

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF HARTFORD

and

**HARTFORD POLICE UNIT EMPLOYEES UNION, LOCAL 1432A, affiliated with
DISTRICT COUNCIL 40, AFSCME, AFL-CIO**

Case 57
No. 62033
MA-12132

(Marlene Yogerst Overtime Grievances)

Appearances:

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, WI 54936-2236, on behalf of the Union.

Mr. Tom Wishman, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, WI 54936-2236, Union Panel Arbitrator.

Davis & Kuelthau, S.C., by **Attorney Roger E. Walsh**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, on behalf of the Employer.

Mr. Gary Koppelberger, City Administrator, City of Hartford, 109 North Main Street, Hartford, WI 53027, City Panel Arbitrator.

ARBITRATION AWARD

Pursuant to Article XXVI – Grievance Procedure, Step 4, the parties requested that the Wisconsin Employment Relations Commission provided a list of five WERC staff arbitrators from which they could jointly select a WERC staff arbitrator to act as Chair of the parties’ contractual arbitration panel to hear and resolve a dispute between them regarding the assignment of overtime to Patrice Moratz rather than Grievant Marlene Yogerst on October 21 and 22, 2002. The parties then jointly selected Sharon A. Gallagher from the panel of arbitrators provided to serve as Chair of the panel.

Pursuant to Article XXVI, Step 4 of the labor agreement, the parties proceeded with the arbitration hearing on April 30, 2003, before Arbitrator Gallagher and one panel member selected by the Union and the other panel member selected by the City. The Union designee was Tom Wishman; the City designee was Gary Koppelberger. No stenographic transcript of the hearing at Hartford, Wisconsin, was made. Arbitrator Gallagher agreed to submit her recommended award to the other two panel members prior to its issuance and that they could then decide if they wished to concur in her opinion or write their own dissent. It was agreed by the parties that Arbitrator Gallagher would then issue the decision in the case with concurrences noted and dissents attached, if any. Finally, the parties agreed to postmark their initial briefs on June 9, 2003, and that on June 20, 2003, they would postmark reply briefs. The undersigned received the last brief on June 23, 2003.

On August 11, 2003, Arbitrator Gallagher sent her proposed award to the Union and City panel members and requested their written concurrence or dissent by September 8, 2003. On August 15, 2003, Panel Member Koppelberger submitted his concurrence (Exhibit A). On September 30, 2003, Panel Member Wishman submitted his dissenting opinion (Exhibit B).

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, the parties stipulated that Arbitrator Gallagher could frame the issues based upon the relevant evidence and argument in this case, after having considered the issues stated by the parties. The City suggested the following issues for determination:

Did the City violate Section 6.07 of the collective bargaining agreement by assigning one hour of overtime to Patrice Moratz rather than to Marlene Yogerst on October 21, 2002, and by assigning one hour of overtime to Patrice Moratz rather than Marlene Yogerst on October 22, 2002? If so, what is the appropriate remedy under the collective bargaining agreement?

The Union suggested the following issues for determination herein:

Did the City violate the collective bargaining agreement and past practice by assigning one hour of overtime to Patrice Moratz rather than Marlene Yogerst on October 21, 2002, and by assigning one hour of overtime to Patrice Moratz rather than Marlene Yogerst on October 22, 2002? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case and the parties' suggested issues, I find that the Union's issues more reasonably state the dispute between the parties under the applicable language of the labor agreement.

RELEVANT CONTRACT PROVISIONS

ARTICLE I - RECOGNITION

1.01 The Employer hereby recognizes the Unit as the bargaining agent for the full-time and part-time employees of the Employer's Police Department employed in the classifications of Detective, Patrol Officer, Police Administrative Assistant, Communications Officer, Clerk-Typist and Parking Enforcement Aide for the purpose of negotiations on all matters concerning wages, hours and other conditions of employment. Although included in the bargaining unit and covered by this Agreement, the Police Administrative Assistant and Communications Officer, Clerk-Typist and Parking Enforcement Aide are not "police officers" within the meaning of that term in Section 111.70, Wisconsin Statutes.

. . .

ARTICLE III - MANAGEMENT RIGHTS

3.01 The Union recognizes the prerogatives of the Employer to operate and manage its affairs in all respects in accordance with its responsibility, and the powers or authority which the Employer has not specifically abridged, delegated or modified by other provisions of this Agreement are retained exclusively by the Employer. Such powers and authority, in general, include, but are not limited to the following:

A. To determine its general business practices and policies and to utilize personnel, methods and means in the most appropriate and efficient manner possible;

B. To manage and direct the employees of the Employer, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by the work force and each employee, and to determine the competence and qualifications of the employees;

C. To utilize temporary or part-time employees when deemed necessary;

- D. To establish work schedules, methods and processes;
- E. To schedule overtime work when required;
- F. To create new positions and to modify existing or introduce new or improved operations or work practices;
- G. To make reasonable rules and regulations for the conduct of its business and of its employees.

ARTICLE VI – OVERTIME

6.01 Daily and Weekly: Any Detective, Police Administrative Assistant, and Clerk-Typist required to work in excess of eight (8) hours per day or eight and one-half (8 ½) hours per day in the case of Patrol Officer, or Communications Officer, or any employee (excluding part-time Communications Officers) required to work on a regularly scheduled day off, shall be compensated at the rate of one and one-half (1 ½) times his/her regular rate of pay for such hours worked.

6.02 Prior Authorization: All overtime shall be authorized or approved by the Chief of Police or Chief's designee. Employees shall be required to work overtime when requested by the Chief of Police unless excused because of physical inability to perform the overtime work or for a serious personal reason. The employee shall give the Chief of Police the specific reason for his/her excuse.

. . .

6.07 Division of Overtime:

A. Patrol Officers: Overtime other than specified in Section 6.06 above shall be divided as equally as possible and practical. Accumulated summaries will be posted quarterly showing each Officer's accumulated overtime and number of hours of declined overtime.

Declined overtime shall be charged against an Officer for purposes of equalization, except in cases where an employee is on sick leave or is receiving Worker's Compensation benefits. For purposes of this Section, an employee called on a regularly scheduled day off shall be considered to be on sick leave if he/she received paid sick leave on his/her last regularly scheduled work day.

In the case of an employee that has scheduled vacation or floating holiday day(s) off consecutive to regularly scheduled off days, the employee will not be called for overtime on any of those days and will not be ordered in to work unless an emergency exists.

If the particular vacancy cannot be filled through the equalization call-in process, the employee that has off, as defined in the previous paragraph, can be called prior to any employee being ordered in. If the employee declines the opportunity for overtime, he/she shall not be charged and the ordering-in process shall continue.

B. Communications Officers: Overtime other than specified in Section 6.06 above shall be governed by the Letter of Agreement signed October 22, 1996 and November 5, 1996.

STIPULATIONS OF FACT

1. Marlene Yogerst was hired in the bargaining unit by the City of Hartford on May 21, 1997 as a Parking Enforcement Aide. She was promoted to Clerk-Typist on July 12, 1999.
2. Patrice Moratz was hired in the bargaining unit by the City of Hartford on April 12, 1993 as a Clerk-Typist. She was promoted to Administrative Assistant on July 1, 1999.
3. The Clerk-Typist position was created in the Police Department on April 12, 1993.
4. The Administrative Assistant (or Secretary) position has been in the bargaining unit since at least 1980.

BACKGROUND

Patrice Moratz (Moratz) served in the capacity of Clerk-Typist from 1993 until her promotion to Administrative Assistant in the Police Department in July, 1999. Also in July, 1999, the Grievant, Marlene Yogerst, was hired to fill the Clerk-Typist position vacated by Moratz. As of July, 1999, the position description for the Clerk-Typist position in the Police Department read in relevant part as follows:

GENERAL POSITION DESCRIPTION

Primarily responsible for accurately transcribing and editing police reports from audiotapes submitted by officers.

SPECIFIC POSITION RESPONSIBILITIES

- Transcribes police reports from audiotapes; proof read and edits reports; and routes to the appropriate authority.
- Responsible for preparing and faxing reports to other agencies.
- Prepares necessary documents for submission to the District Attorney's Office.
- Copies and prepares reports necessary for Municipal Court.
- Assists Court Officer for Municipal Court.
- Other duties as assigned.

SKILLS, KNOWLEDGE AND ABILITIES

Must possess the ability to read and interpret documents such as safety rules, policies, procedures, rules and regulations. Must possess the ability to transcribe reports from dictation tapes, and to proof read for accuracy. Must possess good communications skills including the ability to listen and understand, and to convey the information received in an appropriate manner. Must possess the ability to type at a minimum rate of 50 wpm, with not less than an accuracy rate of 98%. Must possess the ability to utilize a variety of office machines, i.e. computers and associated software linked to the Local Area Network (LAN), typewriters, facsimile machine, copier, printers and calculator.

Must possess the ability to apply common sense understanding in carrying out instructions furnished in written, oral, or diagram form, and have the ability to deal with problems involving several concrete variables in standardized situations.

Must possess the ability to add, subtract, multiply and divide standard units of measure, using whole numbers, common fractions, percentages and decimals.

EDUCATION AND PRIOR EXPERIENCE

High school diploma or general education degree (GED).

CERTIFICATES, LICENSES, REGISTRATIONS

Must possess and maintain a valid Wisconsin Driver's License.
Must have the ability to attain and maintain TIME System Mobile Data Computer (MDC) certification.

The current position description for the Administrative Assistant position reads in relevant part as follows:

GENERAL POSITION DESCRIPTION

Assists the Chief of Police in administrative, clerical and business duties and responsibilities.

SPECIFIC POSITION RESPONSIBILITIES

- Takes dictation in shorthand or by voice recording machine and transcribes notes on typewriter or computer, as assigned.
- Coordinates and maintains office supply inventories.
- Receives and routes incoming mail.
- Locates and attaches appropriate file to correspondence to be answered by supervisor.
- Files correspondence and other records.
- Assists the Chief of Police with open records requests.
- Answers and places telephone calls and provides information to callers, or routes calls to the appropriate official.
- Schedules training accommodations, when required.
- Audits weekly departmental cash receipts and turns receipts into City Treasury.
- Records, compiles and tallies information for false alarm charges, when appropriate.
- Coordinates and maintains court calendars and files through attorneys and courts whenever necessary.
- Prepares departmental purchase orders, expense vouchers and accounts payable, as needed.
- Validates bi-weekly Time Sheets for payroll purposes.
- Serves as the agency's TIME System Agency Coordinator (TAC).
- Assists in Basic TIME System training for Mobile Data Computer (MDC) certification.
- Serves as relief for Communication staff, as required.
- Assumes duties of Clerk-Typist when absent.
- Prepares reports, agendas and minutes.
- Department's DOT agent for processing Temporary License Plate Registrations.
- Other duties as assigned.

SKILLS, KNOWLEDGE AND ABILITIES

Must possess the ability to read and interpret documents such as safety rules, policies, procedures, rules and regulations. Must possess the ability to remain calm and professional under stress. Must possess the ability to decipher

information when received, and to decisively direct an appropriate response. Must possess good communications skills including the ability to listen and understand, and to convey the information received in an appropriate manner. Must possess the ability to speak clearly.

Must possess the ability to apply common sense understanding in carrying out instructions furnished in written, oral, or diagram form, and have the ability to deal with problems involving several concrete variables in standardized situations.

Must be able to perform all required functions on a variety of communication equipment and office machinery, i.e. computers and accessories, two-way radio, alarm system, paging system, teletype system, copier, facsimile machine, cash register, weather alert systems, closed-circuit televisions (CCTV's), and telecommunication device for the deaf (TDD).

Must possess the ability to add, subtract, multiply and divide standard units of measure, using whole numbers, common fractions, percentages and decimals.

Must possess the ability to reasonably utilize a variety of computer software programs available for department use.

EDUCATION AND PRIOR EXPERIENCE

High school diploma or general education degree (GED). Must possess the ability to successfully complete the TIME System Basic and Part II certification course, and maintain certification as a condition of employment.

CERTIFICATES, LICENSES, REGISTRATIONS

Must possess and maintain a valid Wisconsin Drivers License.

Must have the ability to attain and maintain TIME System Part I and II certifications.

Must successfully pass Crime Information Bureau (CIB) and National Crime Information Center (NCIC) fingerprint clearance.

Notary Public.

Yogerst stated herein that her duties include typing all police reports as they come into the Department and distributing these to the appropriate agencies and the courts. "Hot complaints" must be given first priority. These "hot complaints" include domestic complaints, child custody complaints, child abuse and neglect complaints and mental commitment

complaints. The Department expects “hot complaints” to be done as soon as possible and to be faxed to the relevant court and agencies that need them. Because the receipt of “hot complaints” is unpredictable, there can be backlogs in typing these complaints.

