein the City) were parties to a working conditions agreement dated September 1, 2000, and covering the period January 1, 2000, to December 31, 2002, and providing for binding arbitration of certain disputes between the parties. On December 20, 2002, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement as a result of the City's failure to award overtime work to Walter Kloske, an employee in the Waste Water Treatment Plant. The Union requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on March 10 and April 2, 2003. The proceedings were not transcribed. The parties filed briefs on May 9, 2003, and reply briefs by May 24, 2003, whereupon the record was closed.

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ISSUES

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

> Did the City violate the Working Conditions Agreement, its attendant practice and understandings between the parties, and the Consent Award of November 9, 2000, regarding Case 166, No, 59169, MA-11205, on August 31, 2002, when it assigned lab work to a supervisory employee and overtime work to employee Joseph O'Boyle, and on September 9, 2002, when it assigned overtime to employee Joseph O'Boyle and therefore in both instances denied another employee, Walter Kloske, the opportunity to accept or decline such overtime which he, rather than O'Boyle, was entitled to?
>
> If so, what is the remedy?

The City would frame the issues as follows:

> Did the City violate Article VIII, Section 2, or the Overtime Equalization Memorandum of Understanding when it:
>
> 1. extended O'Boyle's shift on August 31, 2002, and
> 2. offered O'Boyle overtime on September 9, 2002?
>
> If so, what is the remedy?

The Arbitrator frames the issues as follows:

> Did the City violate Article VIII of the Working Conditions Agreement, or the Overtime Equalization Memorandum of Understanding, when it offered overtime to Joseph O'Boyle instead of Walter Kloske on August 31, 2002, and September 9, 2002.
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE VIII

OVERTIME AND HOLIDAY PAY

. . .

Section 2 – For emergency and non-emergency overtime, each division shall post in all other divisions, once a year, or more often if deemed necessary, a list of employees with space for each employee to indicate whether or not he wishes to be called in for regular overtime work. After an employee has indicated that he does not wish to be called in for overtime work, he shall not be called unless that employee is needed due to his specific skills or due to the non-availability of a sufficient number of employees desiring overtime work. Overtime shall be divided as equally as possible among the qualified employees of the division, then divided as equally as possible among the qualified employees outside the division, except as otherwise provided in this Agreement, who have signed indicating their desire for overtime. The overtime of employees shall be posted. In the event of an emergency, all employees may be required to work overtime, however, those employees who have indicated a desire to work overtime will be called first provided the employee's normally assigned division shall not be used for the equalization of overtime language contained herein.

. . .

Section 5 – Overtime shall be divided as equally as possible on a calendar year basis among qualified employees in a division. Overtime of employees shall be posted. Part-time and temporary employees will not be assigned overtime except in cases of emergency or when all permanent employees are working overtime or when permanent employees are unavailable for overtime work.

. . .

AFSCME LOCAL 1366

PROPOSED OVERTIME EQUALIZATION PROCEDURES

December 21, 1999

1. There will be one list of all employees in the division where employees will indicate their interest in working overtime. This list shall be in order of the employees' seniority dates.

2. There will be records that will be used by the individual who is calling employees when overtime is available. The list will indicate the date that overtime was offered, the time the employees were called, what job the overtime was in and its qualifications for the job, whether the individual was contacted and whether or not the individual accepted or declined the offered overtime. Accepting or declining an offer of overtime will be considered as having worked that overtime.

3. Every pay period the Employer will post a listing of overtime offered, worked and/or declined for the pay period and year to date. Overtime opportunities shall be offered first to the employee who has the lowest overtime total.

. . .

BACKGROUND

The City and the Union have, over the years, disputed over the interpretation of the overtime equalization language contained in Article VIII of the Working Conditions Agreement, which has resulted in a number of arbitration awards interpreting the provision. In CITY OF FOND DU LAC, WERC CASE 146, NO. 57312, MA-10587 (MAWHINNEY, 10/92), Arbitrator Karen Mawhinney held that overtime equalization must be by division, not job classification, and that the Waste Water Treatment Plant constituted a separate division. Thus, contingent upon qualification to do the work, overtime within the plant is to be equalized among all employees, regardless of classification and the arbitrator instructed the parties to develop a mutually agreeable procedure for effectuating the equalization language. The result of this award was the Memorandum of Agreement set forth above.

In CITY OF FOND DU LAC, WERC CASE 166, NO. 59169, MA-11205 (MCGILLIGAN, 11/00), Arbitrator Dennis McGilligan issued a consent award incorporating a stipulation entered into by the parties concerning overtime equalization procedures in the Waste Water Treatment Plant. The pertinent portions of that stipulation for the purposes of this grievance are:

. . .

4. The parties agree that the employee qualified for the position requiring overtime who has the least amount of overtime as of the prior payroll period shall be the first employee called and given the opportunity to accept or decline the overtime assignment.

. . .

7. Employees contacted for an overtime assignment shall either accept or decline the assignment. In the event the employee is not reached for whatever reason (i.e., busy signal, not at home, no answer, etc.), it will not be counted as a "decline." The next qualified employee for the overtime assignment will be contacted and so on until the position is filled. The Union agrees that the non-contact opportunities will not be considered in any claim against the City regarding overtime equalization.

. . .

That is the contractual and arbitral history that forms the backdrop for the instant proceeding.

The Waste Water Treatment Plant employs a number of persons within several job classifications, including Operations Crew Leader (OCL), Influent Pump Station (IPS) employee, Secondary Treatment Operator (STO), ZIMPRO Operator and Maintenance worker. It operates around the clock and has three work shifts – 12:00 a.m. to 8:00 a.m. (first), 8:00 a.m. to 4:00 p.m. (second) and 4:00 p.m. to 12:00 a.m. (third). According to the terms of Arbitrator Mawhinney's award and the Memorandum of Agreement, overtime is to be equalized among all employees within the plant, contingent upon qualification to do the work. The Grievant has been employed by the City since 1999 as a STO. He is qualified to perform the functions of all the positions in the plant except ZIMPRO Operator and on weekends he also occasionally performs the work of Lab Technician Dick Graham, who does not work weekends, while on second shift.

August 31 Overtime

Under the terms of the Memorandum of Agreement, the City maintains a running record of overtime within the plant for equalization purposes. As of August 30, 2002, the Grievant had accumulated 77.75 hours of overtime. Two employees, Steve Durocher and Brian Huelsman, had less accumulated overtime than the Grievant at that time; all the other employees had more.

On Saturday, August 31, 2002, the Grievant was scheduled to work second shift and was assigned to the Lab Technician's duties that day. The previous night, however, one of the IPS employees had called in sick, creating a vacancy in IPS. The Crew Leader called Durocher, Huelsman and IPS Operator Al Lietz, although not the Grievant, but could not find a replacement. He then called the plant Chemist and Acting Operations Manager, James Kaiser, and informed him of the problem and told him he had called everyone on the overtime list. Kaiser unsuccessfully tried to contact the Lab Technician, Graham, to come in on Saturday, and then made reassignments to make sure all positions were covered. Thus, the Crew Leader was assigned to handle IPS duties and the Grievant was assigned to STO duties during second shift, leaving the lab work uncovered. Kaiser went to work at 5:30 a.m. on August 31 and saw STO Operator Joe O'Boyle, who was working first shift, and offered him 4 hours of overtime to do the lab work during second shift, to which O'Boyle agreed. Kaiser, himself, took the remainder of the hours. O'Boyle ended up working one hour on August 31, but received 4 hours of overtime per his agreement with Kaiser. At the time, O'Boyle had more accumulated overtime than the Grievant.

September 9 Overtime

On September 9, 2002, the City had a need for someone to work overtime on the first shift, which was known beforehand. On approximately September 5 or September 6, Kaiser began seeking someone to work the overtime shift, which he preferred to do in person. The

Grievant had last worked on September 4 and was not scheduled to work again until September 10. On September 5, Kaiser called the Grievant at home to offer him the overtime, but got an answering machine so he left no message. By the afternoon of Friday, September 6, Kaiser had still not found anyone to work the overtime, so called the Grievant again at 4:10 p.m. and again got the answering machine. This time he left a message that the overtime was available and the Grievant should contact him if he wanted it. At 4:30, Kaiser saw O'Boyle at the plant and offered him the overtime, which O'Boyle accepted, so he called the Grievant's machine again and left a message that the overtime was filled. Kaiser told Crew Leader Paul Rawlsky the status of the overtime situation and went home at 5:15. At the time, O'Boyle still had more accumulated overtime than the Grievant.

Shortly after 5:00 p.m. on September 6, the Grievant returned home and received Kaiser's messages. He then called Kaiser's office to accept the overtime, but Kaiser had already left for the day. He also called the Secondary Treatment Plant and Kaiser's home and left messages about wanting the overtime. After receiving the Grievant's message, Rawlsky called Kaiser and told him the Grievant had accepted the hours. Kaiser told him to call the Grievant and tell him the hours had been given to O'Boyle, which he did. Thereafter, the Grievant made several unsuccessful attempts to contact Kaiser throughout the weekend and finally called Operations Manager John Leonard late Saturday afternoon. He explained the situation and Leonard told him that O'Boyle would work the hours.

On Sunday, September 8, Crew Leader Al Lietz, who had learned of the situation from the Grievant, called Kaiser and told him the Grievant should have had the chance to refuse the hours. At the end of the discussion, Lietz was under the impression the Kaiser was going to give the overtime to the Grievant. Kaiser then called the Grievant to ask if he still wanted the hours, which he said he did. The Grievant was under the impression that Kaiser was offering the work to him and assumed that he would get the overtime. Kaiser then called O'Boyle. O'Boyle had previously spoken to Leonard, who assured him he would get the overtime, so he refused to give up the hours. Kaiser then called the Grievant back and told him O'Boyle wouldn't give up the hours and would work the overtime.

On September 18, the Grievant filed a grievance on the refusal of overtime for both August 31 and September 9. The grievance was denied and the parties pursued the matter through the steps of the contractual grievance procedure to arbitration. Additional facts will be referenced, as necessary, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

August 31 Overtime

The Union contends that by past practice the weekend lab work was bargaining unit work and should have been done by a bargaining unit member. James Kaiser is the Plant Chemist and not a bargaining unit member, so he should not have worked the overtime hours

on August 31. The Grievant was supposed to have worked in the lab, but was moved to STO due to the vacancy, at which point the overtime equalization procedures should have been used. Kaiser should have realized that the Crew Leader had not called all the employees and should then have offered the hours to the Grievant instead of splitting the hours between himself and another employee with more accumulated overtime. Even though he was already working he could have extended his shift to do the lab work, as well.

September 9 Overtime

The November, 2000, consent decree requires that employees offered overtime under the parties' equalization procedures be given an opportunity to accept or decline the overtime. A "no answer" is specifically stated to not be considered a decline. The clear intent of the language is to make sure the employees entitled to the hours have a meaningful opportunity to accept or decline them. A decline is only recorded when an employee has the opportunity to exercise his or her rights to the hours and chooses not to do so.

Department management admitted they waited until the week before September 9 to fill the vacancy even though they new of the need long before and then tried to contact the employees in person. The Grievant was off work at the time, and Kaiser couldn't reach him directly by phone, but kept trying, indicating he was aware of the Grievant's right to accept or decline the overtime. Kaiser's recognition of the Grievant's rights was again shown when he called the Grievant on September 8. Although the City argues that Kaiser did not offer the Grievant the overtime at that time, the testimony of the Grievant suggests otherwise, which explains why Kaiser had to call back later and tell the Grievant not to come to work after Joe O'Boyle refused to give up the overtime and John Leonard supported him.

There is nothing in the contract or the consent decree that prevents taking away overtime once it's offered. Leonard stated that such is Department policy, but could offer no evidence in support of his assertion. In fact, the evidence suggests that in the past overtime assignments have been taken away. Thus, the City would have been at little risk of a successful challenge by O'Boyle if the overtime had been taken from him and given to the Grievant. In sum, there is no excuse for the Grievant not receiving the overtime on August 31 or September 9. The grievance should be sustained and the Grievant be given 16 hours pay at time and a half.

The City

These grievances both arise under the parties' contractual agreement to equalize overtime. Of particular importance is the consent award of November 9, 2000. Paragraph 4 states that the employee with the least amount of accumulated overtime is to have the first opportunity to accept or decline overtime. Paragraph 7 states that if the employee cannot be

reached, the next qualified employee is contacted, but that the "no answer" doesn't count as a decline by the first employee for record keeping purposes. Clearly, in the consent award as well as the 1999 Memorandum of Understanding, the parties recognized the need for overtime to be assigned speedily and efficiently. This grievance alleges violations of the overtime equalization provisions, but both claims must fail.

August 31 Overtime

The City maintains it has the right under Article XXVII of the contract to schedule overtime as it sees fit and to assign employees to positions in the Water Treatment Plant as long as it doesn't violate Article VIII, Sections 2 and 5. Normally, the Grievant does lab duties on the weekends, but in this case he was reassigned to STO in the shuffle that took place due to the sudden absence in IPS. It is preferable that lab duties be done at the same time each day, so the City sought workers to work in the lab during second shift on August 31, while the Grievant was performing STO duties, creating overtime during that period. The Grievant was already working at that time and so was unable to have worked the overtime. Thus, the hours were split between Jim Kaiser and Joe O'Boyle, who were available. The Grievant has no right to the weekend lab duties, nor can he require the City to schedule overtime to accommodate his schedule, so he has no claim.

The Crew Leader mistakenly did not call everyone on the overtime list. Had he done so, it might not have been necessary for Kaiser to work. Instead, he split the shift with O'Boyle because generally the City doesn't want employees working double shifts. In any event, the Grievant could not have taken the overtime hours because he was already working that shift. Thus, the Grievant lost nothing because he was paid for working his regular shift. The Union believes he should have been called in early, but the City was under no obligation to schedule the overtime hours for a time when the Grievant was available. The City did not violate the contract by scheduling the overtime as it did and the grievance should be dismissed.

September 9 Overtime

The Union is barred from filing this grievance by the language of the consent award, which states that non-contact opportunities will not be considered in any claim against the City regarding overtime equalization. It is undisputed that the City attempted to contact the Grievant about the September 9 overtime opportunity prior to offering it to O'Boyle. The Grievant wasn't home when he was called. So he could neither accept or decline – thus it was a non-contact opportunity. The consent award unambiguously prohibits filing any claim in such a case, so the grievance should be dismissed.

Also, once the overtime was assigned to O'Boyle, the Grievant had no further claim to it. The Grievant's attempts to contact Kaiser to claim the overtime were to no avail because once the overtime is filled, the matter is closed. This was made clear by Leonard when the

Grievant contacted him to ask that the overtime be given to him instead of O'Boyle. At some point, the system must allow the City some assurance that the schedule is final so that it need not constantly be anticipating last minute changes. Thus, as long as the City has followed the overtime procedure and the overtime is assigned, it is entitled to consider the matter closed and need not reconsider the claims of other employees to the hours.

The City properly followed the procedure mandated by the consent award in assigning the overtime. Kaiser could not reach the Grievant, so he was bypassed as provided in Paragraph 7 and other employees were contacted. When no one could be found to work, Kaiser called the Grievant again and again he could not be reached, so when Kaiser saw O'Boyle he was entitled under the consent award to offer him the hours, which he did. The Union would have the Arbitrator only consider Paragraph 4, which says the employee should be given an opportunity to accept or decline the hours, but it must be considered along with Paragraph 7, which allows the City to continue the search in a "no contact" situation, but does not penalize the employee by treating the "no contact" as a decline. To sustain this grievance would set a dangerous precedent because it would set up constant "bumping" among employees seeking to assert their overtime rights, which would create constant confusion and many more grievances. The current system, which the City followed, allows overtime to be assigned efficiently and expeditiously, while providing the Union members with equalization of hours on an annual basis.

The Union in Reply

August 31 Overtime

The Union does not dispute the City's right to assign work and determine overtime, only the way it was done. The lab work did not need to be done during the Grievant's shift, as evidenced by the fact that Kaiser and O'Boyle began the lab work before the shift started. The City had the obligation to determine that all eligible employees were called and that the work was offered to bargaining unit members before Kaiser took the hours. This did not happen because the Crew Leader did not call everyone on the list. The City should have scheduled the lab work to be done before the Grievant's shift and offered the work to the Grievant.

September 9 Overtime

The City argues that the Grievant has no claim because the consent award precludes claims based on non-contact opportunities. This is only the case if the City otherwise complied with the award. In order to make a fair judgment, the entire award and the record as a whole must be considered. The City knew of the vacancy long in advance and yet waited until just before the opening to offer the hours, at a time when the Grievant was on vacation. Had the City acted earlier, it could have contacted all the employees personally. Also, Kaiser did not

initially leave a message for the Grievant when he called on September 5, which he had no obligation to do. He did leave a message after the second call, however, which suggests that he was seeking a response. He also called the Grievant back and offered him the overtime again after the hours had already been assigned to O'Boyle. The record permits the inference that Kaiser was trying to correct a mistake, but was prevented by Leonard's insistence that O'Boyle work the hours even though his decision was not based on any apparent policy or practice. The City cannot have it both ways. It cannot say that the consent award precludes a claim and also not be held accountable for how it implements the decree.

The City also argues that the Grievant was not entitled to the hours once they were assigned to O'Boyle. There is no evidence that any such policy or practice exists, written or unwritten. Further, there is no danger of the chaos that the City envisions if the grievance is sustained, where employees are "bumping" one another to work available overtime. If the Grievant had had a reasonable opportunity to accept or decline the overtime there would be no claim. What is at issue here is whether he received such an opportunity. If a good faith effort is made to assign overtime in accordance with the decree, no undue confusion will result.

The City in Reply

August 31 Overtime

The City asserts that the work performed by Kaiser on August 31 was not exclusively bargaining unit work. The contract gives management the right to direct the workforce. Further, arbitrators have held that, absent specific contract language to the contrary, management can assign work outside of the bargaining unit in certain instances. The contract does not expressly prohibit managers from doing bargaining unit work and Kaiser's duties overlap those of the lab technician, so there was no violation of the contract. Arbitrators have held that employers can where, as here, there is a business justification bargaining unit work can be performed by management. The City was in a position where it had to fill the hours on short notice and Kaiser did his best to use bargaining unit personnel, only assigning himself to a few hours in the last extremity. It is the Union's burden to show that lab work is exclusive to the bargaining unit and it has failed to meet that burden. Kaiser also had no way of knowing that the Crew Leader had not called everyone on the overtime list, as he did not see the call sheet until the next week. He did the best he could, even trying to call the regular lab technician who had not signed up for overtime, before assigning himself. Finally, as noted in the City's initial brief, the Grievant was already working during the shift wherein the overtime arose and so could not have taken the hours. He, therefore, suffered no injury as a result of the City's actions on August 31.

September 9 Overtime

The Union misconstrues Arbitrator McGilligan's consent award by arguing that until an eligible employee responds to an overtime offer the City cannot seek someone else to fill the hours. Paragraphs 4 and 7 must be harmonized in recognition of those instances where an

employee cannot be reached. Paragraph 7 contemplates this situation by providing that employees who cannot be reached can be bypassed without having the non-contact counted against him.

The City made a reasonable attempt to contact the Grievant, but he was not at home, so it contacted other employees, as provided in the consent award. The Union implies that Kaiser believed the Grievant was still entitled to the overtime after it was assigned to O'Boyle, but this is not the case. He initially contacted the Grievant twice because no one else took the hours. Later, he was attempting to mediate the dispute between the Grievant and O'Boyle, but he did not offer the hours to the Grievant or say they would be taken from O'Boyle. Once the overtime was assigned to O'Boyle, it was assumed that he would perform it. There is no history of overtime being taken away once it is assigned and such a policy would create an untenable situation where employees would be bumping other employees for overtime, leading to a rash of grievances. The current system promotes efficiency and finality, whereas the Union's proposed alternative would create confusion.

DISCUSSION

This grievance in essence alleges two violations of the same contract provisions within a two-week period, but under different sets of circumstances. For purposes of clarity, this discussion will address the two incidents separately.

August 31 Overtime

In this instance, the City was in a position of needing to fill an IPS shift on very short notice due to the illness of an employee. This circumstance thus created overtime within the bargaining unit and it is undisputed that at the time, the Grievant had accumulated less overtime than the employee who ultimately was assigned the hours. Because the Crew Leader had been unsuccessful in finding someone to come in, the situation required the Assistant Operations Manager to restructure the workforce in order to cover the vacant position. He did this by offering four hours of overtime to a worker coming off a regular shift and by taking four hours himself.

The Union asserts that the weekend lab work is bargaining unit work and that Assistant Operations Manager Jim Kaiser should not have assigned the overtime to himself. The record does not support the underlying premise that weekend lab work is exclusively bargaining unit work. As noted in the cases cited by the City, for work to be considered exclusive to the bargaining unit usually requires specific language to that effect in the contract or a clearly established practice. Neither of those elements exists here. While weekend lab work is typically done by bargaining unit employees, it is not clear that the work is entirely reserved to them. It should also be noted that, from Kaiser's perspective, there were no alternatives

because no one but O'Boyle had agreed to work. He did not know that the Crew Leader had not contacted everyone on the call list. Thus, in his view taking some of the hours was the alternative to asking O'Boyle to work a double shift.

More to the point, the Union maintains that all the hours should have been offered to the Grievant prior to O'Boyle, based on their respective numbers of accrued overtime hours at that time. If one were to consider the overtime equalization provisions in a vacuum this argument would undoubtedly have merit. There is no question that the equalization scheme is designed so that at any given time the qualified employee with the least number of accrued hours is to be offered available overtime. One must also consider, though, a couple of other salient points.

First, the overtime hours were available during the second shift on August 31, when the Grievant was already scheduled to work. Logically, there is no way the Grievant could have been working overtime at the same time that he was working his normal shift. One can assume that this scenario arises from time to time, where an employee otherwise entitled to first refusal of available overtime is already working and so is passed over and the offer is made to the next person on the list. In any event, even had the Crew Leader called all the employees on the overtime list, the Grievant would still have been ineligible because he was already scheduled to work.

The Union counters this observation by asserting that the City could have scheduled the overtime hours either earlier or later to allow the Grievant to work the hours. This is undoubtedly true, but, in my view, to impose an obligation on the City to schedule overtime in such a way that it accommodates the employee lowest on the equalized overtime list would invade management rights and would unduly burden the employer. Article XXVII of the contract, the Management Rights clause, vest in management the right to determine schedules of work, as well as the right to determine the methods, processes and manner of performing work. Inherent in these rights is the authority to determine when particular work needs to be done. In this case, the Operations Manager, John Leonard, testified that the preferred time for the weekend lab work to be done was during the second shift and even the Grievant agreed that was the current practice.

When reading contract provisions that appear to be in conflict, it is necessary to try to reconcile them in some rational manner. I find it more reasonable to read the provisions in such a way that overtime hours are to be offered to the available, that is unscheduled, employee with the fewest accrued overtime hours. This preserves management's prerogative to schedule overtime work at times most beneficial to the enterprise, but protects the principle of equalization among those employees qualified and available to do the work. It also avoids putting management in the untenable position of having to organize the operations of the workplace around the employees' respective entitlement to overtime, which would be the tail wagging the dog. Particularly in a situation such as this, where the employer needed to find a replacement and reorganize work schedules on short notice, it would be unduly burdensome to

also require it to predicate its decisions about when to schedule overtime on which employees were lowest on the overtime list at any given point. Thus, I find that the City did not violate the contract or consent award in failing to offer the overtime on August 31, 2002, to the Grievant.

September 9 Overtime

This was a situation where the City knew sometime in advance that it would have a vacancy on the day in question, and thus had ample time to contact the employees available and entitled to the opportunity for overtime. In the event, when Kaiser began seeking someone to work the hours, the Grievant was off work, leading to the telephonic confusion related above and the ultimate assignment of O'Boyle, who again had more hours of accrued overtime at the time than the Grievant.

The City maintains, in the first instance, that the Union is precluded from bringing this claim by the language of the consent award, which states that non-contact opportunities will not be considered in any claim against the City regarding overtime equalization. The Union counters that this language was not entitled to give the City carte blanche regarding contact procedure and that if the City's practice is not reasonable the Union should not be prevented from grieving it. My view is that this is not a non-contact case.

I interpret the language of Paragraph 7 essentially in the same way as the City. That is to say, if the City tries unsuccessfully to contact an employee for overtime, it is then entitled to move on to the next person on the list and so on until it reaches an employee who agrees to work the hours. Employees otherwise entitled to the opportunity, but unavailable when contact was attempted, may not later grieve on the basis that they were not given an opportunity to accept or decline. The *quid pro quo* for this is that the non-contact is also not treated as a decline, which would result in the hours being attributed to the employee as if he had worked them. This way, the employee will get the opportunity the next time overtime is available. At the same time, the City is not hamstrung when it needs to fill overtime hours, but the employee most entitled to the opportunity cannot be reached. If one were to interpret the consent award to require that the employee lowest on the list had to accept or decline before the hours could be offered to another employee, the employer would conceivably not be able to fill the overtime if the employee could not be reached. Had the Grievant not gotten Kaiser's message or otherwise learned of the overtime opportunity until after the fact, that would be the situation here, but that is not what happened.

In this case, the Grievant first learned of the available overtime on the afternoon of Friday, September 6, when he received Kaiser's message on his answering machine. The problem that arose was that between his getting the message and his reaching Kaiser the hours had already been offered to O'Boyle. In fact, Kaiser spoke to O'Boyle less than half an hour after calling the Grievant. Thereafter, the Grievant made numerous phone calls to the plant, as

well as to both Kaiser and Leonard at home prior to September 9 in an attempt to exercise his right to claim the overtime. Leonard was adamant that O'Boyle would work the hours, but Kaiser was more equivocal and attempted to mediate the situation, but O'Boyle was determined to work the hours and ultimately did so. This, therefore was not a non-contact situation, because the Grievant did learn of the overtime beforehand and, but for the intervening offer to O'Boyle, would have been able, and probably allowed, to work it.

The chronology of events on September 6 reveals that the Grievant missed Kaiser's call by about an hour. The Grievant called in a few minutes after Kaiser had left work and left a message with the Crew Leader. The Crew Leader, in turn, called Kaiser between 6:00 p.m. and 7:00 p.m. to tell him that the Grievant was willing to work the hours. Thus, Kaiser was aware of the Grievant's availability by 7:00 p.m. on September 6, but had already offered the hours to O'Boyle, so he told the Crew Leader to tell the Grievant the overtime was filled. Here, then, is a situation where the Grievant, who was lowest on the overtime list, was aware of the overtime in advance and was attempting to exercise his right to it, but was precluded by management because the work had already been offered to another employee. The question then becomes, did the supervisor err in offering the overtime to the Grievant and then giving it to O'Boyle before the Grievant had an opportunity to respond? I find that he did.

The Union argues, with some merit, that there is no established policy regarding the withdrawing of overtime after it is assigned and believes, therefore, that the Grievant should have been able to "bump" O'Boyle. The City's witnesses asserted that such a policy existed and that overtime, once assigned, is not to be withdrawn, but could offer no documentary evidence of such, nor point to any established practice. By the same token, there is no history of overtime being reassigned either. Given that state of affairs, I do not consider the existence or non-existence of such a policy as crucial to the question at hand.

There are two competing considerations, ably identified by the parties, which need to be reconciled. One is the integrity of the overtime equalization procedure and the other is the need for a method of assigning overtime that promotes efficiency and certitude. As Arbitrator Mawhinney observed in CITY OF FOND DU LAC, WERC CASE 146, NO. 57312, MA-10587 (MAWHINNEY, 10/99), among qualified employees the first consideration in assigning overtime should be equalization. Thus, she instructed the parties to develop a procedure whereby overtime would be equalized among employees within each division, which resulted in the Memorandum of Agreement entered into in December, 1999 (Jt. Ex. #8). Problems continued, however, which led to Arbitrator McGilligan's consent award in CITY OF FOND DU LAC, WERC CASE 166, NO. 59169, MA-11205 (MCGILLIGAN, 11/00) (Jt. EX. #6), wherein the award codified a procedure to assure that the employees with the least accrued overtime at any given time were given the opportunity for first refusal of available overtime. None of the foregoing decisions deal with this situation, however.

Essentially, the Union is asking the Arbitrator to expand Arbitrator McGilligan's consent award to require the City to allow employees to bump other employees for available overtime if they have less accrued overtime when the opportunity arises. Admittedly, this is a

narrow exception, which would only arise where an employee who had not had an opportunity to accept or decline overtime due to a non-contact subsequently learns of the opportunity after the overtime has been assigned to another employee and then makes contact seeking to accept the overtime. I find this likely to be a sufficiently rare occurrence that no undo hardship will result by not letting the eligible employee bump, especially where the system is designed to equalize overtime annually and additional opportunities are likely to arise in the future. On the other hand, allowing bumping for overtime has the potential for creating mischief in the workplace. The employer needs to be able to have assurance that once overtime is assigned it will be worked by the employee delegated. Employees may be less likely to accept overtime if they fear other more eligible employees may bump them at the last minute and discord in the workplace may result if and when that occurs. Thus, policies would need to be developed for determining under what circumstances bumping would be allowed and at what point the original assignment would stand. All in all, it would be a cumbersome system likely to create more problems than it would solve. I do not believe this situation calls for such a broad, sweeping remedy.

The breakdown in the system here was an oversight on the part of Assistant Operations Manager Kaiser, who notified the Grievant of the available overtime and shortly thereafter offered the same overtime to O'Boyle without notifying the Grievant that he had done so. By leaving a message on the Grievant's answering machine, the supervisor created a reasonable expectation that the Grievant could accept the overtime, especially given the short passage of time between the leaving of the message and the Grievant's response. The Grievant then tried, to no avail, to accept the overtime only to be informed secondhand that O'Boyle had been assigned the hours. Essentially, he created a situation where two employees reasonably felt, for different reasons, they were entitled to work the same hours. As the City pointed out, the supervisor need not have left a message, and, in fact, he did not do so when he called on September 5. Had he not done so on September 6, there would not have been a problem because the City would have complied with the non-contact provision of the consent award and the Grievant would have remained eligible for the next opportunity. On the other hand, the City needed to find someone to work and Kaiser did not know at the time that O'Boyle was available, so he wanted to make sure the message got to the Grievant if he could. Once he spoke to O'Boyle, however, he should have called the Grievant again to tell him that the overtime had been assigned, at which point the matter would have been closed.

I view this case as being relatively limited to its facts. Thus, it is not necessary to engage in a massive revision of the overtime equalization procedure to insure such an event does not occur again. All that would be necessary, in my view, would be for the City to adopt a notification practice in cases where an eligible employee has been informed of the availability of overtime, but has not had an opportunity to respond. If the overtime is filled before the employee responds, call again and inform him that the overtime has been assigned and he will remain at the top of the call list for the next opportunity. This did not happen here and had it, the ensuing confusion could have been avoided.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

1. The City did not violate Article VIII of the Working Conditions Agreement, the Overtime Equalization Memorandum of Understanding, or the Consent Award of November 9, 2000, when it offered overtime to Joseph O'Boyle instead of Walter Kloske on August 31, 2002, and that grievance is denied.

2. The City did violate Article VIII of the Working Conditions Agreement, the Overtime Equalization Memorandum of Understanding, and the Consent Award of November 9, 2000, when it offered overtime to both Joseph O'Boyle and Walter Kloske on September 9, 2002.

3. The City shall make Walter Kloske whole by paying him 8 hours of backpay at time and a half, without interest, representing value of the lost overtime opportunity.

Dated in Fond du Lac, Wisconsin, this 18th day of September, 2003.

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

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