BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE MARINETTE CITY EMPLOYEES UNION
LOCAL 260, AFSCME, AFL-CIO

and

CITY OF MARINETTE

Case 98
No. 64081
MA-12798

(Unti Denial of Overtime)

Appearances:

Dennis O'Brien, Business Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5590 Lassig Road, Rhinelander, Wisconsin 54501, for the Union.

John Haase, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, for the City.

ARBITRATION AWARD

Pursuant to the request of the Marinette City Employees Union, Local 260, AFSCME, AFL-CIO and the concurrence of the City of Marinette, the Wisconsin Employment Relations Commission assigned me to arbitrate an overtime grievance.

Hearing was held in Marinette, Wisconsin on February 17, 2005. No transcript of the hearing was taken. The parties filed post-hearing argument-the last of which was received April 13, 2005.

ISSUE

The parties were unable to agree on a statement of the issue to be resolved but did agree that I could frame the issue after considering their respective statements thereof. Having done so, the issue is framed as follows:

Did the City violate the contract by paying the grievant straight time for hours worked on August 3, 2004?

If so, what is the appropriate remedy?

DISCUSSION

Pursuant to Article 12 of the contract, in June 2004, the City established a "non-normal shift" (i.e. not 7:00 a.m. -3:45 p.m.) of 2:00 pm to 10:00 pm for one employee on 10 specified dates in the summer of 2004 when it was anticipated events would be occurring on Stephenson Island. On one of the 10 dates (August 3), the employee regularly assigned to the "non-normal shift" was on a long-scheduled vacation and the City assigned another employee (who would otherwise have worked a normal 7am-3:45pm shift) to work 2:00 pm to 10:00 p.m. on August 3. The issue in this proceeding is whether the reassigned employee is entitled to overtime for the August 3 hours.

The Union argues overtime pay is required because the reassigned employee did not receive at least 48 hours of the change in work hours. The City contends that no overtime is due because it gave notice to the Union in June, 2004 that the non-normal shift was being established.

Although the parties' written argument largely focuses on the extent of their disagreement, there are some matters as to which the parties agree.

The parties agree that the "non-normal shift" was properly established and that the regularly assigned employee was not entitled to overtime for the "non-normal shift" hours that he worked. The parties agree that, at least as a practical matter, it is the City's obligation to advise employees that they will be working a "non-normal shift"-whether the employee is the originally assigned individual or his/her replacement. The parties also agree that however this dispute is resolved, if an employee receives at least 48 hours actual notice of the change in "shift hours", no overtime is owed.

The parties disagree over whether at least 48 hours notice to the Union of a "non-normal" shift is sufficient to avoid overtime for anyone who works the "non-normal shift." If notice to the employee is required to avoid the overtime obligation, the parties also disagree as to how that notice can be provided.

As a preliminary matter, I agree with the City that the third paragraph of Article 12 does not apply to this dispute. The text of that contract provision establishes that it is limited in its application to "call-in pay" scenarios where an employee is called back to work after completing a scheduled work day. Therefore, this portion of Article 12 does not apply to "non-normal shift" situations such as that at hand. Thus, it is the first two paragraphs of Article 12 upon which the resolution of this dispute turns. Those two paragraphs provide in pertinent part the following:

> The normal work day begins at 7:00 AM and ends at 3:45 P.M. The starting time may be changed without forty-eight (48) hours prior notice, providing that all time worked outside of the normal hours are compensated for at the rate of time and one-half (1-1/2) the employee's regular rate. . . .
>
> Providing the Employer gives forty-eight (48) hours notice of a change in starting time, and thereby establishes a non-normal shift, the new hours shall be compensated for at straight time pay; . . .

The first paragraph establishes the general proposition that overtime must be paid for time worked outside the hours of 7:00 AM-3:45 P.M.

The second paragraph establishes an exception to the general overtime obligation. No overtime is owed if the City provides at least 48 hours notice of a change in starting time and thereby establishes a "non-normal shift."

Neither paragraph specifies to whom notice is to be given. The Union asserts notice must be given to the employee to avoid overtime. The City contends notice to the Union is sufficient. I conclude the Union is correct.

As acknowledged by the City, the reality of the workplace is that when employees' normal hours are changed, they must be told and advised when to report to work. Where, as here, the contract language is silent regarding who should receive notice of the change, this reality of the workplace makes notice to the employee the most reasonable answer to that "to whom" question. Given this reality of the workplace, if the parties had intended that notice be given to the Union, I conclude they would have so specified. They did not.

In reaching this conclusion, I reject the City contentions that: (1) the contractual silence makes it implicit that notice to the Union is required because the contract is between the City and the Union; (2) because other portions of Article 12 specify that notice must be given to the employee, the absence of that "employee" notice specification in the second paragraph of Article 12 conveys an intent that notice to the Union be provided; (3) I am improperly adding words to the contract by concluding that notice to employees is required; (4) it would never have agreed that 48 hour employee notice is required because there are some circumstances in which it cannot provide same and therefore will automatically incur an overtime obligation; and (5) requiring notice to the employee gives the Union a benefit it did not but should have to acquire at the bargaining table.

As to the City's first contention, the reality of the work place factor already discussed above provides a far more reliable and realistic indicator of the parties' intent than does the implicit answer that could be drawn from the identity of the contracting parties.

As to the City's second contention, I agree that the other Article 12 provisions cited by the City require notice to the employee. However, the City's argument again fails to account

for the reality that notice of the change must be given the employee so that the employee knows when to come to work. In the context of this reality, an interpretation of Article 12 that the contractual silence creates an obligation to give notice to the Union is simply not persuasive.

As to the City's third contention, I am not adding words to the contract. I am answering the question left unanswered by Article 12-to whom is notice given. I would note that if I concluded that notice to the Union was intended, I would apparently from the City's perspective also be improperly adding words to the contract.

As to the City's fourth contention, it is true that there will be circumstances where the City cannot provide the 48 hours notice. However, it must be remembered that the 48 hour notice exception relieves the City of what would otherwise be an ongoing overtime obligation anytime an employee works outside 7:00 a.m. -3:45 p.m. Thus, it was in the City's interest to bargain this exception even if, as I have concluded, notice to the employee is required but on occasion cannot be provided. Thus, this City argument really goes to how good of a deal the City got when the Union agreed to this exception to the overtime obligation (i.e. it would be an even better deal if notice to the Union relieved the City of the overtime obligation) and does not make my interpretation an unreasonable one.

As to the City's last contention, I reiterate that the contract is silent as to whom notice is to be given but the reality is that notice must be given to someone or some entity to make the contractual language operative. Thus, the result reached simply answers the "to whom" question-albeit in a way the City finds undesirable.

Having concluded that notice to the employee is required, the issue becomes whether leaving a message on an answering machine, as the City did here, is sufficient. Again relying on the above-discussed reality of the workplace, I conclude that actual contact with the employee is required. Absent actual employer/employee conversation, there is the real potential for an employee to fail to appear – a result it is reasonable to assume the parties intended to avoid.

Given all of the foregoing, because the City did not provide the grievant with notice of the change in work hours at least 48 hours prior to the start of his August 3, 2004 shift, the City violated the contract by failing to pay him 1½ for those hours. To remedy the violation, the City shall make him whole for those lost wages and any related benefits.

Dated at Madison, Wisconsin, this 6th day of July, 2005.

Peter G. Davis /s/
Peter G. Davis, Arbitrator

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