Since her promotion to Administrative Assistant, Departmental records show that Moratz has worked the following overtime hours in each calendar year listed:

1999:	39.75 hours
2000:	11.5 hours
2001:	17.0 hours
2002:	10.75 hours

The above overtime was performed by Moratz while the Clerk-Typist Yogerst was on vacation, in training or seminars or when Yogerst was backlogged in her work. Yogerst was unaware that Moratz had been doing Clerk-Typist work on overtime prior to October 21, 2002. From 1999 through 2001, Yogerst had only 11 hours of overtime work: 10 hours occurred in 1999 (when Moratz was promoted to Administrative Assistant and Moratz was training Yogerst in the Clerk-Typist job) and 1 hour of overtime in 2002.

In the year 2000, an agreement was reached between the City and the Union regarding Yogerst’s hours of work which read as follows:

. . .

1. Effective October 2, 2000, the normal work hours for the position of Clerk-Typist will remain to be [sic] eight (8) hours per day, Monday through Friday, and
2. The Clerk-Typist's eight (8) hours per day schedule shall be continuous and shall be completed between the hours of 6:00 a.m. and 4:00 p.m. each day, and
3. It is agreed that upon timely and official notification by the Department that there are outstanding issues related to the normal duties of the Clerk-Typist that require immediate attention, that the incumbent will report to work, to complete those duties, as close to the 6:00 a.m. starting time as possible, and
4. If no notification is given on a normal work day, the incumbent may begin her/his eight (8) hour work day anytime between the hours of 6:00 a.m. and 4:00 p.m.

5. It is also agreed that this Agreement serves as being temporary, and will be included in the current on-going negotiation process for contract year 2001 and beyond.

...

This agreement constituted a modification of the normal work hours applicable to the Clerk-Typist position under the labor agreement. As a result of the above agreement, Yogerst stated that if she is not working the second shift, the City must call her by 9:00 p.m. for her to arrive early (by 6:00 a.m.) to work the next day in order to handle "hot complaints." If a "hot complaint" comes in on the third shift, Yogerst must be called by 4:30 a.m. in order to arrive at work at 6:00 a.m. that day to handle the "hot complaint(s)." Yogerst stated that she normally comes into work between 6:45 and 7:00 a.m. if she has not been called to arrive earlier.

From her hire as Clerk-Typist until October 21, 2002, Yogerst regularly took two 15-minute rest breaks along with a contractual 30-minute paid lunch period to equal a one-hour break. Rest breaks are not referred to in the labor agreement although the Chief of Police confirmed that two 15-minute paid breaks have been taken by employees pursuant to past practice. Yogerst never asked for or received authorization from management for her decision to take one or both rest breaks in conjunction with her lunch period. Yogerst stated that no one in management told her that she could not combine rest breaks with her paid lunch prior to October 22, 2002.

From at least 1992 until 2000, the labor agreement contained specific reference to overtime equalization for Communication Officers and Police Officers but was silent concerning overtime equalization for clerical employees. Article VI, Sections 6.01 and 6.07 have read essentially as follows from 1992 through 2000 in each of the respective labor agreements covering those years:

6.01 Daily and Weekly: Any Detective, Juvenile Detective, Police Administrative Assistant, and Clerk Typist required to work in excess of eight (8) hours per day or eight and one-half (8 1/2) hours per day in the case of Patrol Officer, or Communications Officer, or any employee (excluding part - time Communications Officers) required to work on a regularly scheduled day off, shall be compensated at the rate of one and one-half (1-1/2) times his/her regular rate of pay for such hours worked.

...

6.07 Division of Overtime: Overtime other than specified in Section 6.06 above shall be divided as equally as possible and practical. Accumulated summaries will be posted quarterly showing each Officer's and Communications Officer's accumulated over-time [sic] and number of hours of declined overtime.

Declined overtime shall be charged against an Officer or Communications Officer for purposes of equalization, except in cases where an employee is on sick leave or is receiving Worker's Compensation benefits. For purposes of this section, an employee called on a regularly scheduled day off shall be considered to be on sick leave if he/she received paid sick leave on his/her last regularly scheduled work day.

In 1996, the parties entered into a side Letter of Agreement, not to be considered a part of the labor agreement, which covered the treatment of Communication Officers for purposes of Article 6.07 division of overtime work as follows:

. . .

This Letter of Agreement specifically addresses Section 6.07 of the Labor Agreement dealing with the **Division of Overtime**.

The intent of this Letter of Agreement is to *exclude* those employees classified as Communication Officers from the provisions of this section, and that the following provisions will be followed as mutually agreed upon:

1. Equalization for Communication Officers will be eliminated.
2. Overtime that is anticipated for the upcoming month will be posted on a calendar in a conspicuous location in the Communications Center.
3. Communication Officers shall select the hours they wish to work on overtime.
4. Seniority will be the deciding factor for any day in which two or more Communication Officers sign for the overtime.
5. One week prior to overtime hours not taken, the call-in procedure will be utilized, and will be based on seniority with the most senior Communications Officer being called first.
6. Short notice days will be covered by seniority call-in procedure as outlined in #5.
7. If the hours cannot be filled by choice, the least senior Communications Officer will be ordered in to cover the shift.
8. Whenever possible, any necessary ordering in to work will be based on low seniority, and shall be done by a supervisor.

It is also agreed that either party can terminate this Agreement given a sixty (60) day written notice to the other party. In that event, the provisions set forth in section 6.07 of the contract will take precedent.

. . .

In negotiations for the 2001-03 labor agreement, the parties agreed to codify into the labor agreement the above-quoted 1996 side agreement concerning overtime for Communications Officers. The labor agreement indicates that change and the history of parties' negotiations confirms this.

FACTS

The Chief stated herein that prior to October 21st, Moratz told him that Yogerst was behind in typing from 80 to 90 "hot complaints." 1/ The Chief then assigned Moratz to type complaints on overtime to help Yogerst with her backlog. The Chief stated that on October 21 and 22, 2002, Moratz typed approximately 49 of the backlogged complaints.

1/ Yogerst stated that she had been gone for one day of training during the week of October 21st and that she had taken one day of vacation the week before, causing a backlog.

On October 21, 2002, when Yogerst arrived at work, Moratz was already working on typing "hot complaints" which would normally have been typed by Yogerst. Yogerst asked Moratz why this was occurring and Moratz stated that she had been assigned to work overtime on Yogerst's backlog by the Chief.

Later that day, Yogerst spoke with the Chief who indicated that he believed he had the right to assign the clerical overtime work to anyone he wished. Yogerst objected that the work was hers. The Chief responded that he did not agree with that.

At some point on October 21st, Yogerst spoke with Officer Russ Wagner and asked him what he thought of Moratz' performing her (Yogerst's) work. Wagner stated that he felt that the Chief had violated the contract. On October 22nd, Wagner spoke with Lieutenant Horvath about Moratz' performing Yogerst's work. According to Wagner, Horvath responded that he believed no contract violation had occurred and that employees who have not done their work should not be rewarded with overtime work to perform duties normally assigned to those employees. 2/

2/ Horvath asserted herein that he had not intended to refer to Yogerst by this comment; Horvath stated that he had spoken in a general way. Horvath later apologized to Yogerst for the comment..

After this conversation, Wagner reported Horvath's comment to Yogerst who became upset. Yogerst then spoke with the Chief again. Yogerst told the Chief about Lieutenant Horvath's comments (reported to her by Officer Wagner). The Chief stated that the Sergeants had told him that Yogerst was taking too long for lunch, that she was taking too many breaks and that she had been seen reading a book instead of performing work. Yogerst then told the Chief that she had been combining her rest breaks with her lunch break. The Chief responded that he understood that this might make it look as if she were taking longer breaks than were allowed in the Department. The Chief stated herein that at this time, he specifically told Yogerst that it was a violation of the labor agreement for her to combine non-contractual paid breaks with her contractual 30-minute paid lunch break.

Union President Ken Kluck stated herein that during his tenure in the Department as a Patrol Officer (full-time since 1982), only clerical employees have been called in to do clerical overtime work. Kluck stated that he has served as Union President, Steward and Vice President in the past and that he was not aware that Moratz had performed Clerk-Typist overtime in 1999. Union witness Wagner did not testify regarding this issue. Yogerst stated herein that she was unaware that Moratz had worked overtime on a Clerk-Typist backlog in 1999.

On October 29, 2002, Yogerst filed the instant grievance stating that Moratz' working overtime on October 21 and 22, 2002, violated the labor agreement because Yogerst was not asked first to work the Clerk-Typist overtime available and that Yogerst should have been offered this work, citing Article VI, Section 6.07. The grievance sought an order that Yogerst receive two hours of overtime pay for the time that Moratz did Clerk-Typist work and that the Chief be ordered to offer Yogerst all Clerk-Typist overtime opportunities first in the future.

POSITIONS OF THE PARTIES

The City

The City argued that Section 3.01 of the labor agreement reserves to the Chief the power and authority to assign overtime to Moratz. In this regard, the City noted that Sections A, B and E of Section 3.01, indicate that the City can determine practices and policies, assign work, determine the work to be done by each employee, schedule overtime, operate and manage City affairs, utilize personnel in the most appropriate and efficient manner, manage and direct employees and make job assignments. Given the fact that there is no overtime language relevant to the clerical employees in the unit, the City urged that the language of Section 3.01 clearly reserves to the City the right to assign overtime among clerical employees. Indeed, the only restriction regarding overtime work is in Section 6.07, which refers specifically to Patrol and Communication Officers and places no limit on the Chief's discretion to assign overtime among clerical employees.

The City urged that the Union had many opportunities to negotiate restrictions on overtime regarding clerical workers from 1993 forward and that it failed to do so. Finally, the City argued that the past practice of the Chief's assignment of overtime among clerical employees supports the City's position. In this regard, the City noted that in 1999, the Chief assigned overtime to Moratz in order to clear up backlogs in the Clerk-Typist work without any Union objection. Thus, the City urged that the grievance should be denied and dismissed in its entirety.

The Union

The Union argued that the City has a past practice of first offering overtime to the employee holding the job classification of the work if that employee is available to do the work. The Union argued that this practice is consistent and that the Union and employees in the unit should be able to rely upon it. On this point, the Union noted that the Administrative Assistant job description specifically states that the Administrative Assistant must be able to assume "duties of Clerk-Typist when absent." This, the Union urged implies that the Administrative Assistant may only perform Clerk-Typist duties when the Clerk-Typist is absent.

The Union contended that it is unreasonable to expect the labor contract to cover every situation. The Union noted that although the contract has no language requiring overtime to be first offered to the employee holding the classification, that such language is not necessary here. Thus, the Union noted that the language of the contract regarding job posting, promotion, wages and classification imply that each employee has the right to perform the overtime connected with their position. In addition, the job description of the Clerk-Typist lists the work done by that position as belonging to it. The Union noted that there was no need to add language to the labor agreement regarding overtime assignments for the Clerk-Typist because there is only one employee in that classification.

The Union asserted that it was unaware that Moratz had worked Clerk-Typist overtime in 1999. In addition, the Union noted that the record submitted by the City regarding overtime worked across the years does not demonstrate that the backlogs that Moratz worked on were in fact Clerk-Typist backlogs. In any event, the Union urged that a past practice will be enforced if a predominant pattern emerges and 100% consistency is not necessary for enforcement of such a practice.

The Union contended that the City wrongly concluded that Yogerst was abusing her break and/or lunch time and it used this as a reason to deny her overtime. Thus, the Union urged that the City's denial of overtime to Yogerst was a form of discipline without just cause. On this point, the Union observed that the City never investigated the allegation that Yogerst had abused her lunch and/or sick leave; that the City never talked to Yogerst about what she was doing for breaks and lunch; and that the actions of the City were taken to punish Yogerst on the basis of faulty information.

Yogerst was an exemplary employee and Moratz' qualifications should not be relevant here. As Clerk-Typist overtime distribution has never been an issue between the parties, there has been no need to negotiate regarding it. Thus, the Union urged that Yogerst should be paid two hours of overtime pay (at time and one-half) and that in the future, the City should be ordered to offer Yogerst overtime work in her classification first.

Reply Briefs

The City

The City argued that the Union misstated certain facts. First, the City noted that Moratz worked substantial overtime in 1999 (23 hours). For the Union to argue that it did not know about Moratz' overtime work in 1999 was "baseless." In this regard, the City noted that Yogerst admitted herein that she knew that Moratz was working overtime on complaint backlogs but that she did not know Moratz had worked overtime on a weekend in September, 1999. The only backlogs existing in the Department in 1999 and 2002 were Clerk-Typist backlogs.

Second, the Union's argument that overtime was consistently offered first to the employee in the classification was incorrect. The City noted in this regard that witnesses Kluck and Wagner had no actual knowledge of overtime work, had not reviewed overtime records and their evidence did not support assertions that the Union made regarding this point.

Third, the Union's claim was "unwarranted" that the job description of the Administrative Assistant implies that only when the Clerk-Typist is absent can the Administrative Assistant do her work. Here, the Administrative Assistant job description states that the incumbent must be able to do Clerk-Typist work and states that other duties will be expected of the Administrative Assistant "as assigned." Therefore, the job description of the Administrative Assistant supports the City's position.

Given the fact that the contract contains no language limiting the assignment of Clerk-Typist overtime to the Clerk-Typist and the prior consistent assignment of such overtime to the Administrative Assistant, the Arbitrator should deny the instant grievance, there being no evidence to support the Union's claim that the denial of overtime to Yogerst constituted a disciplinary action.

The Union

In its reply brief, the Union essentially repeated the arguments contained in its initial brief. In addition, the Union urged that the Chief's decision to deny Yogerst overtime was arbitrary and capricious because it was based on unfounded and unconfirmed assertions

regarding her use of break and lunch time. Here, the City has unjustifiably taken the most narrow view of its management rights clause. In this regard, the Union urged that if an item involves a benefit like overtime, an employer should not be allowed to arbitrarily select whoever it pleases to do that work as this lessens the bargained-for value of contractual provisions such as job posting, job classification and wage rate for employees in the classification. Finally, the Union urged that cases cited by the City were distinguishable.

DISCUSSION

Article I of the effective labor agreement states the classifications covered by the agreement which include the Police Administrative Assistant and the Clerk-Typist. Article III of the agreement at Sections A and E also reserve to the City the right to “make assignments of jobs . . . to determine the work to be performed by the work force and each employee . . . (t)o schedule overtime work when required. . . .”

This case involves the Chief’s assignment of overtime to the Administrative Assistant rather than the Clerk-Typist. Both positions are in the bargaining unit. Notably, the position description of the Clerk-Typist states that the position is “primarily responsible for accurately transcribing and editing police reports . . .” and it states that the Clerk-Typist can be assigned “other duties as assigned.” The Administrative Assistant position description states that the incumbent must “assume duties of Clerk-Typists when absent . . .” and that the position may be assigned “other duties as assigned.”

Article VI, Section 6.01 states that both the Clerk-Typist and Administrative Assistant can earn overtime pay if they are required to work in excess of eight hours per day. However, Section 6.02 states that the Chief or his designee must authorize or approve all overtime. It is significant that Section 6.07, which is the only provision of the contract which addresses how overtime is to be distributed or equalized, does not mention the Administrative Assistant or the Clerk-Typist position and it does not contain any language regarding the equalization or distribution of clerical overtime between these two bargaining unit positions. The silence of the agreement on this point essentially means that evidence of bargaining history and past practice can become relevant to fill in the blanks on this issue.

The record showed that there has been limited overtime available for unit clerical employees from 1999 through 2002. Most of the overtime was worked by Moratz when Yogerst was on vacation or being trained. During this period of time, there was a total of 79 hours of clerical overtime, an average of 19.75 hours per year. Yogerst worked only eleven of these hours, ten hours in 1999 after she was hired into the Clerk-Typist position (which had been held by Moratz who was promoted to Administrative Assistant at that time). Yogerst worked one hour of backlog overtime in 2002. Therefore, in 1999 and 2002, the Chief assigned Moratz 20 hours of “backlog” overtime in 1999 and he assigned Moratz 3 hours of “backlog of complaints” overtime in 2002, according to City records.

Thus, with the exception of the 11 hours worked by Yogerst, Moratz worked 23 hours of backlog clerical overtime from 1999 through 2002. Given this record evidence, there is no clear past practice of offering all clerical overtime to the employee holding the classification of the work, contrary to the Union's claim herein. In this regard, I note that the Chief specifically stated that the "backlog" overtime worked by Moratz was Clerk-Typist backlog overtime. 3/

3/ Union witness Kluck did not contradict the Chief on this point.

The parties added overtime equalization/distribution language to the 2001-03 agreement regarding Communications Officers which had previously only been covered by a side letter. However, the parties offered no evidence to show that they had discussed the distribution/equalization of overtime among clerical employees. Indeed, it is undisputed that the parties have never addressed this issue at negotiations. Thus, there is no helpful bargaining history relevant to this case.

The Union has argued that the Administrative Assistant's position description limits the Administrative Assistant to performing Clerk-Typist duties only when the Clerk-Typist is absent. I can find no contractual basis for such a conclusion. The position descriptions involved in this case are extra-contractual. In addition, the Administrative Assistant job description states that incumbent can be assigned other duties. Furthermore, neither the labor agreement nor the Clerk-Typist job description guarantees Clerk-Typist overtime to the Clerk-Typist incumbent.

The Union has also argued that the City's actions in granting the Clerk-Typist overtime to Moratz was a thinly disguised means of punishing Yogerst for her use of breaks and lunch time. The facts of this case are insufficient to demonstrate that the Chief intended to discipline Yogerst by assigning Clerk-Typist overtime to Moratz in October, 2002. In this regard, I note that when Yogerst confronted the Chief about his assignment to Moratz on October 21 and 22 of overtime, the Chief merely responded that he had the authority to assign clerical overtime to whomever he wished under the contract. Indeed, according to the Chief, when Moratz told him that there was a backlog of complaints, the Chief reacted by simply assigning Moratz to assist Yogerst in working on the backlog.

Although the Sergeants had reported to the Chief their belief that Yogerst was taking extended breaks and/or lunches, the Chief did not order the Sergeants to investigate the situation. It was the conversation between Russ Wagner and Lieutenant Horvath that upset Yogerst. This conversation was pure hearsay as it was reported to Yogerst by Wagner. In addition, I note that Wagner admitted herein that Horvath did not mention Yogerst's name in his comment to Wagner.

Thus it was Wagner's report of Horvath's comment that spurred Yogerst to speak to the Chief again regarding the overtime assigned to Moratz. During the second conversation, it was Yogerst who raised the issue regarding her use of breaks and lunch and explained her actions. I note that she had never discussed her use of breaks in conjunction with lunch with any Department manager prior to this point in time and that she had not received authorization to combine her breaks with her lunch from anyone in management. The Chief's response to Yogerst's admission of her practice regarding combining one or more breaks with her lunch, was simply that he could understand how people might perceive that given these facts she had been taking extended breaks and/or lunches. Although the Chief advised Yogerst that she was not authorized to combine her breaks and lunch in this fashion, he did not issue her any official discipline. Given the above-described facts, there is insufficient evidence to show that the Chief intended to discipline Yogerst by assigning Clerk-Typist overtime to Moratz on October 21 and 22, 2002.

The Union has argued that the labor agreement cannot cover all topics. This is true. However, where, as here, the contract is completely silent on an important topic such as overtime distribution/equalization and there is no past practice or bargaining history to support the assertion that overtime must first be offered to the employee in the classification of the work, general language in a labor agreement (regarding job postings, classifications, wage rates and overtime entitlement) is insufficient to support the Union's assertion that Yogerst must first be offered all Clerk-Typist overtime work. This is particularly so given the language of Article III reserving to management the right to assign overtime.

It is clear that in 1999 the Union was aware that both Moratz and Yogerst had performed substantial Clerk-Typist overtime when Moratz was promoted to Administrative Assistant. However, the Union did not object to Moratz' performing this work in 1999. Furthermore, the record failed to show that Kluck and Wagner had actual knowledge of Clerk-Typist overtime work or that they had reviewed overtime records to support their assertions in this case.

The Union has also argued that because there is only one Clerk-Typist, there was no need for the parties to negotiate regarding the equalization or distribution of overtime in the labor agreement. I disagree. As both the Clerk-Typist and Administrative Assistant are bargaining unit positions, the question whether overtime should be equalized between those two positions should logically be addressed by the parties if they wish to require such equalization. As the contract does not address this subject, this is further support for the City's arguments herein.

Based on the above analysis, the evidence failed to show that the City was arbitrary and capricious in its assignment of Clerk-Typist overtime work to Moratz on October 21 and 22, 2002 and I therefore issue the following

AWARD

The City did not violate the collective bargaining agreement or past practice by assigning one hour of overtime to Patrice Moratz rather than Marlene Yogerst on October 21, 2002 and by assigning one hour of overtime to Patrice Moratz rather than Yogerst on October 22, 2002. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 10th day of October, 2003.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator