BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF LACROSSE

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 180, AFL-CIO

Case 334
No. 64220
MA-12843

(Italiano Grievance)

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, by **Attorney James E. Birnbaum**, 300 North Second Street, Suite 300, P.O. Box 1297, LaCrosse, WI 54602-1297, on behalf of SEIU Local 180.

Mr. James W. Geissner, Director of Personnel, City of LaCrosse, 400 LaCrosse Street, LaCrosse, WI 54601, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 2002-05 labor agreement between the City of LaCrosse (City) and Service Employees International Union, Local 180, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding an overtime opportunity on October 17, 2004, which was not offered to the Senior Water Department employee, George Italiano. Hearing was held at LaCrosse, Wisconsin, on February 22, 2005. No stenographic transcript of the proceedings was made. The parties agreed to postmark two copies of their briefs to the Arbitrator on March 24, 2005, for her exchange; the parties reserved the right to file reply briefs directly with each other, a copy, to the Arbitrator, ten working days after the parties' receipt of the other party's initial brief. The Arbitrator received the last brief on April 15, 2005, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues to be decided herein. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as the parties' proposed issues. The Union proposed the following issue:

> What is the appropriate remedy after the City violated the Collective Bargaining Agreement and acknowledged its violation by failing to call the Grievant for overtime on October 17, 2004?

The City proposed the following issues for determination herein:

> Did the City of LaCrosse violate Article 12 – OVERTIME on Sunday, October 17, 2004, when a bargaining unit employee failed to follow a written management procedure when he called in a more junior employee than the Grievant? If so,
>
> 1. Should the remedy be as proposed by the City, i.e. to provide the Grievant with an alternative make whole overtime assignment which would not disenfranchise any other bargaining unit employee, or
>
> 2. Should the remedy be as proposed by the Union, i.e. to pay the Grievant 8 hours of overtime at time and one-half ($19.26 X 12 = $231.12) and not have him work for it.

Based upon the relevant evidence and argument in this case, the Arbitrator finds that the City's issues more reasonably state the controversy between the parties.

RELEVANT CONTRACT PROVISIONS

ARTICLE 12
OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1 1/2) 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 37 1/2 hour work week, overtime shall be at straight time cash or compensatory time for the first 2 1/2 hours of weekly overtime.

B. Sick Leave, vacation, holidays (or celebrated holidays) and excused absences by the supervisor in writing shall be interpreted as time worked for purposes of calculating overtime hours within the weekly pay period.

C. In those circumstances when a continuous or variable shift employee elects the one holiday day of pay option, all such pay shall be paid at straight time and not contribute to or result in the pyramiding of 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. Such compensatory time will be taken at a time mutually agreed upon by the employee and supervisor. Compensatory time shall not be taken less than four (4) hours at a time for forty (40) hour per week employees, and not less than three and one-half (3.5) hours at a time for 37.5 hour per week employees, with additional increments not less than one-half hour (1/2 hour). Shorter minimum periods (less than 4 hours 3.5 hours respectively, but not less than 1/2 hour) may be approved by the Department Supervisor if Department operations will not be adversely affected. Accumulated compensatory time may not be carried forward into the next year. Employees will be paid for the accrued compensatory time at the rate in effect on the last day of the year. Such payments shall be made during the first pay period in January.

Overtime Policy and Procedure and Template Memorandum

Effective November 8, 2003, the Union and the City agreed to an Overtime Policy and Procedure (OP&P) and the content of a Timing and Communication Template Memorandum (T Memo) to be used when shift coverage is needed with less than one day's notice. The Overtime Policy and Procedure reads as follows:

. . .

This policy replaces the PUMP HOUSE OVERTIME SHIFT COVERAGE CALL IN PROCEDURE for Operator Shift, Mechanic Shift and Holiday Shift Coverage.

OVERTIME POLICY

For Water Utility Pumping Section work that requires assignment of union personnel to work overtime the following policy applies:

- Pumping section seniority will be used to determine who is requested to work overtime. (Seniority list attached)
- The senior person who is willing to work the overtime must determine if they are able to work the additional hours and are able to competently perform the required work.
- For continuous shift coverage senior person may work all the available overtime hours or may opt to split the work hours with a less senior person(s). The split work hours will not be less than two hours of continuous work.
- In the event no one is voluntarily willing to work the overtime management may require the least senior qualified person to work.
- Continuation of assigned work may cause a less senior person to be paid overtime. Example the operator for the next shift calls in sick and it takes some time for the operator to find the replacement.

. . .

- Operator shift coverage on holidays will be scheduled by normal shift rotation. If the scheduled operator declines the overtime then the process above will be used to fill the shift.

Reassignment of shift coverage is done when required minimum staffing levels cannot be maintained. Examples of the need to reassign include: an operator calling in sick before the start of a shift, or an operator not reporting to work at shift change, or a mechanic calling in sick for the weekend shift.

Management may reassign personnel already at work to perform the required duties. Management may reschedule personnel to cover the shift. If overtime is required the procedure above will be followed.

When filling a weekend or night or holiday operator shift or weekend mechanic or holiday mechanic shift the on shift operator will:

- Attempt to contact a management person to authorize the overtime. The order of contact is Tom Berendes, Mark Johnson then Mike Pederson. If management can't be contacted proceed to find a person to do the work.
- Contact pumping section personnel using the Shift Call In Policy. (Attached)

Attached to the OP&P was the Pumping Section Seniority list showing Italiano as most senior employee and listing his telephone number. All other Pumping section employers and their telephone numbers were then listed below Italiano in order of their seniority. On the bottom of this list were names of City supervisors (to contact to authorize overtime) and their telephone and cell numbers.

Also effective November 8, 2003, the City issued the following T Memo to assist operators who must call in employees for shift coverage with less than one day's notice, as follows:

. . .

When filling a weekend or night or holiday operator shift or weekend mechanic or holiday mechanic shift the on shift operator will:

1) Immediately attempt to contact your supervisor(s) to authorize overtime. If unable to contact your supervisor continue immediately to step two (2).

2) USE the Overtime Policy & Procedure for reassignment of shift coverage to fill the open shift.

3) When you call per Overtime Policy contact the most senior person on the pumping section seniority list:

   a) If you reach the first person that could fill the shift ask him/her if they are available to work the shift. If not continue to the next most senior person on the list.

   b) If you get answering machine leave this message; "(*Person's name*) this is the Pumping Station. I am trying to find an operator (or mechanic) for the (*shift number*) shift. Please call in to let me know whether or not you would be able to work this shift." Then continue to call the next most senior person on the list.

   c) If you get an other [sic] person (example spouse or child) introduce yourself then ask to speak to the person you are calling if they are available then (3) a)), if not ask to leave this message; "I am trying to find an operator for the (*shift number*) shift. Please have (*persons name*) call in to let me know whether or not he/she would be able to work this shift." Then continue to call the next most senior person on the list.

   d) Call back two hour [sic] before the shift starts if this operator has not responded.

   e) If you reach the next person that could fill the shift ask him/her if they are available to work the shift. If not continue to the next step in the Call In Procedure. If he/she is available and there is more than two hours before the next shift then inform this person that you are still trying to contact a more senior person and arrange a time to call them

back to let them know if they will be needed for the vacant shift. If there is less than two hours before the next shift then this is the next operator.

f) If you get answering machine leave this message; "(Person's name) this is Pumping Station. I am trying to find an (operator) (or mechanic) for the (shift number). Please call in to let me know whether or not you would be able to work this shift." Then continue to the next step in the Call In Procedure.

g) If you get another person introduce yourself then ask to speak to the person you are calling if they are available then (4) a)), if not ask to leave this message; "I am trying to find an (operator) (or mechanic) for the (*shift number*) shift. Please have (*persons name*) call in to let me know whether or not he/she would be able to work this shift." Then continue to the next step in the Call In Procedure.

4) Continue to use the Call In Procedure till the shift is potentially filled.

5) When there is more than two hours before the next shift, if the more senior available person calls in to take the shift then call back to:

a) The prospective less senior person who was contacted and said they could work.

b) Any less senior persons where messages were left.

6) Inform them directly or leave a message that lets them know; *The shift is covered by a more senior person.*

When an employee receives a request from a water plant operator to come in to fill a shift the employee shall:

1) Inform the on shift operator whether or not he/she is available to cover the shift.

2) Respond to messages on the voice mail or to the verbal message that was left for you by calling into the pumping station as soon as he/she reasonably can.

. . .

BACKGROUND

Prior to November 8, 2003, there was a different Overtime Policy/Procedure in the City which required replacing an employee with a certain job title with another employee with the same job title. On and after November 8, 2003, straight seniority was used, using two seniority lists, one covering Pump-house Section employees and the other covering Water Distribution employees. Grievant George Italiano is the most senior Pump-house employee; Foreman Bill Baumgartner is the most senior Water Distribution employee.

The Union presented evidence showing that in nine past cases which occurred from October, 1991, through October, 2000, the City paid employees who were not offered overtime opportunities they should have been offered. None of these employees had to perform any work in order to receive the overtime pay paid to them. In these cases, the City paid the affected employees from one hour to eight hours of overtime pay to each employee.

The City presented evidence of one grievance filed by former employee Troy Littlejohn in 2001 requesting "the chance to work the [overtime] hours" he had signed up for on April 8, 2001, which he asserted were denied him as discipline. This grievance was ultimately dropped. This is the only evidence the City proffered to show that Italiano should be required to perform work in order to receive the overtime pay due him. The Union also proffered an Arbitration Award written by WERC Arbitrator Emery which it urged is *res judicata* of this case. (Jt. Exh. 8). The City argued that the Emery Award is inapplicable. Finally, Joint Exhibit 10, the Strittmater overtime grievance settlement dated March 1, 2004, was placed into the record which by its terms was "non-precedental."[1]

FACTS

There is no dispute regarding the facts of this case. The Grievant, George Italiano, the most senior Pump-house employee, was not called out for overtime on Sunday, October 17, 2004, by the Operator in charge, Doug Bilyeu[2] when a second shift Operator called in sick. Bilyeu failed to follow the OP&P and the T Memo quoted above on October 17th. On October 18th, Superintendent Berends told Italiano that Bilyeu had made a mistake by not calling Italiano when the second shift operator called in sick for his shift on October 17th. Berends asked if Italiano would have been available and Italiano said that he was available on October 17th. Berends stated that Bilyeu[3] called a less senior employee than Italiano and that Italiano should have received overtime on October 17th. Berends then asked Italiano whether

[1] This Arbitrator has not considered Joint Exhibit 10 herein, as it can have no precedental value in this case.
[2] Bilyeu was the Operator-in-charge who failed to offer Water Distribution Forman Bill Baumgartner (the most senior Water Distribution employee) overtime on July 5, 6 and 9, 2004. The City admitted Bilyeu erred and it paid Baumgartner for the overtime he missed, without requiring Baumgartner to work any hours to receive the overtime pay involved.
[3] Bilyeu is ninth in seniority out of ten Pump-house Section employees on that seniority list.

he would be willing to perform work for the overtime pay due him. Italiano responded that he did not necessarily have a problem with that but that he would have to check with the Union first. Italiano spoke with local Union representative Padesky who advised Italiano to file the instant grievance, to seek eight hours of overtime pay for the opportunity he missed on October 17th. Italiano timely filed the instant grievance.

The City's Step 2 response to the Grievance reads in relevant part as follows:

. . .

> In this case, the grievant states that he was not offered the opportunity for overtime on Sunday, October 17th, 2004, when a water operator called in sick, and a less senior employee was called in.
>
> The City and the Union are in agreement that the policy for the Pumphouse Overtime Shift Coverage Call-in Procedure was violated when the working Operator (a fellow union employee) failed to obtain authorization for overtime and to follow the outlined procedures.
>
> Management has counseled the employee for failure to properly follow procedures. In addition the City has offered to **create an overtime opportunity** for which Mr. Italiano could work the 8 hours (overtime) which he would have otherwise worked on November 16th, 2004. [sic] **The created overtime would be specific to the position of the Auto Control Technician, thus not applicable to other Water Department employees.** The date for such work would be mutually agreed to by both the grievant and the Superintendent.

. . .

Berends stated that he spoke to Bilyeu each time he failed to call in the most senior employee but that Bilyeu was never disciplined for his conduct on the occasions in July, 2004, and the occasion involved in this case. The position description for Water Plant Operator (Bilyeu's position) states that the Operator "assumes responsibility for utility functions during non-office hours or in the Superintendent's absence" (Jt. Exh. 7). There is no dispute that the Water Plant Operator in charge is responsible to call in employees pursuant to the OP&P, using the T Memo.

POSITIONS OF THE PARTIES

The Union

The Union observed that the City has consistently admitted violating the contract on October 17, 2004 and that the only issue before the Arbitrator is how to remedy the violation. The Union urged that the only appropriate remedy is to pay Italiano for the overtime opportunity he lost on October 17th. In this regard, the Union noted that the parties entered into a written agreement, the OP&P, which requires the City to offer overtime opportunities to employees based upon their seniority. Italiano was the most senior Water Utility employee and he stated herein that he was available to work on October 17th, but that he was not called that day. Therefore, the Union argued that Italiano should be paid for the overtime opportunity he missed due to the City's error in failing to call him in.

The Union asserted that the payment of overtime pay in cases such as this is required by the past practice between the parties, by the Blanchard Award, and in order to prevent the City from violating the agreement in the future. In this regard, the Union contended that Arbitrator Emery held that if the City is not required to pay overtime, it would be rewarded for failing to apply strict seniority (as required by the past practice found by Emery) and it would have no incentive to follow the practice. Furthermore, the Union pointed out that the City has not attempted to bargain away the Blanchard Award and that Blanchard stands as the only binding precedent regarding the issue before this Arbitrator.

The case of Bill Baumgartner is post-Blanchard and consistent with the Union's arguments herein. Both Baumgartner and Italiano are the most senior employees in their Divisions; both have special skills; and both were passed over for overtime by the same agent of the City who gave the overtime to a less senior employee. The only difference between Italiano and Baumgartner is that in the latter case, the City paid Baumgartner, without dispute, for the overtime opportunity he missed on July 6, 2004, while the City has denied Italiano overtime pay and fought his claim therfor. The City's reason why it has refused to pay Italiano, that Italiano's case is too expensive (8 hours of overtime pay, not 2 hours of overtime as in Baumgartner's case), is without merit.

The Union asserted that the lone case cited by the City in support of its claims in this case, the Littlejohn grievance, is irrelevant and is factually distinguishable from the instant case. In this regard, the Union noted that Littlejohn was a discipline grievance, not an overtime grievance, as evidenced by the Articles cited in the Littlejohn grievance; that in any event, Littlejohn pre-dated the Blanchard grievance and Award and the parties' agreement to the OP&P. Even if the Arbitrator finds the Littlejohn grievance relevant, the Union argued that Littlejohn would not have been eligible for overtime as he had worked less than the 40 hours required therfor during the week of April 3, 2001.

In contrast, the Union urged that the evidence it proffered regarding prior cases — nine cases in which the City paid overtime without requiring the employee to work to receive the pay, fully support the Union's assertions herein. Finally, the Union contended that an Award in favor of the City herein would encourage future violations of the labor agreement and give the City no incentive to follow the contract. On this point, the Union speculated that as senior employees' rates are higher than less senior employees, and the former employees have special skills, the City would likely cease calling senior employees in for overtime if the City knew that it would only be required to provide another overtime opportunity to senior employees. As Italiano would be getting what he should have received had the City followed the contract if the Arbitrator orders the City to pay him for the lost overtime opportunity, this would not amount to unjust enrichment. Therefore, the Union sought that the grievance be sustained and that Italiano be made whole — that he be paid 8 hours overtime pay.

The City

The City listed its arguments in its initial brief as follows, without further elaboration:

ARGUMENT #1

The City has been reasonable in its actions in this case. It did not discipline the employee that made the call in mistake and its actions to reschedule/pay the grievant "make him whole."

ARGUMENT #2

The past practice of the parties in similar employee or supervisor error cases is mixed, i.e. sometimes the affected employee is paid and sometimes he is offered to work unique or other overtime when it does not disenfranchise fellow employees.

ARGUMENT #3

Arbitrator Emery's award in Case #308 states that as the parties have demonstrated, the variety of past settlements (in cases similar to this) in this bargaining unit cover the waterfront. There is, therefore, no precedential effect (binding past practice) to be found either way. **(underlined and inserted for emphasis)**

ARGUMENT #4

Unlike the Blanchard cases decided by Arbitrator Emery, a guarantee of future work is feasible. The grievant is in a unique job classification, i.e. Auto Control Technician, and regularly performs work on electrical motors and

> pumps. Additional electrical work is regularly contracted out to private sector vendors. The assignment of "other overtime" to the grievant would not disenfranchise any other bargaining unit employees because the grievant is the only employee qualified to perform electrical work, which was Emery's concern when he denied same in the Blanchard case.
>
> . . .

Reply Briefs

The Union

The Union argued that the City is attempting to argue its case by using evidence not contained in the record and by relying upon inadmissible, irrelevant and privileged evidence, while ignoring non-disputed facts. Where the contract addresses overtime but is silent concerning how employees should be compensated when they are improperly passed over for overtime, the Arbitrator would merely be interpreting the contract by seeking guidance from prior arbitration awards and past practice, not changing or modifying the terms of the agreement.

The City's reference to settlement talks and offers in its brief should be disregarded by the Arbitrator as these talks/offers are privileged and inadmissible, pursuant to the Wisconsin Rules of Evidence, Sections 904.08 and 904.085. Also irrelevant to this case is the fact that the City's agent for call-ins on October 17th was a bargaining unit employee. As the City has admitted that this employee was its agent and that that agent violated the OP&P, the City is clearly bound by its agent's actions which just as clearly violated the labor agreement.

The Union urged that there was no evidence put into this record to support the City's claim that the past practice in similar cases was "mixed;" that the only evidence in this record showed that the City has paid employees in every case without requiring them to work for the pay involved. The Union reiterated its arguments that Blanchard should stand as binding precedent herein and that Italiano would be disenfranchised from future overtime if this Arbitrator rules in favor of the City, noting that the City would end up treating less senior employees more favorably than senior employees in overtime situations.

The City

The City urged that because Article 19 is a reservation of rights provision which states that the City has the right to "determine the schedule of work," the contract has not been violated in this case. Also, for the first time, the City argued that Article 12 does not require the City to offer overtime assignments to bargaining unit employees on a seniority basis. In

this regard, the City noted that the labor agreement is silent on the subject of how overtime should be assigned; that it was not until mid-term of the effective labor agreement that the City asserted, it unilaterally established the Overtime Procedure, pursuant to its management rights. Specifically, the City denied (for the first time) that it negotiated the Overtime Procedure with the Union. The City then asserted:

> Because it was a Sunday and no management staff were on duty, and because the Grievant had not been a long standing member of the plant wide overtime call list, the co-worker (Bilyeu) made a mistake. . . . The mistake was inadvertent and not the result of bad faith by the employer. (Reply Brief, p.2)

The City repeated its arguments that Arbitrator Emery in the Blanchard Award stated that both the contemporaneous and general past practices were mixed and that the settlements covered the waterfront. Thus, the City urged that it did not need to submit any examples of employees who had missed overtime and who had had to work the hours involved in order to receive the pay — Arbitrator Emery stated as much in his award. In any event, the City argued that the Blanchard Award should have no precedential value herein as make-up overtime could not be done in Blanchard, but there is no impediment to Italiano making up overtime in this case as no less senior employees will be denied overtime by Italiano being given skilled overtime that he alone is capable of performing.

The City noted that in half of the overtime cases it looked at (no citations were given), the arbitrators required employees to work the overtime hours in order to receive pay therefor, while in the other half of cases, arbitrators have granted overtime pay without requiring employees to work. As the City did not deny Italiano overtime in bad faith, it urged this Arbitrator to require him to work for the overtime pay he will receive.

The City asserted that the Union has unfairly tried to equate the Baumgartner case with the Blanchard case. In this regard, the City observed that in Baumgartner's situation, only two hours of emergency overtime were involved. The City then argued as follows:

. . .

> The City is hard pressed to schedule employees for a two (2) hour make-up time slot as opposed to scheduling the grievant in this case to a regularly scheduled complete shift. There are numerous additional cases besides the Littlejohn case (which the City did not argue in the Blanchard case) that show the mixed practice of the City in handling missed overtime.

. . .

The City then urged that this Arbitrator should grant a remedy it had suggested during grievance mediation, as follows:

. . .

1. Pay the grievant for one-half of the missed shift (i.e. 4 hours of overtime at 19.82 per hour = $118.92, and
2. Schedule the grievant to "make-up" overtime that does not disenfranchise any other bargaining unit employee, such work to be performed at a mutually agreeable time.

Finally, the City attached an extra page to its Reply Brief entitled "Arbitral Case Law Supports City Position" which read as follows:

. . .

Arbitrators in other missed overtime cases have held that make-up overtime was an acceptable remedy because:

1. the retained residual management rights were exercised in a non-arbitrary, non-capricious fashion taken in good faith;
2. the employer imposed a standard of reasonableness;
3. changes in work rules as occurred in this case when the employer added the grievant to the plant wide overtime list should be accompanied by a gradual educational process and not result in an unjust enrichment due to an employee mistake;
4. unjust enrichment would occur by paying overtime for time not worked as a result of a mistake made in good faith;
5. arbitrators are hired to provide independent judgment especially when the union is relying on a case that is not on point, reasoned and well written, i.e. the awarding of the City's proposed remedy will not disenfranchise a fellow bargaining unit employee as Arbitrator Emery found in the Blanchard case;
6. arbitrators have held that in cases where no specific collective bargaining provision is violated but where the employer's policy was not followed, awards of make-up overtime were appropriate because it would be near impossible or highly speculative for an employee to even establish that he would have been home on a Sunday afternoon and/or that he would have agreed to work the overtime if asked;
7. arbitrators have calculated back pay at only straight time because of the highly speculative nature that the employee was available and would have accepted the overtime work on a Sunday afternoon;

8. other arbitrators have ordered lost overtime hours to be paid where it was impossible to construct a make-up remedy that did not effect other employees, a condition not present in this case.

. . .

DISCUSSION

The first question that must be answered in this case is whether the record demonstrates that the City violated the contract and/or the parties' mutually agreed upon policies/procedures relevant to filling overtime shifts, when employee Bilyeu filled the overtime shift available on October 17, 2004, with an employee less senior than Italiano. Joint Exhibit 3 contains the City's admission that it violated the parties' agreed-upon procedures when Bilyeu failed to call-in the Grievant to work the available overtime on October 17th. The City failed to submit any evidence to show that this admission should not bind the City herein. Furthermore, the testimonial evidence from both the City and Union witnesses fully supported the Union's arguments on this point. Therefore, the only question before this Arbitrator is what the appropriate remedy should be for the City's contract violation.

The Union has argued that the Blanchard Award should control this case. However, the Blanchard Award issued in 2001, approximately two years before the parties mutually agreed upon the Overtime Policy and Procedure and the Template Memo (OP&P and T Memo), quoted above. In addition, the Blanchard Award addressed other issues not before this Arbitrator and rested upon distinguishable facts as well as the parties' past practice regarding overtime call-ins in effect prior to 2001. In these circumstances, the Blanchard Award has only limited applicability to this case which is driven by the OP&P and the T Memo. That said, the Blanchard Award is a precedent between the parties on the issue of overtime pay and demonstrates what another arbitrator believed to be the appropriate remedy in 2001 for a lost overtime opportunity.

The question then arises what the appropriate remedy should be in this case for the City's violation of the OP&P. The City has argued that Italiano should be required to work eight hours of overtime in order to receive a remedy for the City's violation of the OP&P on October 17th.[4] However, there is no language in the labor agreement or the OP&P that requires employees to perform work in order to be eligible for overtime pay wrongly denied them.

[4] The fact that the employee who wrongly failed to offer Italiano the October 17th overtime opportunity was a bargaining unit employee is not relevant to this case. In this regard, I note that the City has designated the Operator-in-Charge as the City's agent to perform call-in duties. This means that the City is responsible to train its agents to understand and use the OP&P and the T Memo; and that the City is responsible for the errors of its duly authorized agents if they fail to properly perform the duties of their agency.

The Union has argued that a past practice has arisen which has been followed both before and after the parties' November 8, 2003 agreement to the OP&P and the T Memo, whereby the City has consistently paid employees who have been wrongly passed over for overtime opportunities, without requiring the employees to work for the overtime pay involved. The Union submitted documentary evidence from nine prior cases, which occurred between 1991 and 2000. In all of these cases, the City paid the affected employees for the overtime opportunities they missed and the City did not require the employees to perform any work for the pay received. The Union also submitted the facts and documents regarding a tenth case, that of senior Water Distribution employee, Bill Baumgartner which occurred in 2004, after the parties' agreement to the OP&P and the T Memo. All of this evidence supports the Union assertions in this case. In short, no evidence was submitted into this record that supported the City's claim that the past practice concerning pay for overtime is "mixed" and this argument has been rejected.[5]

In addition, the Baumgartner situation is virtually identical to the instant case. Both employees are the most senior employees in their Divisions, both have special skills and both were passed over for overtime by Bilyeu in error. In my view, the City has failed to demonstrate why/how the Grievant's case is different from Baumgartner's so as to deny Italiano overtime pay while Baumgartner was granted same without a grievance being filed. I note that the OP&P does not make a distinction between types of overtime based on the number of hours involved and it fails to address overtime expense.

The City proffered one prior case that it asserted supported its assertions regarding the remedy herein. This evidence concerned the 2001 grievance of then-employee Littlejohn in which Littlejohn cited Articles 19 and 20 of the agreement as being violated and sought that he be allowed to work certain hours that he asserted his supervisor had denied him in order to discipline him. In my view, the Littlejohn grievance clearly involved discipline. It is factually distinguishable from the instant case and it did not list or otherwise involve an Article 12 overtime question. As such, I conclude that the Littlejohn grievance is irrelevant to this case.

Regarding City Argument 4, this assertion is irrelevant and immaterial to this case. Whether the City could find some extra work for the Grievant to do that would not affect overtime work assignments is not the point. As a general rule, the remedy for a missed overtime opportunity must be payment for the overtime hours the employee would have worked but for the employer's failure or refusal to properly offer the employee the opportunity. This is so because otherwise, there would be no incentive for the employer to follow the parties' agreed-upon overtime call-in policies/procedures absent an award that the employer pay the affected employee(s) for the overtime opportunity he/she missed. Where, as here, there is no question that the employee was available and that he was capable and qualified to perform the work required and where the record evidence showed the City has

[5] Arbitrator Emery's statement that past settlements "cover the waterfront" is not explained in his award and it must be disregarded.

consistently paid for lost overtime opportunities in the past, a backpay award is necessary to send the employer a clear message that a violation of the labor agreement will have a cost to the City. Therefore, based upon the above analysis, I issue the following

AWARD

The City violated Article 12 – Overtime on October 17, 2004, when its agent, a bargaining unit employee, failed to follow OP&P and the T Memo, when he called in a more junior employee than the Grievant.

Therefore, the City is hereby ordered to pay George Italiano eight hours of overtime pay at time and one-half and Italiano shall not have to perform any work to receive the overtime pay.

Dated in Oshkosh, Wisconsin, this 7th day of June, 2005.

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

SAG/anl
6838.doc