

BEFORE THE ARBITRATOR

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

and

**CITY OF GREEN BAY**

Case 375  
No. 65619  
MA-13271

(Packer Lights Grievance)

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**Appearances:**

**Mr. Thomas J. Parins**, Attorney, Parins Law Firm S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin, appearing on behalf of the Green Bay Police Protective Association.

**Mr. Dean R. Dietrich**, Attorney, Ruder Ware, L.L.S.C., 500 Third Street, Suite 700, Wausau, Wisconsin, appearing on behalf of the City of Green Bay.

**ARBITRATION AWARD**

The Green Bay Police Protective Association, hereinafter "Association," and the City of Green Bay, hereinafter "City," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was assigned to arbitrate the dispute. The hearing was held before the undersigned on July 17, 2006, in Green Bay, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on October 3, 2006, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties framed the substantive issues as:

1. Whether the City violated the labor agreement when it assigned duties to supervisory personnel for the December 11, 2005 Packer game involving generator light towers?
2. If so, what is the appropriate remedy?

The City set forth a procedural challenge framing it as:

1. Whether the Association is estopped from challenging the conduct of the employer in assigning work involving the use of generators lights?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 1 – RECOGNITION/MANAGEMENT RIGHTS**

- 1.02 **UNIT JOB DUTIES.** Non-supervisory job duties shall be assigned only to members of the Bargaining Unit. Ranks excluded from the Bargaining Unit are so excluded because the primary nature of their positions is to supervise personnel of the department, and accordingly, they shall not be assigned to perform non-supervisory duties as part of their normal and usual job duties; provided that these restrictions shall in no way restrict such personnel in taking any and all police action, or performing police duties and functions in relation to situations, events or circumstances encountered or observed by such officers in the course of the performance of their supervisory duties (for example, a supervisor would not work radar or patrol for traffic violators, but would be expected to apprehend or arrest traffic violators who are observed by the supervisor while performing the duties of supervision of personnel).

The Supervisory Unit will perform Voice Stress Analyzer tests for internal affairs purposes, background checks, and other issues requiring a supervisory employee to perform such tests; Unit members will perform all criminal investigation tests unless a supervisory employee is required or a qualified member is not available and a qualified supervisory employee is, and there is an immediate need to take the test for use in an interrogation then taking place.

- 1.03 **MANAGEMENT RIGHTS.** The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City, including the

power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which City operations are to be conducted. The city agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

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### ARTICLE 3 - GRIEVANCE PROCEDURE AND DISCIPLINARY PROCEEDINGS

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3.04 COMPUTATION OF TIME. The days indicated at each step should be considered a maximum. Days as used in this article shall mean working days Monday through Friday, excluding holidays. The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. The party who fails to received a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. The time limits may be extended by mutual consent.

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#### 3.06 STEPS AND PROCEDURE.

(1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she or the Union knew or should have known of the event giving rise to such grievance. The Chief shall furnish the grievant and the Union representative an answer within five (5) working days after receiving the grievance.

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### 6.03 ALLOCATION OF OVERTIME

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- (2) Qualification for Overtime. When determining qualification, the department shall abide by the following:
- (a) When the overtime in question calls for the officer not to be in uniform, such overtime shall be performed by a detective. However, this provision shall not prevent the department from using patrol officers for ordinary plain clothes surveillance duty during their normal shift or using a patrol officer when the department is unable to secure sufficient detectives whether they be on or off duty. Use of patrol officers shall not reduce any shift below the number required for safety reasons.
  - (b) When the overtime in question calls for the officer to be in uniform, such overtime shall be performed by an officer within the patrol division who, in the normal course, performs duty in uniform.
  - (c) Specialists shall be allocated the overtime within their respective specialties, and in addition, if the specialist is, in the normal course, required to maintain a uniform, such specialist shall be allowed to select overtime with patrol division officers for crowd control events, such as the 4<sup>th</sup> of July, Artstreet, and the like.
  - (d) Supervisory officers shall not be qualified to work any overtime involving nonsupervisory duties.

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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 posting 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.

- (2) In the event there is an insufficient number of officers signing the posting to fill the remaining complement needed for the Packer games, officers shall be assigned by inverse seniority among those on their workdays and then by inverse seniority on off days.
- (3) In the event that any officer who has signed the above said posting to work the Packer games later decides not to work any given game, such officer shall have the right to remove his/her name from the posting for any game by giving at least ten (10) days advance notice of such removal before the game in question.
- (4) Officers working overtime for Packer games shall be compensated at twice their regular rate of pay for all hours worked.'

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#### **STIPULATION OF FACTS**

The parties presented at hearing the following stipulation of facts:

1. Incident occurred on Sunday, December 11, 2005 at the Packers vs. Lions football game which had a start time of 7:30 p.m.
2. Attached is a copy of the assignment roster and assignment times for the event. Commander Brodhagen was the supervisor in charge of the game.
3. The Green Bay Police Department garage staff delivered five (5) generator light towers to the Packer Stadium loading dock on Friday, December 9.
4. On December 11, Captain Urban, Captain Arts, and Commander Brodhagen positioned and assembled all five (5) generator light towers at the stadium gate entrances from 2:30 p.m. to 3:30 p.m.
5. Captain Urban turned on all the generator light tower on or about 5 p.m. The lights were turned on approximately 2½ hours before game time, prior to the arrival of the gate officers.
6. Approximately one hour after the football game, Captain Urban turned off the generator light towers to let them cool off before being disassembled.

7. Captain Urban started disassembling the generator light towers and moving them to the south part of the parking lot with a Police Department pick-up truck to be picked up by the Green Bay Police Department garage staff on Monday, December 12.
8. After the visiting team busses left the stadium, approximately 1½ hours after the game was over, Commander Brodhagen assisted Captain Urban in disassembling the generator light towers to speed up the process.
9. During this time period, there were 12 officers assigned to “late” Packers game overtime. The duties of the 12 late overtime officers were 4<sup>th</sup> floor club seats, 6<sup>th</sup> floor club seats, west lower concourse, east lower concourse/atrium, upper concourse, field/stands.
10. The late overtime police officers were relieved from their duties before Captain Urban and Commander Brodhagen finished disassembling the generator light towers and parking them for pick-up.

Additional facts, as relevant, are contained in the **DISCUSSION**, below.

### **DISCUSSION**

The City has challenged the Association’s right to pursue this grievance on the basis that the Association has known since at least late 2003 that supervisory personnel were assembling and disassembling the light tower generators at Packer games and have failed to pursue a grievance until after the December 11, 2005 game.

During the fall of 2003, Brown County Emergency Management purchased light tower generators with Homeland Security monies and distributed one light tower generator to each law enforcement agencies within the County. The law enforcement agencies agreed that the towers would be shared amongst one another when the need arose. Thereafter, the City began using six light tower generators; one at each of the five entrances to Lambeau Field and one at a street intersection to provide light illumination during evening Green Bay Packer games. From December 2003 through December 2005, Commander Brodhagen assembled, raised and disassembled the light tower generators at evening Packer games with assistance from supervisory personnel.

The record establishes that in either December 2004 or January 2005, Scott Peters, a member of the Association Board spoke to Brodhagen regarding his concern that supervisors were performing non-supervisory duties with regard to the light tower generators. Brodhagen informed Peters that he disagreed with Peters’ assessment, indicated that the assembly/disassembly had been performed by supervisors and officers and he opined that it was not strictly a non-supervisory job duty. Neither Peters nor the Association took any further action at that time.

There was an evening Packer game at Lambeau Field on November 21, 2005. Supervisory personnel assembled and disassembled the light tower generators. No grievance was filed nor did any Association member speak to management regarding any concerns with the light tower generators.

No evidence was presented as to whether there were additional evening Packer games between December 2003 and November 21, 2005. On at least five other occasions the light tower generators were used. On two of those occasions, Brodhagen was responsible for assembly/disassembly. On three occasions, lieutenants were responsible for assembly/disassembly. The light was also used by SWAT and accident reconstruction personnel who are not supervisory personnel on various unknown dates.

The City's procedural argument fails. This is a continuing event. The Association filed this grievance on December 22, 2005 regarding the performance of light tower generator work on December 11, 2005. It did not reference any prior dates and therefore was not seeking retroactive application. Article 6.03 establishes a 15 day time limit for filing grievances. The Association filed its grievance within the 15 days and therefore the grievance is procedurally sound. While it is true that the Association waived its right to challenge any pre-December 7, 2005 dates in which supervisory personnel assembled/disassembled the light tower generators, that waiver does not limit future rights or challenges to management actions.<sup>1</sup>

Moving to the substantive issues, the parties have negotiated language regarding bargaining unit work and overtime.<sup>2</sup> Article 1.02 was bargained in 1995 to address what work is solely that of the Association membership. The language followed the elimination of the sergeant positions and the Association was justifiably concerned that the doing away with this working foreman was a subterfuge for expanding supervisory work and thereby reducing bargaining unit work. As such, the parties specifically discussed and attempted to reduce to writing the parameters of bargaining unit work.

Looking to the language, the first sentence provides that, “[n]on-supervisory job duties shall be assigned only to members of the Bargaining Unit.” This seems relatively clear, so long as there is some definition as to what are “non-supervisory” duties. The section continues by explaining that the reason supervisors are supervisors is because their primary duty is to supervise personnel and that supervision is their “normal and usual job duties”. From this

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<sup>1</sup> This case is distinguishable to MANITOWOC COUNTY, MA-6010 (Houlihan, 11/90) inasmuch as the City has not been adversely affected by the Association's delay. While the City argued in its initial brief that it is prejudiced by the Association's delay in bringing this grievance, it fails to explain how it has been prejudiced.

<sup>2</sup> I am a little concerned with the parties' lack of interest in Article 6.07 of the labor agreement especially in light of the “Packer Game” designation on the overtime slips, but given that neither side has indicated its relevance to this scenario, I will trust that it does not apply

language, it is plausible to conclude that supervisors perform some less-than-primary duties which are not the supervision of personnel.<sup>3</sup>

The second paragraph of 1.02 offers guidance as to what duties the parties' perceived to be bargaining unit work. All criminal investigation tests are non-supervisory duties, unless a bargaining unit member is not present and there is an immediate need. Operation of the Voice Stress Analyzer is a non-supervisory duty unless it is for internal affairs purposes, background check or supervision.

The language of 1.02 - by not specifying that assembly and disassembly of light tower generators is non-supervisory work - is ambiguous and subject to differing interpretations. Therefore, it is appropriate and necessary to consider extrinsic evidence to ascertain its meaning. For that reason, I will consider the bargaining history, past practice of the parties and the manner of dealing by the parties as relevant.

Attorney Parins testified as to the bargaining history of this section. He credibly explained the Association's concerns when presented with the City's proposal to eliminate the sergeant position and the conversation that followed. While it is likely that his recollection is beneficial to the Association, his testimony is consistent with the scenarios of the labor agreement.

It appears from Parins' testimony that when the parties have disagreed or there was a question as to what was non-supervisory work, they sat down and worked out their differences. This is evidenced by the two specific work duties contained in the labor agreement and the memorandum of 1997 referenced below. The bargaining history provides little guidance in terms whether the assembly and disassembly of light tower generators is non-supervisory work.

Moving to past practice, the City argues that a binding past practice exists whereby supervisors have assembled and disassembled the light tower generators. A binding past practice exists when there is "clarity, consistency and acceptability," Elkouri & Elkouri, *How Arbitration Works*, 6<sup>th</sup> ed. p.608 (2005) and should only be considered in the absence of a unambiguous written agreement. Given the facts of this case, I do not find a binding past practice.

First, the evidence does not establish that only supervisory personnel have assembled and disassembled the light tower generators. While it is true that Commander Brodhagen and supervisory personnel have assembled, raised and disassembled the light towers

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<sup>3</sup> The parties stipulated that de minimis tasks, those of 15 minutes or less, are not relevant to this proceeding. The assembly and disassembly of the towers is not a de minimis task - each assembly or disassembly takes between 45 minutes and 90 minutes to complete.



during Packer games since late 2003, there have been other instances when the light towers have been used and have been assembled and disassembled by non-supervisory personnel. Not only do SWAT and accident reconstruction personnel utilize the lights, but Officer Schmeichel testified that he had assisted another non-supervisory officer in assembling the light on July 18, 2005. Even if I were to conclude that only supervisory personnel have performed this duty, given the limited number of occasions in which the lights are used within the less than two-year ago time period in which the City obtained the light, I cannot find that is sufficient repetition to establish a past practice. Finally, given the clear communication by Peters to Brodhagen that the Association did not concur with management's conclusion that the work was non-supervisory, I cannot find that the Association has accepted the action. As such, no binding past practice exists.

I next move to the parties' manner of dealing. In 1997 Captain Bill Parins issued the following memorandum to all lieutenants and captains of the City Police Department:

RE: Breathalyzer Tests and OWI Arrests

The duty of a breathalyzer operator is clearly that of Bargaining Unit. In the future, supervisors shall not perform breathalyzer tests. If Bargaining Unit members are not available to perform such tests, the suspect should be taken to St. Vincent's Hospital for a blood draw.

Also, performing the arrest (SFST, citation, paperwork) of an OWI arrest is the duty of the Bargaining Unit and should be handled by a Bargaining Unit member. Once it is suspected that the person stopped may be intoxicated, call a patrolman to work the incident. Provide the officer with your probable cause and turn over the suspect to the patrolman.

As supervisors we must be available to advise our officers, not do their work.

Please see me if you have any questions.

I find it more cogent to analyze this case in terms of what is supervisory work rather than what is non-supervisory work and Captain Parins' memorandum is instructive. The language of the labor agreement affirmatively directs supervision to perform duties that relate to the supervision of staff. The second to last sentence in Parins' memorandum clarifies and reaffirms this purpose. Assembly and disassembly of light towers has nothing to do with supervising staff. The lights were obtained with Homeland Security dollars and were used at Packer games for the purpose of protecting the public. They provided illumination which allowed the patrons to enter and exit the facility safely and afforded law enforcement personnel the opportunity to view persons entering and exiting the facility. Inherent in the use of this tool is the obligation for it to be assembled and disassembled. The parties' manner of dealing

supports the Association's position.

Commander Brodhagen's testimony at hearing supports this conclusion. Brodhagen was explaining when he and Urban would start assembling the light towers and stated that prior to the December 11 game, they had begun the task four hours prior to the game. For December 11, the starting time was changed to five hours before the game due to the increased number of non-supervisory personnel that were assigned to work the game and his recognition that "we weren't able to take care of the supervision and other things that arose. So this game I moved it up an hour, ...". Tr. P. 84. Brodhagen was not able to supervise staff while he was assembling and disassembling the light towers and therefore expanded his time at the stadium. There is no question that the assembly and disassembly of light towers is a separate and distinct task from supervision of officers and therefore the work is non-supervisory.

The City argues that the assembly and disassembly of light tower generators falls within the exceptions contained in Section 2. The language of 1.02 provides that non-supervisory personnel are permitted to "take ...police action" and "perform police duties and functions" when it relates to "situations, events or circumstances" that they encounter during the normal performance of their supervisory duties. The language goes on to offer two examples which assist in defining what constitutes a "situation, event or circumstance". The examples establish that if a supervisor is working, doing supervision, and observes a traffic violator, he/she is expected to apprehend or arrest the violator. The example further limits the supervisor to not working the radar equipment or patrolling for violators. This is a standard "emergency" exception. Such an exception allows supervisors to perform bargaining unit work when there is "unforeseen combination of circumstances that calls for immediate action." Bornstein, Gosline and Greenbaum, *Labor and Employment Arbitration*, 2<sup>nd</sup> ed. p. 24-10 (2002) citing DIAMOND NATIONAL CORP., 61 LA 567, 571 (Gibson 1973). This exception does not allow a supervisor who is at a "situation, event or circumstance" to perform any and all law enforcement duties.

The City next argues that the Brodhagen, Arts and Urban are at the Packer game performing supervision of officers and that the assembly/disassembly of lights is a duty they are performing in relation to the event. The City's argument ignores the language of 1.02. The fact that the supervisors are at the Packer Game event does not create the exception. Rather, emergency circumstances create the exception and it is only when the particulars come to fruition and require immediate intervention that a supervisor is contractually afforded the right to intervene.

Having found that the work in question is non-supervisory, I do not address the Union's arguments relating to Section 6.03.

In conclusion, the grievance is procedurally sound. The parties have bargaining limiting language as it relates to the assignment of job duties and specifically have limited the performance of non-supervisory work to bargaining unit members. The assembly and

disassembly of the light tower generators is non-supervisory work and the City's decision to assign supervisory officers to this work violates the parties labor agreement.

**AWARD**

1. No, the Association is not estopped from challenging the conduct of the employer in assigning work involving the use of generators lights.

2. Yes, the City violated the labor agreement when it assigned duties to supervisory personnel for the December 11, 2005 Packer game involving generator light towers.

3. The appropriate remedy is to compensate the most senior bargaining unit member 120 minutes overtime which represents 60 minutes of assembly and 60 minutes disassembly of the light tower generators.

Dated at Rhinelander, Wisconsin, this 18<sup>th</sup> day of January, 2007.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator

