

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GREEN BAY POLICE PROTECTIVE ASSOCIATION

and

CITY OF GREEN BAY (POLICE DEPARTMENT)

Case 364
No. 64974
MA-13071

(Officer Mulrine Overtime Grievance)

Appearances:

Parins Law Firm, S.C., Attorney at Law, by **Thomas J. Parins**, on behalf of the Green Bay Police Protective Association.

Steve Morrison, Assistant City Attorney, on behalf of the City of Green Bay.

ARBITRATION AWARD

The Green Bay Police Protective Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the City of Green Bay, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 20, 2005, in Green Bay, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by January 27, 2006. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues and agreed the Arbitrator will frame the issues to be decided.

The Association would state the issues as follows:

1. Is Officer Mulrine entitled to payment for lost overtime opportunities from December 5th through December 23rd, 2003, as a make-whole remedy for his inappropriate suspension.
2. Is Officer Mulrine entitled to payment for lost opportunities from December 5th through December 23rd, 2003, based upon the provisions of section 6.03 of the collective bargaining agreement and for the hours spent by Officer Mulrine 8:00-4:00 p.m. under the terms of section 6.01 of the collective bargaining agreement
3. What is the proper methodology for measuring the dollar value of the overtime opportunities lost and the hours spent by Officer Mulrine 8:00 a.m. to 4:00 p.m.

The City would state the issues as:

Is Officer Mulrine entitled to overtime payments during the period of time he was placed on paid administrative leave?

If so, what is the appropriate remedy in this case?

The Arbitrator frames the issues to be decided as follows:

Is Officer Mulrine entitled to overtime pay under the parties' collective bargaining agreement for the period December 5, 2004 until December 24, 2004, during which he was not permitted to work any overtime opportunities and was required to be accessible by telephone?

If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited in relevant part:

ARTICLE 6. OVERTIME.

6.01 OVERTIME PAYABLE. Employees will be compensated at the rate of time and one-half (1½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8½ hours on a regular workday or for hours worked outside the normally scheduled workweek. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. No change in the amount of overtime claimed by an employee shall be made unless the employee is notified of such proposed change within seven (7) days of the employee turning in an overtime card.

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6.03 ALLOCATION OF OVERTIME.

(1) Posting. All overtime of the department schedule, where practicable, shall be posted. If more persons qualified for such overtime work sign for such than are needed, allocation of the overtime shall be on a seniority basis among those qualified for the work. (It is contemplated that at times it will be necessary to determine the qualification of an employee to work overtime based upon the employee's knowledge of the subject of the overtime work or the training and expertise of the employee. However, in the event of a dispute as to same, the City shall have the burden of establishing the necessity.) In allocating overtime the department shall ask for volunteers on the basis of seniority regardless of whether the officer is on a work or off day. In the event sufficient volunteers are not found, the balance of the overtime shall be assigned on the basis of inverse seniority among those on their workdays and then by inverse seniority among those on off days. Management may refuse overtime where there is a legitimate safety concern. Practicability of posting shall be determined in light of time available for posting and departmental or public security, or other relevant and sufficient factors. This paragraph shall not apply to overtime resulting from an extension of a person's normal workday duty, nor shall it apply to overtime not assigned by the City of Green Bay.

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6.06 OVERTIME FOR GREEN BAY PACKER GAMES. (1) Two postings shall be placed on the bulletin board once each year by July 1. All officers interested in working Packer games or working any extra overtime beyond what would be normal for traffic or field assignments are requested to sign the respective postings. These postings shall contain the anticipated manpower needs for the games.

(1) Officers who sign the above said posting shall be assigned to work each of the Packer games in the year in question on the basis of departmental seniority.

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(4) Officers working overtime for Packer games shall be compensated at twice their regular rate of pay for all hours worked.

6.07 STAND-BY PAY. Officer asked to be available for immediate call to duty shall receive an hourly rate of pay equal to fifteen percent (15%) of the top patrol officers' hourly rate for every hour in which they are on stand-by. When actually called to duty, they shall be compensated according to Article 6 and/or

Article 11 of this agreement. If such standby duty is necessary in order to provide mutual assistance outside of the City limits, then the department shall select qualified officers for such duty by seniority from among those signing a posting.

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ARTICLE 26. DISCIPLINE

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26.04 DISCIPLINARY PROCEDURES

(1) Section 62.13, Wisconsin Statutes. Suspension(s), reduction in rank, suspension and reduction in rank, and dismissal of bargaining unit members shall be governed by the procedures set forth in Section 62.13, Wis. Stats.

(2) All other disciplinary proceedings shall be governed by the Grievance Procedure.

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BACKGROUND

The Grievant, Officer Shannon Mulrine, has been a police officer of the Green Bay Police Department for over 25 years and is a K-9 handler. Chief Craig VanSchyndle is the City's Police Chief.

Mulrine and another officer from the Department were sent to Albuquerque, New Mexico for K-9 handler training in the fall of 2003. Upon their return, Officer Mulrine submitted a Travel Expense Claims form regarding his expenses related to the training. Chief VanSchyndle subsequently questioned Mulrine's claimed expenses and on December 5, 2003, issued Mulrine the following letter placing him on paid "administrative leave":

Officer Mulrine:

Please be advised that effective immediately you are being placed on paid administrative leave. This administrative leave is pending the completion of an investigation into the matter of your conduct regarding the submission of 2003 City of Green Bay Travel Expense Claim forms for K-9 handler training you attended in Albuquerque, NM from September 15, 2003 to October 25, 2003. You are also being ordered to have no contact, either directly or indirectly, with Kevin Sheldahl or any police officer or corrections officer that attended any part of your K-9 handler training at Albuquerque, NM.

While on administrative leave, you will be prohibited from access to the Green Bay Police Department. Further, you are directed to return to your regular work schedule of work/off days and remain available during regular office hours (8:00 a.m. to 4:00 p.m.), or provide us with a phone number where you can be reached. You are prohibited from representing the City of Green Bay or the Green Bay Police Department in any manner during this leave.

We will be in contact with you in the near future regarding this investigation, and we expect your cooperation with respect to this matter. Failure to comply with these orders will be considered insubordination, which could be separate grounds for disciplinary action up to and including discharge.

Respectfully,

Chief Craig VanSchyndle /s/
Chief Craig VanSchyndle
Green Bay Police Department

Then-Captain in Internal Affairs Verhagen gave Mulrine the Chief's letter and read it to him. According to Verhagen, they discussed what was expected of Mulrine while he was on administrative leave. Mulrine was informed he would be changed back to his own regular schedule of work/off days and he was to be available between the hours of 8:00 a.m. and 4:00 p.m. on his work days. Mulrine asked if that meant he could only be contacted on his work days and Verhagen answered in the affirmative. Verhagen also testified that with regard to being available, he told Mulrine he could leave the Department a telephone number where he could be reached. Verhagen also told Mulrine that if he were called in outside his work day or work hours, he would be paid at the rate of time and one-half.

Verhagen also testified as to past instances from 1997 to 2003 where officers in the Department were placed on paid "administrative leave" under the Department's Policies and Procedures and not permitted to perform as a police officer or work overtime during that time. The present Captain of Internal Affairs, James Ars, also testified in that regard. Verhagen testified, as did Chief VanSchyndle, that the term "administrative leave" has been used both in conjunction with "Administrative Assignment" under the Department's most recent policies and in conjunction with "paid suspensions" under the Department's prior policies.

During the period December 5, 2003 until December 24, 2003, Mulrine was on paid leave and not permitted to perform or present himself as a Green Bay Police Officer and was not permitted to work any overtime opportunities during that period, including a Packer game on December 7th, SWAT training on December 8th and K-9 training on December 18th that he had previously been scheduled to work.

By separate letters of December 8 and December 9, 2003, the Association's attorney, Thomas Parins, filed grievances regarding the Chief's having placed Mulrine on administrative leave and not permitting Mulrine to work any overtime opportunities while he is on such leave. The grievance regarding the latter stated, in relevant part:

The remedy sought by this grievance is the payment to Officer Mulrine of the overtime he would have earned at the Packer/Bear game of December 7, 2003, and payment any (sic) and all other overtime opportunities to which he has been, or will be, denied based upon his status as being on administrative leave.

The December 8, 2003 grievance regarding the Chief's placement of Mulrine on administrative leave stated, in relevant part:

As to the change in hours, this is a violation of the labor contract between the Green Bay Police Protective Association and the City of Green Bay, and further a violation of Wisconsin labor law. Officer's hours may only be altered through collective bargaining between the City and the Green Bay Police Protective Association.

By letter of December 12, 2003, Chief VanSchyndle responded to that part of Mulrine's administrative leave grievance regarding a change in his hours of work, stating, in relevant part:

Alteration of Work Schedule

The Association grieves what it alleges as "violation of the labor contract" with respect to Officer Mulrine's "change in hours." You again failed to cite the provision of the contract alleged to have been violated. I note that Officer Mulrine's working schedule as ordered is on his regularly scheduled work days. Officer Mulrine has been ordered to remain available during regular office hours (8:00 a.m. to 4:00 p.m.), or provide us with a phone number where he can be reached. These hours are provided for the mutual convenience of the parties, particularly for Officer Mulrine to have counsel available should the need arise. The parties have a long practice of requiring officers on administrative leave to remain available during regular office hours, rather than during the times of their regularly-scheduled shift. Department Policy Sec. I, Chapter III, para. IV. B. the Chief of Police, the Internal Affairs, or Division Commander may relieve an employee for his/her current duty (with pay). Therefore, I must deny this grievance.

By separate letter of December 12, 2003, Chief VanSchyndle responded to Mulrine's overtime grievance, stating, in relevant part:

Overtime Allowance

Upon receiving your letter of December 9th, in regards to Officer Mulrine not being allowed to work the Packer/Bear game on Dec. 7, 2003, Department Policy Sec. I, Chapter III, para IV, B.2. states that while Officer Mulrine is on Administrative leave he is prohibited from representing himself as a police officer for the City of Green Bay and the Green Bay Police Department, therefore this would disqualify Officer Mulrine from working department overtime. Therefore, I must deny this grievance.

On December 24, 2003, Attorney Parins and the Association's president met with the City's Mayor and other representatives of the City to discuss Officer Mulrine's situation and his grievances. A resolution was reached as to Mulrine being on administrative leave, but not as to the overtime grievance. At that meeting, it was agreed that Attorney Parins would reduce the parties' understandings to writing, which he did on that date and which reads, in relevant part, as follows:

**RE: Green Bay Police Protective Association – Officer
Mulrine Interim Settlement**

Dear Mayor Schmitt:

This letter is to confirm the meeting held in your office earlier this afternoon amongst yourself, your administrative assistant, Assisting City Attorney Schimmel, City Negotiator Vander Kelen, Ald. Dax, myself and the Green Bay Police Protective Association President Resch. The subject of the meeting was the Officer Shannon Mulrine matter. At the conclusion of the meeting all present agreed that I was to put in writing by way of this letter the understandings and agreements reached. The following are understandings and agreements reached:

REINSTATEMENT OF OFFICER MULRINE – Officer Mulrine is to be reinstated as a police officer and returned to his position and duties as a K-9 officer in the Green Bay Police Department. Officer Mulrine will report for his regularly scheduled shift on December 24, 2003. The Chief of Police will make arrangements through Association President Resch to have Officer Mulrine's gun, badge, identification card and other indicia of Officer's Mulrine's status as a police officer returned to Officer Mulrine. No vacation days will be credited against Officer Mulrine during the time he has been off duty, and Officer Mulrine will be allowed to carry over accumulated and used vacation from the year 2003 to the year 2004.

DEPARTMENTAL INVESTIGATION – The Mayor will cause an investigation to be conducted both into all of the circumstances surrounding the Officer Mulrine Travel Expense Claim Form matter, and also generally into

administrative and operational matters within the Green Bay Police Department, including but not limited to concerns raised by the Association. Following this investigation, the parties will meet and confer for the purposes of analysis and implementation.

ASSOCIATION ABATEMENT OF LEGAL REMEDIES – Both the Green Bay Police Protective Association and Officer Mulrine will hold in abeyance all legal remedies to allow for a reasonable time for the City to conduct the above mentioned investigation. It is agreed that the pending grievances filed on behalf of Officer Mulrine (administrative leave and overtime grievances) be held in abeyance, and no filings with the WERC, the Green Bay Police & Fire Commission, or lawsuits in state or federal court shall be filed during the pendency of the investigation concerning any aspect of the Mulrine Travel Expense Claim transaction or the removal of Officer Mulrine from his police duties. It is understood that the Association may take action in its representation of its members concerning other unrelated matters.

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Officer Mulrine has joined in the above agreements by his signature below. I am forwarding to you two duplicate originals of this letter. If the above meets with your approval and understandings, please sign below and return one duplicate original to this office.

Both Mayor Schmitt and Officer Mulrine signed Parins' letter and Mulrine was returned to duty as a Green Bay Police Officer that same date.

The parties proceeded to arbitration of Mulrine's overtime grievance before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association is contending in this grievance that Officer Mulrine is entitled to be compensated for lost overtime opportunities during the period that he was inappropriately suspended pending investigation of the Travel Expense Claims as part of his right to a make-whole remedy. While the City partially made Mulrine economically whole in the December 24th settlement agreement, the Association is requesting that the Arbitrator complete the make-whole remedy in this arbitration.

Officer Mulrine is claiming two categories of overtime. The first is overtime opportunities lost which include overtime hours for which Mulrine was qualified to work during the period of December 5 through December 23rd, but did not work because the City denied him the right to work these hours. Union Exhibit D established the specific overtime

hours which Mulrine was entitled to work, but was not allowed to work, during the period in question. The claimed lost overtime totals 45.65 time and one half hours, which at Mulrine's hourly rate of \$28.97 equals a total claim of \$1,322.48. The second category of overtime in dispute is a claim for overtime for each Monday through Friday period of regular office hours of 8:00 a.m. to 4:00 p.m. that Officer Mulrine was ordered by the Chief to be available per the Chief's letter of December 5, 2003. The basis of the claim for these hours is that the hours in question were outside of office or Mulrine's normally-scheduled work hours, and as such would constitute overtime hours. Union Exhibit D establishes that these hours totaled 144 hours which at Officer Mulrine's rate equals a total amount of \$4,171.68.

There is no question that the City concurred with the Association that the suspension of Officer Mulrine was inappropriate, as this was made clear by the December 24th settlement agreement returning Mulrine to duty while the investigation continued. There is also no question that the City and the Association agreed with the general concept that Mulrine should be economically made whole regarding the period for which he had been inappropriately suspended, as he lost no base pay and the settlement agreement restored vacation days lost during the suspension period and extended the time he could use accumulated vacation beyond the end of 2003, so that it would not be lost. However, the City did not agree that lost overtime opportunities during the suspension period were appropriate, but did agree that the overtime grievance could go to arbitration.

The Association first argues that the payment of lost overtime opportunities is a customary and usual part of a grievance make-whole remedy. The general rule regarding make-whole awards is that the grievant should be placed "in the position they would have been had there been no violation", including "recovery of lost overtime." Elkouri and Elkouri, *How Arbitration Works*, Sixth Edition, pages 1201-1203. The Association cites arbitral precedent in support of its assertion that grievance arbitrators customarily include lost overtime as an item for payment in make-whole awards regarding backpay. The Association requests that the Arbitrator complete the make-whole remedy of Officer Mulrine which was started in the December 24th settlement agreement by awarding Mulrine the remedy of payment for lost overtime opportunities in the amount of \$1,322.48.

Section 6.03 of the labor agreement permits the City to deny overtime "where there is a legitimate safety concern" and where the officer lacks the qualifications to work the overtime. Regarding the latter, the City has the burden of establishing the necessity of the qualification under that provision. The City has at no time even suggested that there was any safety concern regarding Mulrine working overtime during the period in question. As to qualifications, according to the Chief's letter of December 12, 2003 denying the overtime grievance, the Chief simply stated that he had instructed Mulrine that he was prohibited "from representing himself as a police officer for the City of Green Bay and the Green Bay Police Department". According to the Chief, per this instruction, "this therefore would disqualify Officer Mulrine from working Department overtime." No basis was given for the order that Mulrine not present himself as an officer of the Department, and the Chief's prohibition in that regard in disqualifying him on that basis does not meet the City's burden under 6.03(1) of the

Agreement. This is especially so as the settlement agreement establishes that the suspension pending the Travel Expense Claim investigation was inappropriate and that Mulrine was entitled to be returned immediately to duty, which would also permit him to be able to represent himself as a Green Bay police officer. To now claim that the City should not have to pay lost overtime because of the conditions set as a part of an inappropriate suspension is nonsense. Further, the City presented no evidence as to why there was any “necessity” that Officer Mulrine not represent himself as a Green Bay police officer while the investigation was ongoing. The City in fact provided evidence to the contrary in agreeing to reinstate Officer Mulrine immediately to his normal duties on December 24th while the matter continued to be investigated. Thus, by its own actions in sustaining the suspension grievance and returning Mulrine to duty, the City established there was no necessity on which to base the determination that Officer Mulrine was unqualified to work the overtime.

In sum, Mulrine had a contractual right to be offered and work the lost overtime under the terms of the parties’ labor agreement and was denied these overtime hours for no legitimate reason. Therefore, the Arbitrator should award the remedy of payment to Officer Mulrine of the amount for the lost overtime opportunities between December 5 and December 23, 2003. The Association asserts that the City has not disputed the number of hours of overtime opportunity Mulrine could have worked.

The Association also contends that Mulrine should be awarded payment for overtime hours based upon the Chief’s requirement that he remain available during regular office hours (8:00 a.m. to 4:00 p.m.) Monday through Friday. Mulrine testified that he fully complied with this directive and remained available during regular office hours while remaining at home and at his phone each day. Section 6.01 of the parties’ labor agreement provides that overtime includes “hours worked outside the normally scheduled workweek.” Mulrine testified that his normally-scheduled workweek was the power shift, which started at 10:00 p.m. Therefore, all of the hours Mulrine spent being available between 8:00 a.m. and 4:00 p.m. were outside his normally-scheduled workweek, and as such qualified as overtime hours under the above provision. These hours were spent at the specific request and instruction of the City and given all of the circumstances, it was reasonable to expect that the City knew or should have known, that Mulrine would have remained home by his phone.

The City disputes that Mulrine should be compensated for these hours at the rate of time and one-half and rather, contends that payment for these hours should be restricted to the rate of stand-by pay provided in Section 6.07 of the labor agreement. This argument might have merit had not Officer Mulrine been relieved of all duties as a police officer to the extent of being prohibited from representing himself as a Green Bay police officer. As Section 6.07 provision only applies when an officer is “asked to be available for immediate call to duty” and also refers to stand-by as “stand-by duty”, Mulrine was not eligible at the time to perform police duties. Thus, the stand-by provisions of the labor agreement cannot apply to these hours.

The Association concludes that as to the lost overtime opportunities that Mulrine be awarded payment of these overtime hours as part of a make-whole remedy based on his inappropriate suspension from duty. However, even if Officer Mulrine is deemed to not be entitled to a make-whole remedy for the inappropriate suspension, Mulrine is also entitled to these overtime hours independently based on Section 6.03 of the labor agreement. Mulrine should also be compensated for the hours he was required to spend by his phone during the suspension between 8:00 a.m. and 4:00 p.m., i.e., outside of the regular hours of his workweek.

City

The City asserts that Officer Mulrine was placed on administrative leave by the Chief pursuant to Department policy. Prior to being placed on leave, Mulrine had been temporarily assigned to a different schedule at his request and was temporarily working with another K-9 officer for training purposes. During the period of paid administrative leave, Mulrine was prohibited from access to the Department and was directed to return to his regular work schedule, i.e., he was directed to remain available during the hours of his regular work schedule. The Association challenged the Chief's action and filed a formal grievance with the Department demanding three distinct remedies: 1) that Mulrine be removed from administrative leave and immediately reinstated to duty; 2) that the Chief immediately rescind his no contact order and 3) that Mulrine be restored to his regular workweek schedule. Item 3 was accomplished with the Chief's initial action and Items 1 and 2 were accomplished in the meeting with the Mayor on or about December 24th.

The meeting with the Mayor was not part of the grievance procedure, rather, it was in the nature of an accommodation to the Association. Consequently, the initial grievance was rendered moot and is not in issue in this proceeding. The Association filed an additional grievance, the instant grievance seeking overtime pay for Mulrine for a Packer game he had planned to work on December 7th, but as he was on paid administrative leave at that time, he was not allowed to work the game. Perceiving that the remedies it had sought were upheld simply because the Mayor reinstated Officer Mulrine, the Association took the position that Mulrine should have received overtime pay for the Packer game he missed.

The City asserts that in order for the Association to establish that Mulrine was entitled to overtime payments during the period of his paid administrative leave, it must first prove that the action taken in placing him on paid leave is a violation of the agreement. The Association has failed in this regard and instead relies on the fact that after he was placed on paid leave he was reinstated by the Mayor. Contrary to the Association's assertions in this regard, the reinstatement does not prove that the action in placing Mulrine on paid leave was wrong, or in any way a violation of the labor agreement; rather, it proves only that he was reinstated by the Mayor. The grievance had not progressed through the steps of the contractual grievance procedure when the Mayor took his action and there was no process by which a neutral third party reviewed the Chief's action, and no ultimate conclusion that the Chief's actions were contrary to the contractual provisions complained of. Thus, it cannot now be said that the actions of the Chief in placing Mulrine on paid administrative leave was wrong.

The Association seems to suggest that the Chief had no authority to place Officer Mulrine on paid leave pending the internal investigation which may have resulted in disciplinary action against him. In this case, Mulrine was placed on paid leave pending an investigation into the circumstances surrounding events which might have given rise to potential discipline, pursuant to the Department Policies and Procedures Manual, Section I, Internal Investigations Into Complaints, Chapter III. Mulrine was not disciplined by the Chief, and only after the investigation was complete could the Chief have concluded that discipline may have been appropriate, at which time proper charges may have been prepared and filed with the Police and Fire Commission. It is at that time that the statutory provisions of Chapter 62.13, Stats., would have applied and the discipline, if any, would have been meted out by the Police and Fire Commission pursuant to that statute. The City cites legal precedent that such a paid leave pending an investigation is not “penal” in nature.

Contrary to the Union’s assertion, paid leave is not discipline. Chapter 62.13, Stats., contemplates penal suspensions, rather than suspensions with pay. The Department’s Policies and Procedures Manual, Section I, Chapter III, c,a, contemplates non-penal leaves with pay pending the outcome of an internal investigation. While it appears the Association is attempting to somehow bring the actions of the Chief in placing Mulrine on paid administrative leave within the confines of the discipline article in the Agreement, Article 26, Officer Mulrine was never disciplined. Consequently, Article 26 does not apply, nor does Section 62.13, Stats. However, since Mulrine was on paid administrative leave he was not authorized to act in the capacity of a Green Bay police officer pending the outcome of the investigation. Thus, he was not authorized to represent the Department at the Packers game.

The parties’ agreement does not bar the implementation of paid leave pending internal disciplinary investigations. To find such a bar would require the Arbitrator to formulate a contractual interpretation extending beyond the four corners of the contract, an action he is not authorized to do. If the Association desires such a limitation on the Chief’s ability to place officers on paid administrative leave pending internal investigations, it should bargain the limitation, rather than attempt to gain it through a contrived grievance procedure. Further, any such decision by the Arbitrator would be entirely unreasonable and result in the potentially dangerous situation of requiring the Chief to send an officer back onto the street who is suspected of serious crimes or other serious breaches of duty pending an internal investigation. In short, it would prevent the Chief from protecting the citizens of the community. The very crux of the Chief’s ability to place officers on paid leave pending internal investigations is the ability to remove the officer from duty, and thus from any potential harm he or she may do in the interval, while management determines whether or not discipline is justified, but at the same time not causing the officer to suffer a penalty by withholding pay.

The City requests that the grievance be denied.

Association Reply

The Association first disputes the City's assertion that in requiring Officer Mulrine to make himself available during the hours of 8:00 a.m. to 4:00 p.m. Monday through Friday essentially returned him to his regular work schedule. The testimony was that the two K-9 officers in the Department in the patrol division are assigned to evening or "power shift" while the 8:00 a.m. to 4:00 p.m. coincides with the day shift. The testimony was that the two K-9 officers worked a schedule on the evening shift of four days on duty and four days off on a rotating basis so that the normal schedule would be that Mulrine would work the four days that Officer Resch normally is off and Resch would work the four days that Mulrine was normally off, so that there was always a K-9 officer on duty on the evening shift. At the time Mulrine was suspended this normal schedule of work days and off days was not enforced, as the two K-9 officers were working the same work days for training purposes. Thus, if Mulrine was ordered to return to his "regular work schedule", that schedule would be to return to a workweek of four days on that Officer Resch was off would not be during the day shift. Thus, the hours of 8:00 a.m. to 4:00 p.m. were completely outside of Officer Mulrine's "regular work schedule."

The Association also notes that while the City's brief stated that the December 9, 2003 overtime grievance asked for overtime pay for the Packer game that Mulrine missed, the grievance also requested payment of any other overtime opportunities Officer Mulrine may miss due to the suspension.

The Association asserts that the settlement of the December 8th grievance regarding Officer Mulrine's suspension is binding precedent on the issues in the arbitration of the December 9th overtime grievance. The City's assertion that the settlement of the December 8th suspension grievance was merely "in the nature of an accommodation to the Union" and that therefore the "grievance was rendered moot and not at issue in this proceeding", is simply not a correct statement of the legal effect of the settlement agreement. The Union cites Elkouri and Elkouri, How Arbitration Works, Sixth Edition:

"It is to be expected that a mutual settlement of a grievance by the parties ordinarily will be held binding on them insofar as the particular instance is involved. It also seems obvious that where a grievance has been settled by mutual agreement of the parties, the same issue that is involved in such "settled" grievance, though appearing in the guise of another grievance, should not ordinarily be subject to arbitration at the request of only one party (or, if the issue does reach arbitration, the prior settlement should constitute a binding precedent). 'It is essential to good labor-management relations . . . that grievance settlement not be disturbed in the absence of a conclusive showing of changed conditions.'"

(At pages 269-270).

The above applies exactly to the instant situation. The issue in the December 8th suspension grievance was whether it was appropriate under the agreement that Mulrine be suspended during the pendency of the Travel Expense Claim investigation. There is no question that this grievance was settled by way of the December 24th settlement agreement with the remedy of immediate reinstatement to duty of Officer Mulrine, the rescission of the no-contact order and restoration of Officer Mulrine to his regular work schedule. The testimony established that Officer Mulrine returned to his K-9 officer duties on the power shift on his next regularly scheduled shift of duty. The same issue regarding the appropriateness of Mulrine's suspension is before this arbitration "appearing in the guise of another grievance" and the prior settlement of the suspension grievance "should constitute a binding precedent", as set forth above.

The City admits that the Chief acted to carry out the terms of the settlement agreement and that all of the remedies sought in the grievance were granted in the settlement, but now suggests that the issue of whether Mulrine should have been suspended should again be subject to arbitration. Such is not the law regarding grievance arbitration.

The City's argument regarding the nature and basis of the settlement agreement should also be rejected, as it is based on factual allegations concerning what occurred during a meeting between the Chief of Police and the Mayor. There was no testimony or evidence submitted regarding such discussions between the two at a December 24, 2003 meeting. Thus, the Arbitrator cannot make an award based upon unsworn, off-the-record factual allegations made in the brief.

The Association also asserts that a chief of police in Wisconsin has no authority to suspend a police officer from duty except under the provisions of Sec. 62.13(5), Stats. While the Association did not make any legal arguments in this regard in its initial brief, the City's brief strongly stressed the issue. The assertion that "administrative leave" or "paid leave" is something less than a suspension from duty is highly misleading. Mulrine testified that he was relieved of his gun and badge and all indicia as a police officer for the City, and was ordered not to hold himself out as such. This is not a situation where Mulrine continued as a police officer for the City, nor was simply assigned administrative duties, rather, the testimony and evidence establishes that Mulrine was suspended from duty as a police officer for the City on December 5, 2003.

Nor is the City's references to the fact that Mulrine was off duty with pay significant as to Mulrine's status. Section 62.13(5)(h), Stats., states, "No person shall be deprived of compensation while suspended pending disposition of charges." Thus, all suspensions of police officers in this state, whether disciplinary or not, are suspensions with pay until charges are disposed of by the Police and Fire Commission. The parties' labor agreement provides at Sec. 26.04(1) that suspensions of bargaining unit members shall be governed by the procedures set forth in Section 62.13, Stats. Sec. 62.13(5)(c), Stats., in turn, sets forth the authority of the chief of police to suspend and requires just cause for suspension and provides that the chief shall file a report of such suspension with the PFC immediately upon issuing the suspension.

The Chief testified that Mulrine's suspension was not disciplinary, and tellingly testified that he did not file a report of the suspension to the Police and Fire Commission as required by Sec. 62.13(5)(c), Stats. Thus, the Chief suspended Officer Mulrine without following the procedures set forth in Sec. 62.13, Stats., as required by the terms of Section 26.04(1) of the labor agreement.

The City's brief alludes to some kind of inherent legal authority of the Chief of Police to suspend a police officer. However, as a chief of police is a city officer, if there is such legal authority, it must be founded on statute, and the City cites none. The two cases cited by the City are inapplicable. The first only speaks to those rights to place an officer on "administrative leave". The term "administrative leave" implies that the officer being placed on leave continues as a police officer. In this case, the record is uncontroverted that it is a case of suspension, and not a case involving paid leave. Mulrine was stripped of all authority as a Green Bay police officer and in fact the City uses Mulrine's status of not being a City police officer as grounds for denying the overtime claimed in this grievance. Further, the case would only stand for the proposition that placing a police officer on administrative leave does not violate the federal constitution or federal law, however, the Association makes no claim under either. The second case cited involved a suspension pending charges which was imposed by the Police and Fire Commission and did not involve a suspension by the Chief of Police.

The Association asserts that the authority to suspend a City police officer, and not safety concerns regarding duty assignments, is the issue in this case. The City argues that the Chief must have authority to do what the Chief did in this situation, otherwise it would result in the "potentially dangerous situation" of placing the Chief in the position of having to send an officer back on the street who was suspected of serious crimes or other serious breaches of duty. That simply is not the case here. There is nothing in the record to suggest that anyone thought Mulrine's being on the street constituted a "potentially dangerous situation". This was simply an investigation into a travel expense claim. More important, the action complained of in this case is not that Mulrine was assigned to administrative or alternative duties while remaining a police officer; rather, the issue has to do with the right to work overtime. The overtime in question could have been denied to Officer Mulrine under the explicit terms of Sec. 6.03(1) of the agreement, which allows management to deny overtime to any officer for "legitimate safety concerns". That is not the case here, as the Chief's denial letter to the December 9th overtime grievance does not refer to any safety issues and in fact there were none. The sole reason given in the City's denial of the overtime grievance was that Mulrine was not eligible to work overtime because he was not a Green Bay police officer. This is why the issue of the suspension is important. If Mulrine was merely assigned to administrative or alternative duties, he would have retained all of his contractual rights to overtime. Section 6.03(1) of the agreement would have required the Chief to articulate "legitimate safety concerns" before denying Mulrine overtime opportunities. The Chief attempted to evade Mulrine's contractual rights that he would have had if he was merely assigned alternative duties, by suspending Mulrine and thereby eliminating the contract requirement that he must have "legitimate safety concerns" before denying Mulrine his overtime opportunities.

City Reply

The City disputes the Association's claim that its "victory" on the initial grievance supports the proposition that the Chief had no authority to suspend Mulrine in the first place. The Association states that it "prevailed" in that case when, in actuality, it simply met with the Mayor and cut a deal whereby the Mayor allowed Mulrine to go back on duty. The Mayor made an accommodation to the Association and nothing more. Contrary to the Association's assertions regarding the December 24, 2003 letter, there was no agreement or stipulation to the effect that the City acknowledged that it acted in an inappropriate manner or breached the contract in any way. The representatives for the City who would have otherwise been present at any formal disciplinary proceeding concerning this grievance were not present at the meeting with the Mayor. The City does not agree that the claim for Mulrine's overtime is nothing more than a final vestige to be cleaned up, rather, the claim goes to the heart of the Chief's ability to place officers on paid administrative leave without the chilling effect of massive overtime consequences. If the grievance is granted, all future chiefs will be faced with the prospect of having to pay overtime to any officer placed on administrative leave, regardless of the reasons for doing so. The prior restraint against the necessary and valid exercise of the Police Chief's authority would be unreasonable and not supported by the language of the contract.

The City again disputes the Association's claim that the Chief's order for Mulrine to return to his regular work schedule while on administrative leave was a change in his normal schedule of hours. The Association claims such a change constitutes a breach of the agreement, but fails to direct one to any specific contractual section. The schedule Mulrine was working at the time he was placed on administrative leave was not his normal work schedule, but rather a temporary schedule he had requested so he could work with the other K-9 officer and his dog. His "regular" schedule was Monday through Friday, i.e. the schedule he was returned to following his placement on administrative leave. Thus, the Association's argument that he should be reimbursed at overtime rates for each and every hour he sat by the phone at home Monday through Friday must be rejected.

As to the claim that Mulrine should be compensated for "overtime opportunities lost" in the amount of \$1,322.00, there is ample evidence that Mulrine did not work overtime as a general rule other than Packer games. Therefore, an inference should be drawn that in the event he were available to do so during the period in question, he would not have done so, consistent with his past history. In addition, this item of damages is speculative, and not generally included in back pay awards for that reason. BROWN COUNTY (MENTAL HEALTH CENTER), Case 606, No. 58444, MA-9808. The claim should be rejected here as well.

Last, the claim for overtime for the Packers game must also be denied. The action of the Chief in placing Mulrine on administrative leave was appropriate and did not abridge any contractual right found in the labor agreement. During the period of the leave, the officer is not authorized to represent the City as a police officer and therefore may not work as an officer at a Packer game or anywhere else.

DISCUSSION

It is initially noted that the instant grievance involves the issue of whether Officer Mulrine was entitled to payment for overtime opportunities lost during the period he was placed on administrative leave by the Chief, as well as the issue of whether he was entitled to overtime pay for the hours he was required to be available during that period. It is, however, also necessary to resolve the issue of whether Officer Mulrine was appropriately placed on paid administrative leave, as it is essentially the position of the City that because Officer Mulrine was on paid administrative leave pending an investigation, he was not "qualified" to perform any duties as a City of Green Bay police officer, including working overtime assignments, during that period. In this regard, the Arbitrator advised the parties that he would not rule on the legal authority for paid administrative leave, absent mutual agreement of the parties that he had jurisdiction to decide that issue where it involved statutory construction beyond the four corners of the contract. Such mutual agreement was not forthcoming and the Arbitrator has restricted his analysis in this regard to the parties' labor agreement and practices.

The Association asserts that the impropriety of placing Mulrine on paid administrative leave was conceded by the City when the Mayor and other City representatives agreed to return Mulrine to duty per the parties' settlement agreement reached on December 24, 2003. While the Arbitrator agrees with that conclusion to the following limited extent, it is necessary to point out that such a concession by the City is necessarily inferred from its actions in this regard, and is not to be construed as a wholesale acknowledgement that paid administrative leave is inappropriate or violative of the parties' labor agreement or State statute. The December 24, 2003 settlement agreement drafted by the Association's attorney cites no such broad concession by the City or its representatives, and notes only that in addition to there being an ongoing investigation of Mulrine's expense claims, there would also be an investigation into the Department's administrative affairs. The settlement agreement also expressly notes that the grievances filed regarding the propriety of placing Mulrine on paid administrative leave and the instant overtime grievance were to be "held in abeyance" pending completion of those investigations.

The Association cites no provision of the labor agreement beyond Section 26.04, pertaining to discipline, under Section 62.13, Stats., as restricting the City's rights to impose paid administrative leave pending an investigation. As noted above, the Arbitrator has no authority to make a determination as to whether paid administrative leave equates with a suspension under that statutory provision. The testimony of Commander Verhagen and Captain Ars, as well as that of Chief VanSchyndle, establishes that the Department has placed officers on paid administrative leave at least as far back as 1997, and that in most of those cases the officers were not permitted to work overtime opportunities during that period they were on such leave. It also appears that no grievances were filed in this regard until occurrences in 2003, including Officer Mulrine's. While the circumstances in the instances cited varied from case to case, the testimony was essentially un rebutted that paid administrative leave has been used in the past without being challenged until recently. Absent a specific

provision in the parties' agreement restricting management in this regard, there is not a sufficient basis in the record upon which to find that the imposition of paid administrative leave pending an investigation, in and of itself, violates the parties' agreement.

It is generally recognized, however, that there must be a reasonable basis for management's exercise of its authority under the agreement, and the same holds true with regard to the imposition of paid administrative leave. While the City, through its representatives at the December 24th settlement discussions, did not concede that the imposition of paid administrative leave is inappropriate under any circumstances, it at least agreed it was not necessary in this case that Mulrine be off duty and precluded from performing police duties for the City while the investigation into his travel expense claims was being conducted. There is no indication in the record that anything had changed between December 5, 2003, when the Chief placed Mulrine on paid administrative leave, and December 24, 2003, when the City agreed to return Mulrine to duty. Thus, if it was unnecessary to keep Mulrine off duty as of December 24th in the City representative's own estimation, it was likewise unnecessary to do so on December 5th.

The issue then becomes what was Mulrine's entitlement as to overtime pay for (1) overtime opportunities he was not permitted to work during the period he was on paid administrative leave and (2) for the hours he was to remain available to the Department during that period.

As to the lost overtime opportunities, Chief VanSchyndle and Officer Stanton testified that Mulrine routinely turns down call-in overtime and does not sign for posted overtime, even though he has not removed himself from the overtime list. Mulrine conceded this is the case as well. The purpose of a make-whole remedy is to place the employee in the same circumstances he or she would have been in had their contractual rights not been violated, it is not to provide a "windfall". Given the uncontroverted evidence that Mulrine has not accepted or signed for such overtime in recent years, to now award him overtime pay for opportunities it appears he would not have accepted would provide just such a "windfall". Hence, that remedy is not awarded in this case.

With regard to the scheduled overtime for the Packer-Bear football game on December 7th, the SWAT training on December 8th, and the K-9 training on December 18th, the evidence establishes that the Grievant had signed for the Packer game and had been scheduled ahead of time to work the SWAT training and K-9 training. Thus, it would be appropriate under a make-whole remedy to award the overtime due under the agreement for working any overtime on those three days that he presumably would have worked had he been permitted to do so.

With respect to Mulrine's entitlement to overtime pay for the hours he was to keep himself available to be called in to the Department while he was on paid administrative leave, there are number of disputes that must be resolved in order to make a determination in that regard. First, Mulrine claims that he was required to remain available between the hours of

8:00 a.m. and 4:00 p.m. Monday through Friday, and that he therefore sat by his telephone at home during those hours. Mulrine's claim in this regard is not supported by either Commander Verhagen's testimony or Chief VanSchyndle's letter of December 5, 2003. Verhagen testified that he told Mulrine that he would be returned to his regular schedule of workdays/days off, and that he would only be contacted on his work days. Likewise, the Chief's December 5th letter directs Mulrine to return to his "regular work schedule of work/off days" and makes no mention of Monday through Friday. This was reiterated by the Chief in his December 12, 2003 response to the administrative leave grievance. Further, Verhagen testified that he informed the Grievant that he could leave a telephone number where he could be reached. This is again consistent with the Chief's December 5th letter, which directed Mulrine to "remain available during regular office hours. . . or provide us with a phone number where you can be reached", as well as the Chief's December 12th response. Mulrine was only required to be available from 8:00 a.m. to 4:00 p.m. on his regular work days. There was no requirement that Mulrine sit by his telephone at home during these hours and that choice was his to make.

Under the circumstances in this case, where Mulrine received his regular pay which would coincide with the hours of his regular work schedule, and was required to keep himself available to be called in, presumably to be questioned or to discuss the investigation regarding his travel expense claims, and was not otherwise required to perform any duties for the Department, Section 6.07, Stand-By Pay, of the parties' agreement is most applicable to the situation, albeit that the Chief conceded he did not consider Mulrine to be placed on "stand-by" and entitled to stand-by pay under the agreement. Regardless of the Chief's interpretation of the agreement's stand-by pay provision, it is concluded that provision is most applicable, and that Officer Mulrine is, therefore, entitled to stand-by pay for the hours he was to remain available to be called in on his workdays outside of his regularly-scheduled work hours. By the City's own computation (Employer Exhibit D), that consists of eight hours per day for December 9, 10, 11, 12, 17, 18, 19, and 20.

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

AWARD

The grievance is sustained and the City of Green Bay is directed to immediately pay Officer Mulrine the overtime pay he would have received under the parties' Agreement for the overtime hours he had been scheduled to work on December 7, December 8 and December 18, 2003, and stand-by pay at the rate provided in Section 6.07 of the parties' Agreement for eight (8) hours per day for the following days: December 9, December 10, December 11, December 12, December 17, December 18, December 19, and December 20, 2003.

Dated at Madison, Wisconsin, this 19th day of July, 2006.

David E. Shaw /s/

David E. Shaw, Arbitrator

