BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LACROSSE CITY EMPLOYEES UNION
LOCAL 180, SEIU, AFL-CIO, CLC

and

CITY OF LACROSSE

Case 325
No. 61575
MA-11992

(Dave Goyette Overtime Grievance)

Appearances:

Mr. James G. Birnbaum, Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, on behalf of LaCrosse City Employees Union Local 180, Service Employees International Union.

Mr. Peter B. Kisken, Deputy City Attorney, City of LaCrosse, on behalf of the City of LaCrosse.

ARBITRATION AWARD

LaCrosse City Employees Union Local 180, SEIU, AFL-CIO, CLC, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of LaCrosse, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 10, 2003, in LaCrosse, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by August 6, 2003. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

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 agree on a statement of the issues and agreed the Arbitrator will frame the issues to be decided.

The Union offers the following statement of the issues:

1. Did the City violate Articles 10, 12 and 19 and/or past practices of the collective bargaining agreement, the expressly written overtime policy and/or past practice when it failed to offer overtime to the Grievant?

2. If so, what is the appropriate remedy? 1/

1/ The Union entered a number of subsequent grievances of Goyette and Lab Tech/Pretreatment Aide, Richard Smith, which it requested be covered as part of the remedy in this case.

The City would state the issues as follows:

Did the City violate the Collective Bargaining Agreement when it did not offer overtime to the grievant on August 5, 2002, when it did not need the grievant to work overtime, because another employee within a higher job classification, who was qualified to do the work at issue, was available to perform the work.

If so, what is the appropriate remedy?

The Arbitrator finds that the issues to be decided are properly stated as follows:

Did the City violate the parties' Collective Bargaining Agreement when it failed to offer the Grievant, Dave Goyette, overtime on August 5, 2002 and instead assigned the Special Projects Coordinator, Jeff DeJarlais to perform the lab work during his regular work hours? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE 2
GRIEVANCE PROCEDURE

. . .

The arbitrator shall not add to, or subtract from the terms of this agreement.

. . .

ARTICLE 12
OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1½) times their regular rate of pay for services rendered and hours worked over and above their regularly scheduled work week. In no case shall time and a half be authorized for services less than forty (40) hours in one week. For employee's on a 37½ hour work week, overtime shall be at straight time cash or compensatory time for the first 2½ hours of weekly overtime.

. . .

D. In each calendar year, at the employee's option, he/she may accumulate up to 40 hours of compensatory time at a rate of time and one-half for each hour of overtime worked over 40 hours. . .

. . .

ARTICLE 19
RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of LaCrosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations

governing conduct and safety, to determine the schedules of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

. . .

ARTICLE 25
AMENDMENT PROVISION

This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union wherein mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

ARTICLE 28
ENTIRE AGREEMENT

The foregoing constitutes an Entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

BACKGROUND

The City maintains and operates a Wastewater Treatment Plant (WWTP). The Grievant, David Goyette, hereinafter Goyette, has held the position of Chemist in the WWTP lab, Richard Smith, hereinafter Smith, has held the position of Lab Technician/Pre-Treatment Aide in the lab, and Jeff DeJarlais, hereinafter DeJarlais, has held the position of Special Projects Coordinator at the WWTP. Greg Paul is the Superintendent of the WWTP. The lab monitors the sewage that comes into the plant, the by-products, and the water that goes out of the plant.

Prior to 2000, there were four individuals employed in the lab, including Goyette and Smith. The weekend shifts were rotated among the four employees and their work schedules were adjusted accordingly. One of the employees retired in 2000 and by March of 2002, another employee in the lab had retired, leaving only Goyette and Smith with regularly-

assigned lab duties and creating overtime opportunities for two weekend shifts per month and their being scheduled to work the other weekend shifts as part of their regular work hours.

DeJarlais has held the position of Special Projects Coordinator since the mid-1990's. DeJarlais' position description lists as a normal duty "monitor biological and chemical treatment processes." In May of 2000, Paul informed Smith, who was a Union Steward at the time, that he intended to have DeJarlais learn the testing procedures in the lab to give him some background for his job as Special Projects Coordinator. Smith initially raised a concern that other, more senior, employees might object to having DeJarlais work in the lab. Smith checked with those other employees and advised Paul that they did not object to DeJarlais working in the lab as long as he did not earn overtime working there. Paul advised Smith that overtime would not be an issue with DeJarlais as far as lab work was concerned. Thereafter, DeJarlais worked in the lab several days per month with Smith and/or Goyette, learning the testing procedures.

On August 5, 2002, Smith was on vacation and it was a scheduled day off for Goyette, as he had worked his scheduled weekend shift. Paul assigned DeJarlais to work in the lab that day during his regular work hours and did not contact Goyette and offer him the opportunity to work the day as overtime. There is no dispute that this did not involve an emergency or unforeseen situation On August 8, 2002, Goyette filed a grievance that alleged violations of Articles 12 and 19 of the parties' Agreement and past practice, and requested 8 hours of overtime pay or the equivalent in compensatory time as a remedy, and which stated, in relevant part:

> On Monday, 8/5, Rich Smith took the day off. This was Dave's day off. To fill the spot in the lab, Greg Paul had Jeff DeJarlais work in the lab and didn't ask Dave to work. The Wastewater Utility has "job seniority" when it comes to overtime. While it's true that having Jeff work in the lab was not overtime for Jeff, if Dave would have been asked to work, it would have been overtime. Jeff has been working in the lab but, he is still not in the lab job classification. There is nothing in Jeff's job description pertaining to the lab. When Greg first had Jeff work in the lab, he said it was to give him some background for his job. Now, we're at the point where the established policy of job seniority is being ignored and people within a certain job description are losing overtime. According to the policy we've been under for many years, Dave believes he should have been offered the option of working on Monday, 8/5 for overtime.

The City responded by letter of August 23, 2002, which stated, in relevant part, as follows:

. . .

Article 19 – Reservation of Rights of the SEIU Local #180 collective bargaining agreement states, "Except as otherwise specifically provided herein. . .to determine the schedule of work. . .are vested exclusively in Management." It is the City's position that management has the right to assign work as necessary for the efficient operation of the department. Mr. DeJarlais has been trained to perform lab duties and has been doing so weekly for approximately the past eighteen months. In this case, management believes that it was not necessary to create an overtime situation since Mr. DeJarlais was qualified and available to work *under his classification* during normal working hours to perform the required work in the lab in the absence of Mr. Smith and Mr. Goyette.

The "Policy for Awarding/Assigning Overtime for the WWTP" outlines the guidelines to be used when awarding/assigning overtime. Article 12 "Overtime" of the collective bargaining agreement describes how overtime is to be paid once it is worked. Since no overtime was awarded/assigned in this situation, neither Article 12 or the WWTP policy apply. In addition, the City disagrees with the union's allegations of a binding past practice or policy which requires that only employees in a job classification may perform the work in that classification. On the contrary, the city believes that it is a management right to assign employees to work under their classification and continue their normal rate of pay.

Based on the City's conclusions as stated above and the fact that no specific violation of the collective bargaining agreement has occurred, the union's requested grievance remedy for 8 hours of overtime pay for Mr. Goyette is hereby denied.

The overtime policy to which the grievance and the response refer, and which was in effect on August 5, 2002, states, in relevant part, as follows:

Policy for Awarding/Assigning Overtime
WasteWater Treatment Plant

September 4, 2001
G. Paul

NOTE:

All sections of this document are meant to be guidelines for awarding and assigning over time. In most cases these guidelines will be followed but there may be a few variations from these guidelines due to unforeseen circumstances.

1. GENERAL GUIDE LINES FOR ASSIGNING VOLUNTARY OR INVOLUNTARY OVERTIME:

FOUR HOURS OR MORE: When four or more hours of overtime are required within a specific job classification, departmental seniority within that classification will be used to award this work. For example, if an Operator is needed the OPERATOR SENIORITY list will be used when calling for a replacement. No one shall be scheduled more than 12 hours per day. This 12-hour limit may be waived for emergencies and special sludge hauling schedules.

. . .

The parties were unable to resolve their dispute and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the City violated its own long-standing policies, the parties' Agreement and past practice when it assigned someone from outside the classification to perform duties, rather than offering overtime on a seniority basis to those employees in the classification that performs the work.

The City's own written policies, dating back to 1989, require it to award overtime on a seniority basis within the job classification that performs the work. The policy in effect on August 5, 2002, states, "When. . .overtime [is] required within a specific job classification, departmental seniority within that classification will be used to award this work. . ." (Emphasis added). The City's argument that there was no violation of the overtime policy, since the work was performed during DeJarlais' normal work hours, and hence was not overtime, ignores the above-emphasized wording. One must look at the classification that performs the work in question. The work in this case constituted overtime for the Chemist classification. Further, it is overtime for a particular position, not a particular person, that is relevant, as evidenced by the example in paragraph 1 of calling Operators to replace an Operator. Paul testified at hearing that the duties that needed to be performed on August 5th

were those of a Chemist, i.e., Goyette's position. Therefore, Goyette should have been offered the work as overtime on August 5th. By having someone outside the classification perform the work, the City violated its own express written policy.

With regard to the collective bargaining agreement, the Union asserts that the parties have bargained over the overtime policy, and Article 19 guarantees that overtime will be assigned based on seniority within a given classification, unless the City first gives notice. Article 19 provides that the City may not alter any of its policies without advance notice to its employees. To change its overtime policy, the City should have provided notice, but did not do so. In addition, Article 10 sets forth the employees' wages and job classifications, demonstrating that Chemist and Special Projects Coordinator are separate job classifications. Article 12 provides that employees are to be paid time and one-half for hours worked above their regularly-scheduled work week, which the employee has the option of taking as pay or compensatory time off.

Last, the City violated the parties' past practice. Both Smith and WWTP Superintendent Paul testified that the practice had always been to offer overtime to the most senior person in the job classification, and then to the most senior person in that same department, consistent with the written overtime policies dating at least as far back as 1989. Prior to August 5th, shifts that needed covering in the lab were offered to employees working in the lab based on seniority, and DeJarlais had not been assigned to cover these shifts, despite his having been trained in lab duties since May of 2000. This indicates that the City agreed that the proper policy to follow was to first offer the overtime to Goyette or Smith in this situation. Prior to August 5th, DeJarlais always worked with another lab employee when he worked in the lab and never took overtime away from those who worked in the lab on a daily basis.

As a remedy, the Union requests that Goyette and Smith be compensated for the overtime opportunities they lost as a result of the City's violations.

In its reply brief, the Union disputes the claim that Article 19 permits the City to violate its own policy and procedure and past practice without notice or negotiation. Past practice and written policy have long been universally held to be binding on parties to a collective bargaining agreement. The evidence establishes that prior to August 5th, it had been the consistent and unwavering policy and practice to make available hours to persons by specific job classifications within the department by seniority. The written policy is a codification and clarification of the rights clearly enumerated in Article 12. Further, the City's argument flies in the face of the express proviso in the management rights clause which states ". . .except as otherwise specifically provided herein. . ." The "herein" includes not only the four corners of the agreement, but also the interpretive practices which establish the common law of the bargaining relationship. To read Article 19 as expansively as the City proposes,

particularly in a residual bargaining unit such as this, would drive every department in the City into labor chaos. Finally, it is a maxim of contract interpretation that the specific should govern over the general. The very general language of Article 19 is seriously narrowed not only by additional provisions of the Agreement, but by special written policies and the long-standing practices of the parties.

The Union also disputes the significance of Goyette's not testifying at hearing. The cases cited by the City involved factual disputes and credibility issues, which are not present in this case. Further, before any negative inference is to be drawn for a failure to testify, the employer must establish a prima facie case, which has not been done. Last, Goyette did testify to the facts in this case, as his grievances stated the facts and circumstances surrounding the City's failure to offer him the overtime. As the City did not object to the admission of those grievances on foundation grounds, those exhibits constitute Goyette's testimony. Further, at the arbitration stage in the grievance procedure it is the Union, not Goyette, that is the movant, and the Union did put on testimony supporting its case. Thus, the Union requests the grievance be granted and that the remedy requested be awarded.

City

The City takes the position that the grievance should be denied, as the Union's arguments are not supported by the express language of the Agreement. According to the City, the Union seeks to add a "guaranteed overtime" provision to the Agreement while, at the same time rendering Article 19 meaningless.

The City asserts that Article 19, Reservation of Rights, vests the right to determine the schedule of work and to decide job qualifications exclusively in management, along with the right to determine the methods, procedures and manner of performing work. As the language of Article 19 is clear and unambiguous, the Union's argument of a past practice must fail. PHELPS DODGE COPPER PRODUCTS CORP., 16 LA 229, 233 (Justin, 1951). The City cites arbitral precedent for the proposition that past practice has not been found to prevent management from changing work schedules or reassigning work. Conversely, there is no provision in the Agreement guaranteeing overtime to employees.

Next, the City asserts that the testimony and relevant arbitral precedent do not support the Union's position. First, Goyette did not testify. This failure to give his version of events casts doubt on the merits of the grievance. The failure of a grievant to testify has, in some cases, been found to be a factor in concluding the grievance lacked merit. The testimony of the Union's only witness, Smith, consisted largely of hearsay and should be given little, if any, weight. Further, most of the exhibits introduced by the Union had little or no relevance to the merits, and Smith could not point to any contract provision or policy which refers to a mandatory right of overtime, so none exists.

The City asserts that Article 19, along with arbitral precedent, gives management the right to determine whether work will be performed during regular work hours or on overtime. Absent a contract provision guaranteeing overtime, arbitrators have recognized management's right to plan its work so as to avoid overtime. CONTINENTAL CAN CO., 53 LA 809 (Cohn, 1969). As to past practice, the Union has failed to establish there was been a clear, consistent, long-standing and mutual practice in support of its case.

The City cites the testimony of the WWTP Superintendent Paul, a 23-year employee. Paul has supervision over the lab and testified he is familiar with DeJarlais' work and that he is qualified to perform lab work. DeJarlais is in a higher classification than Goyette and his position description indicates that one of DeJarlais' essential duties is to "monitor biological and chemical treatment processes." The position description further indicates that those duties listed are not exclusive or all-inclusive, and that other duties may be assigned; thus contemplating that DeJarlais would perform lab work on an as-needed basis.

On August 5th, Smith took the day off and it was Goyette's scheduled day off. DeJarlais was on site and qualified to do the work, so Paul assigned him to do the routine lab testing for the day. Thus, DeJarlais was working below his classification. There was no overtime involved since DeJarlais performed the work during his regular hours. Paul testified that it is common for employees in the WWTP to work under their classifications.

Generally speaking, arbitrators have recognized broad authority in management to determine operations and to operate on the most efficient basis. Given these rights, the clear language of Article 19, and that neither the Agreement, nor the overtime policy, contain a provision guaranteeing overtime for employees, the grievance should be denied.

In its reply brief, the City first disputes the Union's claims of "undisputed" facts and contractual rights and requirements, asserting there is a significant dispute in those regards. The City reiterates that the Union has failed to establish a past practice of guaranteed overtime existed, and is unable to cite a provision of the Agreement establishing such a right, nor is the Union able to cite any arbitral authority to support its claim that employees in this situation are entitled to a remedy.

While the City contends this case does not involve a binding practice, it notes that Paul testified that it is common for employees at the WWTP to work under their job classifications. Obviously, past practice provides no guidance where the evidence regarding its nature and duration is contradictory. RELIANCE STEEL PRODUCTS, 24 LA 30 (1954).

The Union simply ignores Article 19, which provides that management has the right to determine the schedule of work and the methods, processes and manner of performing work. Generally, arbitrators hold that, in the absence of specific contractual limitations or a showing

of bad faith, such decisions fall within management's residual rights. Thus, in this case, the allocation of overtime, where overtime is to be worked, is an exclusive right of management. Whether overtime is to be worked is a decision the Plant Superintendent initially makes. Only if overtime is to be worked, does the overtime policy come into play; where overtime is not necessary, the policy plays no part.

The City requests the grievance be denied.

DISCUSSION

As it must, analysis begins with the parties' Agreement. Article 19, Reservation of Rights, cited by both the City and the Union, provides that:

> Except as otherwise specifically provided herein, the management of the City of LaCrosse and the direction of the work force, including but not limited to the right . . .to determine the schedules of work, . . .together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.
>
> New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

Article 12, Overtime, delineates only how overtime is to be paid and is silent as to how overtime work is to be offered or assigned. Thus, Article 12, itself, provides no specific limitation on management's Article 19 rights in regards to allocating overtime work or deciding if work is to be done on an overtime basis.

However, the evidence is sufficient to establish that the parties have had a practice with regard to awarding work that would constitute overtime work in the classification that performs the work as part of the normally-assigned duties of that classification. Smith testified that work which would constitute overtime work if performed by someone in the classification that regularly performs that work, is first offered to the employees in that classification on a seniority basis. Union Exhibit 36, showing the instances of overtime in the lab for 1999 through the beginning of March of 2003, indicates that when a lab employee was off work for vacation, illness, etc., he was replaced by another employee in the classification that regularly

performs those duties as part of the assigned duties of the classification. This continued to occur even after DeJarlais had learned the testing procedures. 2/

2/ The Arbitrator draws no adverse inference from Goyette's failure to testify, as the circumstances of August 5, 2002 are not in dispute, and Smith was able to testify on a first-hand basis regarding the practice.

While Paul testified that it is common for employees at the WWTP to work below their classification, he did not further explain the circumstances in which they have done so, nor did he give specific examples. Without evidence that those employees do so in circumstances similar to those in this case, Paul's testimony in that regard is not sufficient to rebut the specific instances noted in Union Exhibit 36, showing only a lab employee replaced an absent lab employee and did so on an overtime basis, as well as Smith's testimony on that point.

In addition, there is the written "Policy for Awarding/Assigning Overtime" at the WWTP. The evidence indicates that the parties have had such a written policy at least since 1989. Smith's unrebutted testimony is that these policies have been negotiated between the Union and management over the years. In essence, the written overtime policy amounts to a negotiated work rule, subject to the notice requirement of Article 19. The written overtime policy for the WWTP in effect on August 5, 2002, was the policy dated September 4, 2001, set forth previously. Union Exhibit 36 and Smith's testimony establish that the practice in the lab and the written policy have been consistent over the years. The parties' practice and the written overtime policy constitute a limitation on management's general rights under Article 19 to assign the work.

The City asserts that the overtime policy does not apply in this case, as there was no "overtime" work awarded; DeJarlais having been assigned to work in the lab during his regular work hours. The City asserts it had the right under Article 19 to assign DeJarlais the work as it did and was not required to have the work performed on an overtime basis. The Arbitrator disagrees.

The policy speaks of instances when overtime is required "within a specific job classification." In this case, the work could only be performed within the job classifications (that regularly perform that work) on an overtime basis. More importantly, the policy assumes that would be the case, as evidenced by the example given, i.e., when an Operator is needed, the Operator seniority list will be used to obtain a replacement. This would appear to be intended to not permit management to instead assign the work to an employee in a different classification to replace an absent employee in order to avoid the overtime, as was done in this case.

The City's argument that DeJarlais is qualified to perform the work misses the point. DeJarlais is not in either of the job classifications that perform the work as part of their daily duties – Chemist or Lab Technician/Pre-Treatment Aide. Only Goyette and Smith are in those respective classifications and only they perform the lab duties as part of their regularly-assigned duties. That DeJarlais has worked in the lab on an intermittent basis, as Paul testified, in order to learn the routine testing procedures for background to assist him in his job as Special Projects Coordinator, does not place him within the classifications currently assigned to perform lab duties on a regular basis. This is so regardless of the fact that his position description refers to "monitoring biological and chemical treatment processes"; the lab work is simply not part of the regularly-assigned duties of his classification.

In sum, the negotiated written overtime policy is consistent with the parties' practice, and together they limit management's right to assign work in the manner it did in this case so as to avoid overtime. The practice and the policy requires that work that would constitute overtime work in the job classification that is regularly assigned to perform that work, must first be offered on a seniority basis in that classification. By assigning DeJarlais to perform the routine lab work on August 5, 2002, instead of offering the work to Goyette, the City violated the parties' practice and the current overtime policy and hence, the parties' Agreement. Thus, the grievance is sustained.

With regard to remedy, the Union requests that compensation be awarded to Goyette and Smith for all of the overtime opportunities they have lost, including those instances subsequently grieved by them following August 5, 2002. The City indicated at hearing that it had not agreed to have the Arbitrator resolve the subsequent grievances and objected to their being considered. The Arbitrator only has the authority to resolve the matters the parties have agreed to submit to him for decision. As the City has not so agreed with regard to the subsequent grievances, the Arbitrator has no authority to decide or to provide a remedy in those matters, and will limit the remedy to Goyette's grievance regarding August 5, 2002. Goyette will be awarded the overtime for the hours he could have worked on August 5, 2002, had they been offered to him.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance of David Goyette is sustained. Therefore, the City is directed to immediately compensate Mr. Goyette on an overtime basis in accord with Article 12, Overtime, of the parties' Agreement, for the hours he could have worked in the lab on August 5, 2002, had DeJarlais not been assigned the work.

Dated at Madison, Wisconsin, this 28th day of October, 2003.

David E. Shaw /s/
David E. Shaw, Arbitrator

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