

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF PHILLIPS (POLICE DEPARTMENT)

and

**PHILLIPS PROFESSIONAL POLICE ASSOCIATION
LOCAL 231, LABOR ASSOCIATION OF WISCONSIN, INC.**

Case 7

No. 62204

MA-12198

Appearances:

David Deda, Phillips City Attorney, P.O. Box 7, Phillips, Wisconsin, appearing on behalf of the City.

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 Arlington Street, Appleton, Wisconsin, appearing on behalf of the Union.

ARBITRATION AWARD

The City of Phillips (Police Department), hereinafter referred to as the City, and the Phillips Professional Police Association, Local 231, Labor Association of Wisconsin, Inc., hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the rate of pay for a part-time employee. Hearing on the matter was held in Phillips, Wisconsin on October 2nd, 2003. Post-hearing written arguments and reply briefs were received by the Arbitrator by December 22nd, 2003. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issues and agreed to leave framing of the issues to the undersigned. The undersigned frames the issue as follows:

“Is the grievance timely?”

“If yes, did the City violate the collective bargaining agreement when it paid the grievant the part-time rate of pay for work performed from July 1st, 2003 to December 31st, 2002?”

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE V – MANAGEMENT RIGHTS

Section 5.01 – Management Rights: It is agreed that the management of the City and the City’s right and authority to direct its operations and affairs is vested exclusively in the City, and the City reserves and retains all of its constitutional, statutory and common law rights to direct its work force and manage its operations except as expressly bargained away in this agreement. [Emphasis added].

Section 5.02 – Exercise of Rights: The rights retained exclusively by and solely to the City shall include, but are not limited to: the determination of the existence or nonexistence of facts which are the basis of the City decisions; to determine the number, location, and types of its operations, and the methods, processes, practices, materials and manpower to be employed; to determine to what extent any operation, service or activities of any nature shall be added, modified, eliminated, or obtained by contract, provided that no bargaining unit employees are laid off or reduced in benefits; to determine and from time to time redetermine the number of hours per day or week operations shall be engaged in; to select and determine and from time to time redetermine the number and qualifications of employees to be hired, to assign work and determine the amount and quality of work to be performed by employees in accordance with requirements determined by the City; to establish and change assignments; to transfer, promote and reclassify employees, and to layoff,

terminate or otherwise relieve employees from duty; to make and enforce reasonable rules; to suspend, discharge or otherwise discipline employees for just cause and to take such measures as the City may determine to be in the City's best interests.

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ARTICLE XV – WAGES AND HOURS OF WORK

Section 15.01 – Wage Schedule: The classification and wage schedule shall be made a part of this agreement and is attached hereto as Appendix “A”.

Section 15.02 – Regular Hours: The normal work day shall be eight and one-half (8-1/2) consecutive hours including a thirty (30) minute paid lunch period, which may be taken provided that the employee is subject to call. All employees shall receive a thirty (30) minute paid lunch break during the employee's tour of duty, which will be taken at staggered times.

Section 15.03 – Work Week Schedule: Employees will work a repetitive schedule as follows: Four (4) days on duty followed by two (2) days off duty, then repeating the cycle.

The normal shift hours shall be as follows:

Day shift 6:30 a.m. to 3:00 p.m.

Second shift 2:30 p.m. to 11:00 p.m.

Third Shift 10:30 p.m. to 7:00 a.m.

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APPENDIX A

Classification	1/1/02- 3.0%	10/1/02 – .25%	1/1/03 –3.0%	10/1/03 - .25%
<i>Patrol Officer – Annual/Hourly</i>	33,865/16.38	33,950/16.42	34,969/16.91	35,056/16.95
<i>Part-time Patrol Officer Hourly</i>	13.91	13.95	14.37	14.41

BACKGROUND

The City operates a Police Department wherein it employs both full time and part-time employees. During calendar year 2002 Police Officer Frank Crepinsek retired. On April 30th, 2002 Police Chief Craig Moore requested from the Phillips City Council full time pay for a part-time employee to work additional hours due to Crepinsek's retirement. The City Council denied his request. Chief Moore made additional requests on May 2nd, 2002 and July 25th, 2002. Both times the City Council denied the request. Chief Moore met with part-time Police Officer Kevin Rose, hereinafter referred to as the grievant, and the other part-time employees and informed them he wanted one employee to work Crepinsek's full time schedule. The grievant informed Chief Moore he would work the full time schedule. Chief Moore informed the grievant that he would receive the part-time rate of pay, that there was no guarantee he would be awarded the full time position, that there would be other candidates for the position, but that if the grievant was awarded the position that in the past the City Council paid full time rates back to the time the employee commenced working the full time schedule. The grievant was also aware the City Council denied Chief Moore's requests to pay a part-time employee full time rates.

During November of 2002 the Union's bargaining representative, Patrick J. Coraggio, became aware that Rose was working a full time schedule. On November 21, 2002, Coraggio sent the following letter to the City's legal representative:

November 21, 2002

Gregg Bilz
Bilz Law Office
P.O. Box 238
Phillips, WI 54555

**RE: PHILLIPS PROFESSIONAL POLICE ASSOCIATION
OFFICER KEVIN ROSE**

Dear Attorney Bilz:

Kevin Rose is listed as a part-time employee but has been working full-time since July 1, 2002. It is also my understanding that he is projected on the schedule to continue working as a full-time employee. Previously, when I raised this issue about equal pay for equal work and paying employees based on their actual hours worked rather than their status, the City has made an adjustment to the pay retroactive to the date of starting to work full time. In this case that date would be July 1, 2002. This was done in the case of Neil Holm and Ron Clapero.

Therefore, I am requesting that the City make the same adjustment for Kevin Rose and continue to pay him as a full-time officer until the full-time position, which is currently open, is filled.

Your prompt attention to this matter would be appreciated.

Sincerely,

Patrick J. Coraggio
Patrick J. Coraggio /s/
Labor Consultant

PJC/mb

CC: Neil Holm
Kevin Rose
Chief Moore

On December 4th, 2002 the City's legal representative, David Deda, sent the following response to Coraggio:

December 4, 2002

Patrick J. Coraggio, Labor Consultant
The Labor Association of Wisconsin, Inc.
N 116 W16033 Main Street
Germantown, WI 53022

RE: PHILLIPS PROFESSIONAL POLICE ASSOCIATION
OFFICER KEVIN ROSE

Dear Pat:

This letter is in reply to your letter of November 21, 2002 that was addressed to Gregg Bilz. I am now doing all of the employment law matters for the City of Phillips.

Like many municipalities, the City of Phillips has financial concerns. The City Council has decided to go with two full-time police officers. Therefore, there will not be a third full-time police officer hired.

It is my understanding that the Police Chief and the Law Enforcement Committee are working on what the schedule is going to be this upcoming year. It is my understanding that Kevin Rose will not be working full-time.

My instructions per the Council were to reply to your letter and advise you that the Council was not willing to make the additional financial payments towards wages or fringe benefits as requested in your letter of November 21, 2002.

If you have any questions or concerns, you are welcome to contact me. I look forward to working with you cooperatively in regard to employment issues.

Sincerely,

David Deda /s/
DAVID DEDA

DD/an

cc: Mayor Joseph Boho
Councilman Ted Kempkes
Police Chief Craig Moore

On December 6th, 2002 Coraggio sent the following response to Deda.
December 6, 2002

David Deda
Slaby, Deda, Marshall, Reinhard & Fuhr, LLP
215 North Lake Avenue, P.O. Box 7
Phillips, WI 54555-0007

RE: PHILLIPS PROFESSIONAL POLICE ASSOCIATION
OFFICER KEVIN ROSE

Dear David:

I received your letter dated December 4, 2002 regarding the City's position on Officer Kevin Rose. It is my understanding from your letter that Kevin Rose will no longer be working full-time. However, this does not negate the fact that Kevin Rose has been full-time since mid 2002. Previously, the Association and the City discussed this type of situation with Officer Neil Holm and Ron Clapero. In each of these cases, the City agreed with the Association's position that these officers were working full-time and deserved full-time benefits and a full-time salary. This was under the theory of equal pay for equal work. I do not believe there is any difference in the situation with Kevin Rose that would mitigate them paying him at the part-time rate for full-time work. Therefore, I respectfully request that you evaluate your position based on the above and your prompt attention to this matter would be appreciated.

Sincerely,

Patrick J. Coraggio
Patrick J. Coraggio /s/
Labor Consultant

PJC/mb

CC: Neil Holm

Thereafter the parties scheduled a meeting to discuss the matter with the City Council. Bargaining Consultant Thomas Bauer represented the Union when the parties met on January 28th, 2003 and discussed this matter. Bauer questioned whether timeliness was an issue and was informed by Deda that it was not. Bauer sent a letter to Deda on February 5th, 2003 concerning what decision the City Council had made. On February 18th, 2003 sent a letter to Bauer denying the full time rate. On February 11th, 2003 the instant grievance was filed. The matter was thereafter processed to arbitration. In the City's April 2nd, 2003 letter to the Wisconsin Employment Relations Commission Deda informed the Commission there was a timeliness issue. At the hearing the parties stipulated that there is no requirement in the collective bargaining agreement that mandates the City to promote a part-time police officer to a full-time position. The parties also stipulated that as of February 18th, 2003 the City had not raised a timeliness issue. The record also demonstrates that on two previous instances the City

reimbursed part-time employees at the full-time rate for all hours they worked a full-time schedule.

Union's Position

The Union asserts the grievance is timely and properly before the Arbitrator. The Union points out the April 2nd, 2003 letter to the Commission was the first time the City raised the timeliness issue. The Union also points out that at no time during the parties' discussions concerning the merits of the instant matter did the City raise the question of timeliness. The Union also points out that the question of timeliness was raised by the Union at the January 28th, 2003 meeting and that the City presented no evidence to refute the Union's claim that Deda informed the Union the City was not raising a timeliness objection. The Union concludes the grievance is timely and should proceed to resolution.

The Union argues that there has been a long standing practice of the parties to compensate part-time employees assigned to work a full-time schedule of hours at the full-time rate of pay. The Union contends that when Rose accepted the full-time assignment his assumption was that it would be permanent because Chief Moore was going to request the City Council hire the grievant as the full-time replacement for Crepinsek. The Union argues that the current Association Steward, Police Officer Neil Holm, when he was a part-time employee had, effective June 1st, 2001, been assigned to fill the full-time schedule of a retired employee and was compensated at the full-time rate of pay. The Union argues that this also occurred in 1998 to part-time Police Officer Ronald Clapero and Clapero was also paid the full-time rate of pay. The Union also points out that Chief Moore informed the City Council at their meeting on July 25th, 2002 that denying the full-time rate to the grievant could lead to a grievance based upon the Clapero/Holm situations.

The Union would have the Arbitrator sustain the grievance and direct the City to make the grievant whole by paying the grievant the difference between the part-time rate of pay and the full-time rate of pay, \$2.47 per hour, for all hours the grievant worked, including appropriate overtime for the period July 1st, 2002 through and including December 31st, 2002.

City's Position

The City contends the grievant was informed by Chief Moore from the start that he would not receive the full-time rate of pay. The City contends that Section 7.02(D) of the parties' collective bargaining agreement provides that grievances should be filed within ten (10) working days of when the grievant knew or should have known of the circumstances giving rise to the grievance. The City argues the grievance should have been filed within ten (10) days of the first paycheck the grievant received after July 1st, 2002. The City asserts it never agreed to waive any time limits. The City also points out that the grievant could have declined to work the hours.

The City also argues that had the grievant filed a grievance in a timely manner the City would have had the opportunity to avoid the entire matter by dividing the hours among all part-time employees or not filling the hours.

The City also argues the collective bargaining agreement does not require the City to pay part-time employees the full-time rate. The City points out there is no dispute that the grievant is a part-time employee and has never been a full-time employee. The City also argues that although Holm testified that when he was a part-time employee his pay was bumped up to the full-time rate when he worked a full-time schedule, this was done voluntarily by the City Council and that the collective bargaining agreement did not require it.

In its reply brief the City argues it is clear the grievance was not filed in a timely manner. The City also contends that the Union's claim that Holm testified Deda informed Bauer that the grievance was timely filed and that the City was not raising a timeliness issue is not a correct summary of Holm's testimony. The City also contends that Holm did not have an accurate recollection. The City points out the grievant, who was present at the January 28th, 2003 City Council meeting, testified he had no recollection of any timeliness discussions taking place. The City avers that the grievant testified accurately and honestly. The City contends it never waived any issue related to timeliness and argues there is no documentation demonstrating any waiver. The City also argues that April 2nd, 2003 letter to the Commission was fair notice to the Union that timeliness was an issue.

The City also argues past practice is pertinent only if there is ambiguity in the collective bargaining agreement. The City argues there is no ambiguity in the instant matter. There are separate rates of pay for part-time and full-time employees. The City also argues the Holm and Clapero examples cited by the Union are actions where the City Council voluntarily paid the higher rate. The City argues if the collective bargaining agreement required the higher rate the City Council would not have to act on the matter. The City concludes the grievant, Chief Moore and the Association all knew that the grievant was not being paid the full-time rate.

The City avers that in the instant matter the City made a decision to fill hours after the retirement of a full-time employee until a decision was made whether or not to replace the retired employee. The City points there is nothing in the collective bargaining agreement requiring that if a part-time employee is asked to work additional hours that that part-time employee be paid at the full-time rate.

The City would have the Arbitrator find the grievance untimely. If found timely the City would have the Arbitrator deny the grievance on the merits.

DISCUSSION

During the course of the hearing Chief Moore testified that when he met with the grievant and discussed with him working the work shift of the retired full-time employee he informed the grievant that he would be paid the part-time rate of pay. However, Chief Moore also testified he informed the grievant that history included back pay, that they would document his hours and at the end of 2002 it would be decided what would happen to those hours. The record demonstrates the Union raised the rate of pay issue in November of 2002. Given Chief Moore's testimony the Arbitrator finds it was not until the City denied the Union's request for the grievant to receive the full-time rate of pay that it was necessary for the grievant to file a grievance. The record also demonstrates that the parties met to discuss the matter on January 28th, 2003. That by February 5th, 2003 the City had not responded as to whether it would pay the full-time rate of pay. The Arbitrator therefore concludes the filing of the grievance on February 11th, 2003 is timely.

The Arbitrator also notes here that there is no evidence to dispute Holm's testimony that the question of timeliness was raised at the January 28th, 2003 meeting with the City Council. While the City is correct in that the grievant, who was present at the meeting, testified that he did not recall any conversation about timeliness, the Arbitrator finds that the grievant's lack of recollection is in and by itself insufficient to support a conclusion that such a conversation did not take place.

The record also demonstrates that there is no dispute that the grievant worked a full-time work schedule from July 1st, 2002 to December 31st, 2002. It is also clear that the City was aware of Chief Moore's actions in assigning the grievant to work a full-time work schedule, and, that the City was aware that when this had occurred in the past the employee was paid at the full-time rate of pay. The City did not direct the Chief to spread the hours among the other part-time employees. The Union referred to this as the walks like a duck theory. If an employee is working a full-time schedule the employee is to be paid the full-time rate of pay. The parties' collective bargaining agreement has an agreed upon rate for full-time employees. Clearly, when the City assigned the grievant to work a full-time schedule it was required to pay the employee the full-time rate of pay. The fact the City allowed the part-time employees to volunteer to work additional hours does not relieve it of the requirement to pay full-time rates to employees working a full-time schedule. To conclude otherwise would allow the City to circumvent the clearly agreed upon rates of pay.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented the Arbitrator finds the City violated the collective bargaining agreement when it failed to pay the grievant the full-time rate of pay when he worked a full-time schedule from July 1st, 2002 through December 31st, 2002.

AWARD

The grievance is timely.

The City violated the collective bargaining agreement when it paid the grievant the part-time rate of pay for time worked from July 1st, 2002 through December 31st, 2002. The City is directed to make the grievant whole by paying him the difference between the full-time rate of pay and the part-time rate of pay for all hours worked by the grievant from July 1st, 2002 through and including December 31st, 2002.

Dated at Madison, Wisconsin, this 29th day of January, 2004.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
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