BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC

and

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

Case 187
No. 63517
MA-12613

(Overtime Grievance)

Appearances:

Davis & Kuelthau, S.C., by **Mr. William G. Bracken**, Employment Relations Services Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the City.

Mr. Thomas Wishman, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, WI 54936-2236, on behalf of Local 1366.

ARBITRATION AWARD

According to the terms of the 2003-05 collective bargaining agreement between City of Fond du Lac (City) and City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding overtime allegedly due for work done on December 23 and December 24, 2003. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled for and held on June 9, 2004, at Fond du Lac, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to file their briefs, post-marked July 2, 2004, directly with each other, a copy to the Arbitrator and the parties waived the right to file reply briefs. By July 8, 2004, the parties' briefs were received whereupon the record was closed.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case. However, the parties stipulated that Arbitrator could frame the issues based upon the relevant evidence and argument in this case as well as their suggested issues. The Union suggested the following issues for determination:

1. Did the City violate the labor agreement and understandings regarding overtime equalization on December 23, 2003, when it ordered a shift extension for employees performing snow removal duties instead of calling in employees to work overtime?

2. Did the City violate the labor agreement and understandings between the parties regarding overtime equalization on December 24, 2003, when it called in employees to perform snow removal duties without regard to the overtime call-in list?

3. If so, what would the appropriate remedies be?

The City suggested the following issues for determination:

1. Did the City violate the "Overtime Equalization Instructions" in implementing Article VIII, Section 2 and 5, the 2003-05 Master Agreement by a weather-related shift extension on December 23, 2003?

2. If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein, I find that the Union's issues more reasonably state the controversy between the parties and they shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE XXVII

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac 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, to abolish

positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

ARTICLE VII

CALL-IN PAY

Section 1 - Employees who shall be called into work at other than their regularly scheduled starting time shall be entitled to at least two (2) hours work or pay at the overtime rate applicable. If an employee is called in less than two (2) hours prior to his normal starting time, he shall be paid for two (2) hours at the applicable overtime rate and then allowed to complete the regular scheduled hours of the date of the call-in.

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ARTICLE VIII

OVERTIME AND HOLIDAY PAY

Section 1 - Time and one-half shall be paid for all time worked outside of the employee's regular shift of hours, except as otherwise provided in this Agreement. . . .

Compensation of overtime shall be paid at time and one half in cash or compensatory time, as the employee may choose; however, no compensatory time in excess of forty (40) hours may be carried on the books beyond December 1 of each year. Hours in excess of forty (40) as of that date will be paid to each employee in cash, along with pay for hours under forty (40), if requested by December 1. Use of compensatory time shall be subject to authorization by the employee's immediate supervisor and/or department head. Employees may use an annual total of twenty (20) hours of compensatory time in lieu of sick leave for absences in increments of four (4) hours or less. Abuse of this privilege, like abuses of sick leave, will subject the employee to disciplinary procedures.

Section 2 - For emergency and non-emergency overtime, each division shall post in all other divisions, once a year, or more often if deemed necessary, a list of employees with space for each employee to indicate whether or not he wishes to be called in for regular overtime work. After an employee has indicated that he does not wish to be called in for overtime work, he shall not be

called unless that employee is needed due to his specific skills or due to the non-availability of a sufficient number of employees desiring overtime work. Overtime shall be divided as equally as possible among the qualified employees of the division, then divided as equally as possible among the qualified employees outside the division, except as otherwise provided in this Agreement, who have signed indicating their desire for overtime. The overtime of employees shall be posted. In the event of an emergency, all employees may be required to work overtime, however, those employees who have indicated a desire to work overtime will be called first provided they are capable of performing the available work. Overtime hours worked in a division other than the employee's normally assigned division shall not be used for the equalization of overtime language contained herein.

. . .

Section 4 - Time worked on a holiday shall be compensated for at twice the employee's regular rate of pay in addition to the holiday pay. For ease of administration and uniformity, premium holiday pay shall be paid to those employees whose work shifts start during the contract holiday date listed elsewhere in this Agreement. For the Transit Division, full-time employees shall receive eight (8) hours regular pay for each full holiday and four (4) hours regular pay for each partial holiday.

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

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RELEVANT PROVISIONS OF THE OVERTIME EQUALIZATION INSTRUCTIONS FOR AFSCME CONTRACT

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Using the Call-in List

The parties also discussed how employees would rise to the top of the list for call-in purposes. Both parties agreed that employees must be qualified to do the work in question. Priority order is given to full-time employees in the division, full-time employees out of the division, part-time employees in the division and part-time employees out of the division. Employees will be

charged time up to the point where someone accepts. The overtime will then be offered to the next available person on the list at the next overtime opportunity. For example, we need four employees and had to call six employees. Next time overtime is needed, we would call the seventh employee on the list to being the call-in procedure.

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Shift Extensions

The parties agreed that shift extensions were possible when the project had to be completed and it did not make sense to call someone in. The parties agreed that if the calling in of new employees would cause *significant* disruption to the completion of the project, the current employees on the job should simply remain on the job as a shift extension. Normally, this occurs on an unplanned, limited duration basis and the shift would be extended at the end of the normal work day.

The parties agreed that in the event the project is planned in advance and it is known that overtime is part of that project, then the City should assign employees who have expressed an interest and are qualified in working overtime as opposed to those that have not.

There was some discussion about the "normal" one to two hours of a shift extension and how that would not trigger an overtime call-in. However, upon further discussion, the parties agreed not to list a specific time for the extension but rather deal with it on a case-by-case basis. Both parties agreed that if calling in new employees would cause a *significant* disruption to the completion of the project, current employees should remain on the job as a normal part of their shift extension.

The Union representatives stated that the supervisors should be attuned to who signs for the voluntary overtime or not. The Union recounts a situation where two employees who did not want voluntary overtime were working on a project and in fact the supervisor could have used the two other employees who wanted overtime.

Both parties agreed that communication with employees and supervisors on all of the aspects of this program are essential to its success. It was suggested that the parties develop some basic rules regarding the operation of the overtime equalization formula so that supervisors and employees can understand how this will be tracked. These simplified rules could be developed along with the forms that are necessary to keep track of this information.

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BACKGROUND

Prior to January 1, 2003, the Union and the City entered into discussions in an effort to come to an agreement regarding equalization of overtime in the Construction and Maintenance (hereafter C & M) Division. The distribution of overtime had been the subject of several grievances and it had been a problem for some time. In fact, in the year 2002, there had been a difference of 30 hours of overtime between the employee who had worked the most and the employee who had worked the least overtime hours that year. The parties' discussions resulted in their agreement to execute the "Overtime Equalization Instructions for AFSCME Contract" (hereafter Instructions document) quoted above.

Local Union representative Jennifer Barrett stated herein that at negotiations which lead to the parties' agreement to the Instructions document, the parties never agreed to define shift extensions in all cases, that shift extensions were to be considered on a case-by-case basis but that a "normal" shift extension was stated in the Instructions as 1 to 2 hours. Barrett stated that the parties discussed several possible situations where shift extensions could be expected. These included situations where a "significant" disruption would be caused by calling in employees on overtime. For example, the parties agreed that shift extensions could occur in order to complete a particular project that a crew of employees had been consistently working on together (such as a main sewer/water break) and that a shift extension could occur in order to finish grass mowing in an outlying park (far from the City garage). In regard to the latter situation, the parties discussed the disruption involved when mowing at a park on the south side of the City could not be finished by the normal 3:30 p.m. quitting time - that driving the mower back to the City garage and calling in an employee from the call-in list to drive the mower back out to the park to finish the job, would mean the loss of almost an hour of time for a minor amount of overtime to complete the mowing.

Although Barrett stated that it was her understanding from the parties' discussions that there had to be "extreme" disruption before a shift extension would be authorized, the term "extreme" was not included in the Instructions document, nor was the term "significant" defined by the parties. Barrett stated that the parties discussed snow and ice removal in their negotiations but no specific conclusions were reached regarding shift extensions for that work.

On December 23, 2002, the parties executed the Instructions document in the hopes of spreading overtime opportunities equally across the unit for employees who signed the voluntary sign-up sheet showing their interest in working overtime. The document stated that "the goal is to have all this implemented by January 1, 2003."

Prior to January 1, 2003, it was the City's practice to assign and then hold over (if necessary) its truck drivers to salt (and finish salting) City streets; other City operators were not assigned salting work. Also prior to January 1, 2003, shift extensions, if they occurred, generally lasted from 30 minutes to 1 hour; and shift extensions were never 2 hours or more in the past. Prior to January 1, 2003, if more than 2 hours were needed to finish necessary work begun during a regular shift, City managers called employees in off the overtime call-in list to perform the work after 3:30 p.m.

After January 1, 2003, City managers called employees off the overtime call-in list pursuant to the Instructions document, avoiding shift extensions for the most part. Although shift extensions occurred after January 1, 2003, they were always less than 2 hours and they were few in number. No evidence was presented to show that shift extensions were ordered for snow/ice removal or salting between December 23, 2002, and December 23, 2003.

FACTS

On December 23, 2003, it was 28 degrees and a light snow began falling at 10:30 a.m. On that morning, newly promoted Foreman Joe Longo 1/ had received a weather report from Great Lakes Weather Services, Inc. 2/ The December 23rd report was a "Winter Storm Warning" in which Great Lakes predicted snow (a 10 out of 10 chance) beginning between 1:00 a.m. and 3:00 a.m. and ending between 8:00 a.m. and 10:00 a.m.; that there would be accumulation of a "trace to ½ inch;" that the wind would be southeast from 5 to 10 m.p.h. and the temperature would fall during the storm from 28 to 20 degrees; and that the high temperature on December 23rd and December 24th would range from 31 to 34 degrees while the low temperature would range from 20 to 24 degrees. The report did not predict any ice accumulation and totally failed to accurately predict the weather conditions on December 23rd.

1/ Longo stated that he had worked for the County for more than 30 years when he was promoted to foreman, 2 ½ years prior to the instant hearing.

2/ The City contracts with Great Lakes to provide such reports.

The snow fell off and on all day, sometimes falling heavily and sometimes stopping entirely, until 6:30 p.m. when the snow stopped leaving approximately 1.5 inches accumulation. At 11:00 a.m. Foreman Joe Longo sent out six employees in spreaders to salt City roads. These six employees spread salt all day. Two other employees, Larry Dikeman and John Rickert were assigned to clean flow meters at the City garage on December 23rd and they worked on flow meters for 6 ½ hours on December 23rd.

At approximately 2:00 p.m., Longo asked Dikeman and Rickert if they would stay and work past 3:30 p.m. quitting time salting streets. Dikeman and Rickert agreed and Longo immediately sent them out in spreaders to salt streets. At some time between 2:30 and 3:10 p.m., Longo radioed the original six employees who had been salting since 11:00 a.m. and told them to complete the salting of all primary, secondary and residential roads and stop signs in the City. Union witness Lavigne stated that at 2:50 p.m. Longo came out to where he was salting, pulled him over and asked him to work beyond 3:30 p.m. Lavigne asked whether Longo intended to "go off the list" and Longo replied that he would only use the overtime call-in list if an employee (then working) turned down the offered overtime. Longo then radioed the remaining five drivers and asked them to work beyond 3:30 p.m. All of them agreed to do

so.

Longo stated that he believed that it would only take the eight employees 1.5 hours past the normal 3:30 p.m. quitting time to finish salting that day. Employee witnesses Dikeman, Lavigne and Stewart stated that based upon their experience salting City roads, it would take between 3 and 5 hours to salt all primary, secondary and residential streets and intersections. Longo also stated that he asked Dikeman and Rickert to extend their shifts because he did not want to disrupt the work of a sewer crew that was working at the City ball diamonds on Spring Street. 3/ Longo stated that none of the employees he asked to stay late objected to working overtime on December 23rd.

3/ Employee Stewart, who worked on the Spring Street sewer crew on December 23rd, stated that Longo told him and the crew to return to the garage early when the crew was unable to put in the manhole cover on that project that day. Stewart stated that he and his crew (Nelson, Von Price, Freiberg and Moore) were back in the garage by 1:45 p.m., cleaning equipment on December 23rd.

Longo did not call in any employees on the overtime call-in list on December 23, 2003. He believed that extending the shift that day would be less disruptive and that the work could be finished by 5:00 p.m. Longo was wrong. The following employees performed the amount of overtime listed next to their names due to Longo's decision to extend the shifts of the listed employees after their normal 3:30 p.m. quitting time:

Dikeman	4.75 hours
Dille	4.75 hours
Jurgensmeier	4.75 hours
Kaatz	4.75 hours
Lavigne	4.75 hours
Rickert	4.75 hours
Stibb	4.75 hours
Treptow	4.75 hours

On December 23rd, those who performed salting used between 1 load and 3 loads for a total of 13 loads of salt, a total of 112.75 material tons. Only Rickert and Dille used 1 load while Treptow, Kaatz, Jurgensmeier and Lavigne used from 1.25 loads to 1.75 loads; Dikeman used 2 loads and Stibb used 3 loads of salt that day.

Longo stated that he would have used the overtime call-in list had he known that the snow storm would last until 6:30 p.m. It is undisputed that City foremen do not always know how long a project or assignment will take to complete. According to Longo, once he had decided to extend the shift, it would have been inefficient and unsafe for City residents to call employees back to the garage and use the overtime call-in list. Longo stated that the employees who salted that day starting in the morning, had to salt some areas several times to

keep the streets from becoming icy.

Longo stated that had he called in employees off this list, the streets might have become dangerously slippery between the time he called in employees and when those employees could get out on the streets to salt. There was no consensus among witnesses regarding the amount of time it would take for called-in employees to get to the garage and then get out on the road to finish salting: Superintendent Kees estimated 15 to 20 minutes; Barrett estimated 45 minutes; Longo at first stated 30 to 45 minutes and then estimated 1 ½ hours. Longo admitted shift extension normally lasts for 45 minutes to 1 hour and that 4 ¾ to 5 hours is atypical.

December 24, 2003, was a half-day holiday at the City. Longo called in 5 employees two hours early (to start work at 5 a.m.) to remove snow and salt City streets. The following employees were called in 2 hours early and received overtime pay therefor on December 24th: Dikeman, Goldapske, Jurgensmeier, Kaatz and Treptow. Longo also asked three employees at work on December 24th to extend their shifts (that is, to work past the 11:00 a.m. quitting time on the holiday). These employees agreed to the shift extension which they worked and were paid overtime pay, as follows:

Luttenberger	1 hour
Peterson	.25 hour
Stibb	.75 hour

In 2003, there were 37 employees who had listed themselves as willing to work overtime. The overtime worked by these employees ranged from 68.25 hours to 74.25 hours, a maximum difference of 6 hours across the year 2003.

On January 20, 2004, the Union filed the instant grievance alleging :

> Improper management decision was made for overtime use on 12-23-03 and 12-24-03. They determined during 12-23-03 a shift extension was proper and it lasted 5 hours! The next day 12-24-03 some of the same people were called into work. Management didn't work the overtime list 12-23-03 but did 12-24-03.

The Union sought a make whole remedy.

POSITIONS OF THE PARTIES

The Union

The Union noted that Article 8, Section 5 of the labor agreement requires that overtime be divided as equally as possible and that the parties agreed to the Instructions document to try to accomplish this contractual goal. The Union also asserted that the City has not used shift

extensions to finish snow removal in the past ten years. The Union argued that the work done

outside of normal working hours met the definition of overtime under the Instructions document and under past practice, requiring the conclusion that Longo's decision to extend the shift on December 23, 2003, violated the labor agreement and the Instructions document. In this regard the Union observed that the Instructions state specific, limited standards regarding when a shift extension is allowable – to complete a project, when to call in employees would cause a "significant disruption" of work and when it does not make sense to call in employees.

The Union urged that the snow and ice removal needed on December 23rd was not a project but was routine work for which employees are normally called in on overtime. As Union witness Stewart stated that the greatest delay caused by calling in employees on December 23rd would have been 15 to 20 minutes, the Union urged that the City failed to prove that there would have been a "significant disruption" caused by calling in employees on December 23rd. The Union also noted that Supervisor Longo admitted that 4 to 5 hours is not a normal shift extension.

The Union asserted that Longo knew or should have known that the work done outside of normal work hours on December 23rd would require more than 1 or 2 hours of overtime. In this regard the Union observed that all of its witnesses stated that the work assigned by Longo after hours on December 23rd would take at least 3 to 4 hours given the number of employees assigned thereto; that City records showed that 2 to 3 applications of salt were made to City streets from 12:30 to 8:00 p.m. and that 6 of the 8 drivers assigned to salt that day had to return to the garage for more salt that day.

The Union also argued that the City should not have relied on the outside weather report it received that day as that report proved to be completely inaccurate from the time it was received throughout the day. Given the uncertainty of the weather and the lack of any reliable predictions, the Union argued that Longo should have used the overtime call-in list and that had he done so it would not have caused significant disruption of services that day.

Concerning the overtime that was worked on December 24th, the Union asserted that December 24th was a holiday for unit employees and that of the employees who worked on that day, Treptow, Dikeman and Jurgensmeier, should not have been offered overtime because they had worked on December 23rd and would not have been eligible for overtime on December 24th until all other employees on the call-in list had been offered the overtime or a new list was prepared for use. Therefore, Longo could have easily skipped Treptow, Dikeman and Jurgensmeier in offering overtime on December 24th without causing the City any problems in using the list thereafter if it needed to do so.

Finally, in the Union's view, the fact that overtime appeared to be equalized across the unit by the end of 2003 is not relevant to this grievance. On this point the Union noted that there are many reasons why an employee may accept or refuse overtime at any particular time of the year, that these reasons may change from year to year and because the effective labor agreement credits employees with time whether they accept or decline overtime, the City's

argument on this point should be disregarded.

In all the circumstances of this case, that Union urged the Arbitrator to sustain the grievance and order the following remedy: that employees who should have been offered overtime on December 23, 2003 should be paid 4.84 hours of overtime pay (the average time worked that day) and employees who should have been offered overtime on December 24, 2003, should be paid 2.2 hours of overtime pay (the average time worked that day).

The City

The City argued that it retained the right to decide when a shift extension is warranted under Article XXVI (Management Rights). Supervisor Longo decided to extend the shift on December 23rd based upon his belief that the work needed would last only until 5:00 p.m. The City noted that Longo's notes and his testimony showed that he truly believed this based upon his call to his wife that day, indicating that he would be home for dinner around 5:00 p.m.

The City also argued that Longo complied with the Instructions document by extending the shift on December 23rd. In this regard the City noted that the Instructions do not set a "normal" shift extension time, leaving this to consideration on a case-by-case basis. Based upon the language of the Instructions, it is the City that must determine whether a shift extension is warranted in each case, not the Union. The City should not be penalized for the unpredictability of the weather on December 23rd. The City observed that the storm had been predicted to end at 10:00 a.m. but it did not end until 6:30 p.m. and that instead of a trace to .5 inches of snow, 1.5 inches of snow fell on December 23rd.

In any event, the City noted that no employees were harmed by the Longo's decisions on December 23rd and that even if the Arbitrator finds in favor of the Union in this case, no remedy should be granted as overtime was equalized by the end of 2003 for all employees on the call-in list. In regard to the Union's assertions concerning overtime worked on December 24th, the City contended that Longo acted correctly in assigning the work that day and that the Union failed to prove that there was a past practice or any contractual requirement that the overtime call-in lists must be revised after a shift extension.

The City therefore urged the Arbitrator to deny and dismiss the grievance.

DISCUSSION

Article VIII, Sections 2 and 5, clearly state that overtime must be "divided as equally as possible" among those qualified for the available work, with interested, qualified employees getting first consideration in rotation. However, the labor agreement is silent concerning how equalization should be accomplished. It is undisputed that prior to January 1, 2003, the parties had difficulty equalizing overtime as required by the contract. For example in 2002, there was

hours in the C & M Division and the employee who had worked the least overtime in 2002. As a result, the parties negotiated the Instructions document in an effort to agree upon a more effective overtime equalization system.

The Instructions document defines shift extensions only in terms of allowing same for projects. The document provides that when a "project must be completed and it does not make sense to call someone in," a shift extension could occur on an "unplanned limited duration basis" where calling in employees "would cause significant disruption to the completion of the project." Nowhere in the Instructions document did the parties define the term "project," and snow and ice removal work is not mentioned in the document. Therefore, evidence of past practice and bargaining history is relevant to assist in determining the meaning of "project" in this case.

In the area of past practice, the evidence showed that sewer crew work (like that performed by Stewart and his crew on December 23rd) is considered project work by the parties. In addition, finishing grass mowing at an outlying park (according to Barrett) and washing freshly poured concrete (according to Lavigne) have caused shift extensions in the past of less than 2 hours duration about which the Union has not complained.

Although washing concrete may be part of a project, grass mowing is a routine task of C & M employees, not true "project" work. The ordinary meaning of the term "project" is not particularly helpful in this case. The Random House Dictionary of the English Language (College Edition, 1968) at page 1058, defines "project" as follows:

> 1. Something that is contemplated, devised, or planned 2. a large or major undertaking, esp. one involving considerable money, personnel, and equipment.

The above definitions support a conclusion that project work must be planned in advance and involve work that is distinct from ordinary day-to-day tasks.

However, the parties' past practice, the broad terminology of the Instructions document and the bargaining history herein tends to show that the parties intended to allow shift extensions in order to finish up regular shift work, such as grass mowing and other routine shift jobs which had to be finished and where it would "not make sense" to call in employees. Such work would not normally be considered project work but it appears, based upon this record and the express language of the Instructions document, that the parties included this work within their loose "definition" of project work subject to shift extensions.

Assuming *arguendo* that the work on December 23rd was a "project" the question still remains whether Longo violated the contract or the Instructions document by his actions on December 23rd. The parties argued strongly regarding whether it was reasonable for Supervisor Longo to conclude that it would take only 1.5 hours to complete salting all City

in employees at the end of the shift that day. The record herein is clear that only Longo believed his assignment would take 1.5 hours, while all other witnesses who testified on the point believed the assignment would take from 3 to 4 hours given that Longo had assigned eight employees to salt after 3:30 p.m. that day. 4/ It is also significant that the Great Lakes weather report which Longo received and relied upon on December 23rd failed to accurately predict the weather on any level that day. Also, it appears that Longo was a newly promoted supervisor with limited experience ordering shift extensions as of December 23rd. 5/

4/ The City admitted in its brief that eight employees were two more than the City normally uses for salting.

5/ Longo testified at the June 9, 2004 hearing herein that he had been a supervisor for 2 to 2.5 years but that he had been employed by the City for 35 years. From this, one can conclude that Longo was promoted to supervisor just prior to the December 23rd incident.

The City argued that because the parties did not agree in the Instructions document to set a specific limit or time for shift extensions, leaving the time for each extension to be determined on a case-by-case basis, the City thereby retained the right to extend any shift in its discretion for any amount of time the City chose. I agree in part and disagree in part. Union witness Dikeman stated without contradiction that in his 14 years with the City, shift extensions have never been ordered to complete salting work. All witnesses who testified on the point herein stated that shift extensions have never exceeded 2 hours and have typically lasted less than two hours. 6/ In addition, the parties agreed in the Instructions document that the "normal" shift extension were between 1 and 2 hours. The fact that the parties did not agree in the Instruction document to an absolute time limit applicable to every shift extension does not mean that the City should have *carte blanche* to extend shifts beyond what the parties agreed was "normal."

6/ The City argued herein that the Instructions document does not define shift extensions. This is technically true. However, I believe that the document states the "normal" shift extension as between 1 and 2 hours.

Having said that, the Instructions document implicitly leaves the decision to extend a shift to management. 7/ At times, managers make mistakes in judgment. Here, Longo was clearly mistaken (and alone in his judgment) that eight employees could finish salting all City streets and intersections in 1.5 hours. 8/ Longo was also aware that the December 23rd weather report that he had received was far from accurate — that it was, in fact, wholly

unreliable. Nevertheless, pursuant to the Instructions document, it was up to Longo to decide

what to do on December 23rd and he made the decision to extend the shifts of the 6 employees who had been salting all day and to reassign Dikeman and Rickert to salting and then to extend their shifts. 9/

7/ Article XXVII is a general management rights clause which does not mention shift extensions. It does not trump the Instructions document on any relevant point herein.

8/ Longo may have realized this on some level which could explain why he asked Dikeman and Rickert to begin salting at 2 p.m. before they had finished their meter-cleaning assignment.

9/ One of Longo's justifications for his actions on December 23rd was the fact that all employees agreed to work overtime that day. As individual employees cannot waive their contract rights, this constitutes no justification/defense herein.

Hindsight is always 20/20. Longo had the authority to make the decision to extend the shifts of the six employees who had been out all day salting. Longo's decision turned out to be wrong based on the facts as we know them today. But absent evidence of a pattern of intentional and wrongful shift extensions in excess of the "normal" 2 hours, proven to have been done to avoid using the overtime call-in list, Longo's decision to extend the shifts of Dille, Jurgensmeier, Kaatz, Lavigne, Stibb and Treptow cannot be disturbed.

On this point, I note that Longo stated without contradiction that he called his wife and told her he thought he would be home for dinner around 5:00 p.m. that night. Longo was legitimately concerned that the roads would become slippery if salting ceased for any period of time so that called-in employees could take over the salting operation. Thus, in Longo's view, the salting had to be completed and it did not make sense to call in employees given the road conditions and he believed that significant disruption to the completion of salting would have occurred if the six employees had to be called in to continue the work. Longo also stated that had he known that the shift extensions on December 23rd would last for almost 5 hours he would have called employees in off the overtime call-in list.

It is also significant that Longo could not have foreseen that the storm would continue off and on as it did past 3:30 p.m. By quitting time (at 3:30 p.m.) on December 23rd, it was reasonable for Longo to conclude that it would have been too disruptive to have the six original employees cease salting and to wait for employees called-in on overtime to arrive to continue the salting. City streets and intersections could have easily become dangerously slippery in the time it would have taken the called-in employees to get to the City garage and then to get out on City streets to continue salting (an average of approximately 1 hour). 10/ The above evidence supports a conclusion that Longo had legitimate concerns about how best to complete the salting work; that Longo had no hidden agenda or bad intent in ordering the shift

extensions of the above-listed six employees on December 23rd.

10/ I note that Longo stated initially that it would take 30 to 45 minutes for a called-in employee to take over for a shift employee after 3:30 p.m. Later in his testimony, Longo stated that the time for this would be 1.5 hours. Barrett estimated the time at 45 minutes and Superintendent Kees estimated the time from 15 to 20 minutes. Therefore, an average time based on these numbers is 1 hour.

However, Longo's decision to reassign Dikeman and Rickert and to extend their shifts is a different matter. In this regard, the City cannot argue that the salting would have been disrupted if Longo had called in two employees off the overtime call-in list at 2:00 p.m., as it would likely have taken the called-in employees only 15 to 20 minutes to get to the garage to take out a truck then in the garage. Therefore, Longo violated the Instructions document by extending Dikeman and Rickert's shifts and failing to call in two employees off the overtime call-in list to join the six employees already salting on December 23rd.

The City has argued that since overtime was equalized in 2003 due to the implementation of the Instructions document there was no harm done by Longo's decisions and there should be no remedy therefor even if a violation of the document is found. I disagree. The parties agreed to the mechanism of equalization contained in the Instructions document and they should be held to it where applicable.

The Union also argued that Longo's failure to use the overtime call-in list on December 24th violated the Instructions document. In my view, the Union failed to prove that the City violated the contract, the Instructions document or past practice by Longo's actions on December 24th. In this regard the evidence showed that employees assigned to work on December 24th were called out 2 hours early to salt City roads that day. 11/ Nothing prohibits this conduct. In fact, Article VII expressly allows pre-shift call-ins and requires the City to give employees called in 2 hours of work or pay at time and one-half. 12/ Furthermore, the Union failed to prove that the City had ever checked off or credited overtime to employees who had worked a shift extension on the overtime call-in list until a new list was formulated. Here, a new list was not posted until after December 25th. In these circumstances, no violation of the contract, the Instructions document or of past practice occurred because of Longo's December 24th early callout of employees.

11/ The grievance did not allege a violation for the extension of three employees' shifts on December 24th by from 15 minutes to 1 hour and such an allegation is, therefore, not before me.

12/ The labor agreement at Article VII requires the City to pay time and one-half (pay) "for all time worked outside of the employee's regular shift of hours."

Based upon the above analysis, and the relevant evidence and argument, I issue the following

AWARD

The City did not violate the labor agreement and understandings regarding overtime equalization on December 23, 2003, when Supervisor Longo extended the shifts of Dille, Jurgensmeier, Kaatz, Lavigne, Stibb and Treptow and the grievance in this regard is denied and dismissed. In regard to Longo's extension of the shifts of Dikeman and Rickert, the City did violate same by extending their shifts rather than calling in the next qualified employees on the overtime call-in list and the City is ordered to pay the next two qualified employees on the list that was available on December 23, 2003, 4.75 hours of overtime pay.

The City did not violate the labor agreement and the understandings regarding overtime equalization on December 24, 2003, when Supervisor Longo called in employees to perform snow and ice removal duties prior to the start of their regular shifts. The grievance in this regard is denied and dismissed.

Dated at Oshkosh, Wisconsin, this 23rd day of August, 2004.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/anl