BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF GREEN BAY
(DEPARTMENT OF PUBLIC WORKS)

and

CITY OF GREEN BAY
DEPARTMENT OF PUBLIC WORKS LABOR ASSOCIATION

Case 369
No. 65275
MA-13177

(Custodian Overtime Grievance)

Appearances:

Attorney Thomas J. Parins, Jr., Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, for the labor organization.

Attorney Geoffrey A. Lacy, Davis & Kuelthau, S.C., Attorneys at Law, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, for the municipal employer.

ARBITRATION AWARD

The City of Green Bay and the City of Green Bay Department of Public Works Labor Association are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide an arbitration concerning the application and interpretation of the terms of the agreement relating to the assignment of custodial work during certain vacancies. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Green Bay, Wisconsin, on May 17, 2006; a stenographic transcript was made available to the parties on June 5, 2006. The parties filed written arguments and replies, the last of which was received August 28, 2006. On November 29, 2006, the arbitrator requested that the parties supplement the record, which they did on December 11, 2006.

ISSUE

The parties stipulated to the following issue:

"Did the City violate the collective bargaining agreement by not offering the work available on May 10, 11, 12, 13, 2005 to a full-time custodian rather than assigning a relief custodian to work those days?

If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

1989-1990 COLLECTIVE BARGAINING AGREEMENT

ARTICLE 7

SENIORITY AND JOB POSTING

. . .

BUILDING CUSTODIAN

5. Building Custodian seniority shall be separate from the Street, Sanitation and Sewer Section for job assignment and overtime purposes.

It is agreed that a "pool" of several "custodian relief" employees would be established to make available familiarized employees to replace absence Custodians as needed. These "custodian relief" employees will be laborers. These employees shall be asked or required to provide custodian relief according to seniority.

ARTICLE 26

HOURS OF WORK

The regular workweek shall be Monday through Friday, eight (8) hours per day and forty (40) hours per week. Time and one-half (1 ½) shall be paid for all hours worked in excess of eight (8) hours and/or forty (40) hours per week, whichever is greater, but not both

ADDENDUM 1

All conditions set forth in the preceding Labor Agreement shall apply to the Building Custodian classification with the following exceptions:

1. The regular work schedule shall be as follows:

Shift #1	3:00 AM to 9:00 AM
Shift #2	9:00 AM to 3:00 PM
Shift #3	3:00 PM to 9:00 PM
Shift #4	9:00 PM to 3:00 AM
East Side Garage	8:00 AM to 4:00 PM

Each employee will work a regular shift of six (6) hours per day Monday through Friday and twelve (12) hours per day on alternate Saturdays and Sundays, thus maintaining an average forty-two (42) hour week.

Custodians shall receive one and one-half (1 ½) times the regular rate of pay for all work performed over 40 hours in a seven (7) day work sequence.

When it becomes necessary to change an employee's schedule during vacation periods, s/he shall be given at least one week advance notice.

The regular shift, 9:00 AM to 3:00 PM, will be suspended when vacations are taken or one of the employees is absent on sick leave. When an employee is required to substitute on his/her regular off duty weekend, s/he shall be granted time off during the week to compensate for such time worked. The Employer will allow the employees to trade days (by mutual agreement between the employees) providing it causes no operational problems.

2. A separate seniority list shall apply for employees within the custodial classification.

. . .

It is agreed that a "pool" of several "custodian relief" employees would be established to make available familiarized employees to replace absence Custodians as needed. These "custodian relief" employees will be laborers. These employees shall be asked or required to provide custodian relief according to seniority.

On October 29, 1990, the parties reached a tentative agreement to insert the following after paragraph 5., noted above:

BUILDING CUSTODIANS

FILLING APPROVED ABSENCES

Custodial hours or shifts which are open due to an approved absence will be filled as follows:

Any hours or days less than five (5) working days in duration will be filled by overtime from within regular building custodians. If the overtime involves the custodians normally assigned to the West Side Municipal Garage, all regular west side custodians will be offered the overtime first, then the east side custodian. When the overtime involves the custodian normally assigned to the East Side Municipal Garage, the regular east side custodian will be offered the overtime first, then all regular West Side custodians.

Any vacancy of five (5) working days or more will be filled from the pool or relief custodians. If no relief custodian is interested in working, the least senior relief custodian will be assigned to whatever shift is open.

Despite this language being acknowledged as a tentative agreement, it was somehow omitted from the list of stipulations when the parties went to interest arbitration for the successor agreement.

1996-1998 COLLECTIVE BARGAINING AGREEMENT

(signed August 22, 1996)

ADDENDUM 1

BUILDING CUSTODIAN

All conditions set forth in the preceding Labor Agreement shall apply to the Building Custodian classification with the following exceptions:

1. The regular work schedule shall be as follows:

Shift #1	12 Midnight to 6:00 AM
Shift #2	6:00 AM to Noon
Shift #3	Noon to 6:00 PM
Shift #4	6:00 PM to Midnight
East Side Garage	8:00 AM to 4:00 PM

Each employee will work a regular shift of six (6) hours per day Monday through Friday and twelve (12) hours per day on alternate Saturdays and Sundays, thus maintaining an average forty-two (42) hour week.

Custodians shall receive one and one-half (1½) times the regular rate of pay for all work performed over 40 hours in a seven (7) day work sequence. It is agreed that any full time custodial positions are afforded any scheduled overtime opportunities before being offered to relief custodians not including the two hours of overtime in their regular scheduled work week.

When it becomes necessary to change an employee's schedule during vacation periods, s/he shall be given at least one week advance notice.

When an employee is required to substitute on his/her regular off duty weekend, s/he shall be granted time off during the week to compensate for such time worked. The Employer will allow the employees to trade days (by mutual agreement between the employees) providing it causes no operational problems.

1. A separate seniority list shall apply for employees within the custodial classification.

. . .

(4) Building Custodian seniority shall be separate from the Street, Sanitation and Sewer Section for job assignment and overtime purposes.

It is agreed that a "pool" of several "custodian relief" employees would be established to make available familiarized employees to replace absent Custodians as needed. These "custodian relief" employees will be laborers. These employees shall be asked or required to provide custodian relief according to seniority, as determined by an annual posting.

1999-2000-2001 COLLECTIVE BARGAINING AGREEMENT

(signed October 31, 2001)

ADDENDUM 1

BUILDING CUSTODIAN

All conditions set forth in the preceding Labor Agreement shall apply to the Building Custodian classification with the following exceptions:

1. The regular work schedule shall be as follows:

Shift #1	1:00 AM to 7:00 AM
Shift #2	7:00 AM to 1:00 PM
Shift #3	1:00 PM to 7:00 PM
Shift #4	7:00 PM to 1:00 AM
East Side Garage	8:00 AM to 4:00 PM

Each employee will work a regular shift of six (6) hours per day Monday through Friday and twelve (12) hours per day on alternate Saturdays and Sundays, thus maintaining an average forty-two (42) hour week.

Custodians shall receive one and one-half (1½) times the regular rate of pay for all work performed over 40 hours in a seven (7) day work sequence.

2. In the event a custodian shift is vacant for any reason, any of the following procedures may be used (this language shall not affect the application of Article 8, Seniority and Job Posting (New Jobs and Vacancies):

A. The City is not obligated to fill any vacant custodian shift.

B. Vacancies of less than five (5) days may be filled by full-time custodians.

C. Vacancies of five (5) days or more may be filled with relief custodians.

D. When an employee is required to substitute on his/her regular off duty weekend, s/he shall be granted time off during the week to compensate for such time worked. The Employer will allow the employees to trade days (by mutual agreement between the employees) providing it causes no operational problems.

E. Long-term vacancies may be filled as a temporary vacancy as provided at Article 8 Seniority and Job Posting (Disputes).

1. A separate seniority list shall apply for employees within the custodial classification.

. . .

(4) Building Custodian seniority shall be separate from the Street, Sanitation and Sewer Section for job assignment and overtime purposes.

It is agreed that a "pool" of several "custodian relief" employees would be established to make available familiarized employees to replace absent Custodians as needed. These "custodian relief" employees will be laborers. These employees shall be asked or required to provide custodian relief according to seniority as determined by an annual posting.

Custodian relief employees will be provided a forty-eight (48) hour notice prior to filling a custodian vacancy.

The following examples clarify the application of this language.

v = vacation
r = relief custodian (r-6, indicates that the relief custodian worked 6 hours that day)
ftc = full-time custodian

Example #1

S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
	v	v	V	v	V	V	v							
	r-6	r-6	r-6	r-6	r-6	r-12	ftc							
	6	12	18	24	30	**42**								

Example #2

S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
	v	v	v	v	V	V	v	v	v	v				
	r-6	r-6	r-6	r-6	r-6	r-12	r-12	r-6	r-6	r-6	r-8	r-8		
	6	12	18	24	30	**42**	12	18	24	30	38	**46**		

Example #3

S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
			v	v	V	V	v	v	v					
	r-8	r-8	r-6	r-6	r-6	r-12	r-12	r-6	r-6	r-8	r-8	r-8		
	8	16	22	28	34	**46**	12	18	24	32	40	**48**		

Example #1
The full-time custodian would get the Sunday overtime because the relief custodian would already have reached the 42 hour threshold at the end of the shift on Saturday.

Example #2
Relief custodian would work 10 days in a row in order to obtain at least 40 hours in week #2. If the Sunday overtime was scheduled for the full-time custodian, the relief custodian would only work 36 hours in week 2.

Example #3

Relief custodian would work 46 hours in the first week and 48 hours in the second week. If Sunday overtime was scheduled for the full-time custodian, the relief custodian would only get 36 hours in week 2.

ARTICLE 28
HOURS OF WORK

The regular workweek shall be Monday through Friday, eight (8) hours per day and forty (40) hours per week. Time and one-half (1½) shall be paid for all hours worked in excess of eight (8) hours and/or forty (40) hours per week, whichever is greater, but not both.

2004 COLLECTIVE BARGAINING AGREEMENT

The 2004 collective bargaining agreement, under which the instant grievance arose, retained in all relevant aspects the text from the 1999-2001 agreement.

BACKGROUND

The parties stipulated to the following statement of facts:

The grievant, Jeff Schmechel, is a full-time custodian working for the City of Green Bay Department of Public Works. He filed a grievance on May 18, 2005 regarding his not being offered to work overtime on the dates of May 10, 11, 12, 13, 2005 while another full-time custodian was on vacation. The work was assigned to a relief custodian. Had the overtime been offered to a full-time custodian Jeff Schmechal would be the most senior and would have been offered the overtime. The grievance has proceeded normally through the grievance process as outlined in the labor agreement to the point of this arbitration hearing.

The custodian who was on vacation was gone on the following dates: May 10, 11, 12, 13, 2005 and May 16, 17, 18, 19, 20, 2005. The days of May 14 & 15, 2005 were a Saturday and a Sunday for which the custodian who was on vacation was not scheduled to work.

The manner of scheduling relief custodians has been a matter of controversy between the parties for over a decade. On January 20, 1997, employee Kathy Tilot filed the following grievance:

Ed Senechal worked for Gerry Betzinger on Sunday, January 19, 1997. According to the contract, it states "It is agreed that any full time custodial positions are afforded any scheduled overtime opportunities before being offered to relief custodians."[1] I was available to work on this day but was never given the opportunity first. I feel I should receive the 12 hours of overtime at a Sunday rate.

[1] As noted above, the actual text of the collective bargaining agreement, which had been executed on August 22, 1996, also includes the phrase, "not including the two hours of overtime in their regular scheduled work week," an element not implicated in the Tilot grievance.

In denying the grievance, public works superintendent Dale Darrow replied that "Mr. Senechal was replacing a full time custodian who was on vacation for 5 days or more. The use of a part time custodian in this situation is in accordance with what the union has agreed to." In preparing his answer, Darrow was in receipt of the following note from supervisor Neal Campshure:

> Ed Senechal was filling in for Gerry due to a vacation request of more than 5 days in succession. This request began on Monday Jan. 13 – Monday Jan. 20, which included Gerry's weekend to work. Jan. 13, 14, 15, 16, 17, 18, 19, 20. This was a total of 8 days in a row. This grievance should be denied on the fact that we are to use part time custodians for 5 days and more in succession.

Following settlement discussions, on June 9, 1997, City Human Resources Director James Kalny wrote to Danny McGowan, Recording Secretary of Teamsters Local No. 75, as follows:

> I am sending a detailed explanation of the language proposal that we discussed on Wednesday, June 4, 1997. This should clarify the intent of the language which is to protect overtime for full-time custodians and at the same time ensure that relief custodians are able to work a 42 hour work week thereby not losing any hours worked or pay. If you have any questions regarding the clarification, feel free to call me at 448-4070.

The explanation to which Kalny referred, which did not address a non-work weekend for the full-time custodian whose vacation absence occasioned the need for a relief custodian, read as follows:

> . . .
>
> Relief custodians may be used to fill temporary vacancies created by the absence of a full-time custodian provided such absence is of a duration of five (5) days or more.
>
> When using relief custodians under the above paragraph, reasonable effort shall be made to schedule the relief custodian for 42 hours per week. If a relief custodian reaches the 42 hours during any shift, the relief custodian will complete that shift. The use of relief custodians under this paragraph shall not affect the overtime provided for in the regular schedule for full-time employees.
>
> The following examples clarify the application of this language.
>
> v = vacation
> r = relief custodian (r-6, indicates that the relief custodian worked 6 hours that day)
> ftc = full-time custodian

Example #1

S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
	V	v	v	v	V	v	v							
	r-6	r-6	r-6	r-6	r-6	r-12	ftc							
	6	12	18	24	30	**42**								

Example #2

S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
	V	v	v	v	V	v	v	v	v	v				
	r-6	r-6	r-6	r-6	r-6	r-12	r-12	r-6	r-6	r-6	r-8	r-8		
	6	12	18	24	30	**42**	12	18	24	30	38	**46**		

Example #3

S	M	T	W	T	F	S	S	M	T	W	T	F	S	S
			v	v	V	v	v	v	v					
	r-8	r-8	r-6	r-6	r-6	r-12	r-12	r-6	r-6	r-8	r-8	r-8		
	8	16	22	28	34	**46**	12	18	24	32	40	**48**		

Example #1
The full-time custodian would get the Sunday overtime because the relief custodian would already have reached the 42 hour threshold at the end of the shift on Saturday.

Example #2
Relief custodian would work 10 days in a row in order to obtain at least 40 hours in week #2. If the Sunday overtime was scheduled for the full-time custodian, the relief custodian would only work 36 hours in week 2.

Example #3
Relief custodian would work 46 hours in the first week and 48 hours in the second week. If Sunday overtime was scheduled for the full-time custodian, the relief custodian would only get 36 hours in week 2.

The record does not show any response from McGowan. After further discussion, detailed below, these examples were incorporated into the 1999-2001 agreement, and retained through the 2004 agreement.

On December 9, 1997, Kalny wrote McGowan as follows:

Re: Tilot Grievance

Dear Mr. McGowan:

The purpose of this letter is to recap our meeting of November 26, 1997 and respond to the Union proposal made at that meeting.

In recapping this meeting, there was considerable discussion in the over one and one-half hour meeting, the Union put on the table four main points:

1. The Union forwarded documentation that the five day rule had never been formally adopted by the parties at negotiation.

2. The Union demanded payment on four grievances that have been filed based on their understanding of an agreement not to implement the November 4, 1997 correspondence to the City until the November 26, 1997 meeting.

3. The Union voiced its opinion that management did not have the authority to reduce the compliment of custodians on certain shifts for temporary absences inasmuch as based on past practice, both shifts had been filled.

4. The Union took exception to the City position that it can limit the numbers of regular custodians off for vacation at a time to one custodian at a time.

In regard to the first point, the City does not deny that no formal agreement concerning the five day rule was negotiated and placed into contractual language in the past. However, there was once a tentative agreement regarding the five day rule during negotiations which ultimately reached impasse and was a subject of arbitration. For whatever reason, the five day rule did not survive into either parties' final offer. However, based on that tentative agreement and scheduling practices utilized at that time, the City has utilized relief custodians to fill regular custodian absences of five days or more. The understanding of what constitutes the five day rule as implemented by the City is clarified to a large degree by the documentation forwarded by the Union at the November 26, 1997 meeting.

The City's understanding in regard to the five day rule is not that there ever was a contractual agreement or obligation to carry it out. The City agrees that the five day rule was implemented by management without any contractual language compelling its implementation. As the Union points out, the issue raised in the Tilot grievance had to do with the new language in the contract which on its face can be read to prohibit the use of relief custodians until all full time custodians have been offered overtime opportunities in all cases. The new language could be read to void the five day rule. It was the understanding of the City that the new language was not intended to affect the five day rule. More importantly, in the initial discussions of the settlement of the Tilot grievance,

the City came away with the understanding that upon payment of the Tilot grievance, the five day rule would be formally drafted and upon agreement as to the proper language to describe the five day rule the new language would exist as an exception to the general rule that full time custodians would be entitled to all overtime opportunities before relief custodians.

The City's understanding of the Union's position on the settlement of the Tilot grievance is that the Union agreed to discuss the drafting of a limited five day rule exception to the new language but in no case agreed to void out the new contractual language. Obviously, the two different views of the original grievance discussions have led to difficulties in attempting to finalize the settlement of this matter.

In regard to the second point discussed at the November 26, 1997 meeting, in a phone conversation between Mr. McGowan and myself, I did inform Mr. McGowan that I would suggest to Mr. Hall that he not implement the procedures outlined in the November 4, 1997 letter until such time as we have had an opportunity to meet and discuss the matter. While I did not directly state that we would suspend implementing the changes stated in that letter, it was reasonable for Mr. McGowan to assume the City would and accordingly it is reasonable to pay those grievances. It must be understood, however, that both the City decision not to implement the procedures outlined in the November 4, 1997 correspondence and the payment of these grievances is done in the hopes of assisting settlement of this matter and is not to be precedential in regard to the City's right to determine when overtime is needed and to assign overtime in accordance with the needs of the department as determined by management and to limit vacation in accordance with the needs of the department as determined by management. And with this understanding alone, the City would be willing to pay the grievances submitted.

In regard to the Union's position that the City cannot reduce the compliment of custodians on duty when a custodian is absent and that position need would have to be filled with overtime, the City responds that the determination of when to utilize overtime and staffing levels are clearly policy decisions left to managerial discretion. The "new language" in the contract that provides that full time custodians are entitled to overtime opportunities before relief custodians does not in any way modify management's right to determine when overtime is necessary and determine staffing levels. Any past practice that may have existed in regard to filling these positions is not binding to management in exercising its discretion.

Finally, in regard to the exception to implementing a vacation policy requiring no more than one full time custodian to be on vacation at the time, the contractual language, management rights clause and law in regard to

management rights, all allow management the discretion to determine when to grant vacation in accordance with the needs of the department. Past practice is not binding against management in the exercise of its managerial rights under these circumstances.

In regards to the Union's offer to settle this matter, it is our understanding that the Union's offer that they will accept each and every term and condition outlined in the letter of June 9, 1997, if the City agrees not to implement any of the procedures suggested in the November 4, 1997 letter. So that there is no misunderstanding in regard to the City's response and intent, it is our understanding that the Union proposal that we would implement the June 9, 1997, in regard to the implementation of the five day rule, that a memorandum of understanding would be signed to that effect and that the City would thereupon not implement policies which would:

1. Change an employee's schedule vacation to fill weekend absences.
2. Restrict vacation to one custodian at a time, and
3. Fill all regular custodian absences.

Unfortunately, the City cannot agree to the Union's offer as stated. As stated in the November 4, 1997 letter and more thoroughly addressed in this correspondence, the City believes that it is acting well within its management rights or where necessary under contractual authority in implementing each of the three policies stated above. Each of the three policies are rights reserved to management regardless of the new language in the contract dealing with providing overtime opportunities to full time custodians. As we previously discussed, when the City became aware of the cost of overtime, the City reassessed the policy of allowing vacation to more than one custodian at a time in filling all custodian vacancies and came to the policy decision that this was not a sound practice. The City continues to maintain that it is a clear managerial policy issue and is certainly prepared to arbitrate its right to continue those practices.

However, in the interest of settling this matter, the City would be willing to continue to fill all full time custodian vacancies **during this contract term** in exchange for the drafting of a memorandum of understanding implementing the five day rule. This is with the understanding that the five day rule would exist as a permanent exception to the new contractual language in regard to offering full time custodians overtime opportunities before relief custodians. It is also with the understanding that the parties will be free to negotiate new language regarding these issues when contract negotiations open next fall. However, the City will be free to discontinue the practice of filling all ~~relief~~ custodian vacancies in the event that agreement is not reached on those issues. (**emphasis** in original).

It also must be clear that the City will not modify its newly adopted policy of allowing only one full time custodian to be on vacation at a time. The City believes that this is a sound policy which will provide for a more cost efficient and effective manner of scheduling custodians.

At present, the City has agreed to fill all custodian vacancies until our meeting of December 9. The City has, however, implemented the policy in regard to permitting only one full time custodian to be on vacation at a time. In the event that we cannot reach agreement on December 9, please take this as notice that the City will implement the policies outlined in the November 4, 1997 correspondence.

If you have any questions concerning the content of this correspondence, please contact me.

The record does not show any response from McGowan.

On August 24, 1998, the parties executed the following settlement of the Tilot grievance:

MEMORANDUM OF UNDERSTANDING

Tilot Grievance

As settlement to the Tilot grievance dated January 20, 1997, it is hereby agreed as follows:

> The City will fill all fulltime custodian vacancies in the same manner utilized prior to the filing of the grievance through the current contract term (December 31, 1998).
>
> Notwithstanding contradictory language which may be used to the contrary, the parties will follow the five (5) day rule as outlined in the attached letter dated June 9, 1997. The five (5) day rule as stated in the attached letter shall serve as a permanent exception to the contractual language in Addendum 1, paragraph 3 of the labor contract.
>
> This memorandum of agreement shall not bind the parties in future contractual negotiations. The parties shall be free to negotiate new language regarding the five (5) day rule during negotiation of a successor agreement.

> In the event that an agreement is not reached in the issues addressed in this memorandum agreement during contractual negotiations, the City shall be free to discontinue the practice of filling all custodial vacancies.
>
> Nothing in this agreement shall, in any way, limit the City's right to allow only one (1) fulltime custodian to be on vacation at one time.

In July, 1999, a dispute arose over whether the contractual ban on the city's changing schedules to avoid overtime – an aspect of custodial overtime unrelated to the current dispute -- continued during the hiatus. The grievance was settled in May, 2000, and became part of the 1999-2001 and 2004-2006 collective bargaining agreements. The first record evidence of the dispute is McGowan's letter to Kalny on October 27, 1999, as follows:

> RE: JEFF SCHMECAL (sic) GRIEVANCE DATED 7-20-21-99
> GERI KIDD GRIEVANCE DATED 7-26-30-99
>
> Dear Jim:
>
> On Tuesday, October 26, 1999, the parties met and conducted a third step meeting relative to the above referenced grievances. There are however eighteen (18) grievances pertaining to the same issue that have been filed by Jeff Schmecal, Frank Preble, Geri Kidd and Kathy Tilot.
>
> As a result of the discussion pertaining to the issue, the City offered a settlement to this issue. My understanding of the City's offer is as follows:
>
> 1. The five (5) day rule will be in effect per the Memorandum of Understanding dated 8-24-99 (sic) including its attached example.
>
> 2. The City intends to exercise its right to change the shift of a custodian and/or leave the shift open.
>
> 3. The settlement will not include anything else that is a current subject of bargaining for either side.
>
> 4. The City agrees to make a monetary settlement to the above referenced grievances. The total amount of the offer was not decided upon to date.
>
> 5. I have reviewed the grievances and the total monetary settlement of each:

Jeff Schmecal	50 hours	$1132.00
Frank Preble	86 hours	$1946.04
Geri Kidd	6 hours	$135.84
Kathy Tilot	46 hours	$1041.44
		Total $4256.32

Please let me know if the contents of this letter is accurate and what the monetary offer of the City is.

On November 10, 1999, Kalny replied to McGowan as follows:

Re: **Schmecel/Kidd Grievance Concerning Custodian Scheduling for Overtime**

Dear Mr. McGowan:

As you are aware, this grievance revolves around the interpretation of a memo of understanding that was drafted to settle the Tilot grievance. The City strongly believes that it was the intent of that agreement to require that the City could not utilize its contractual ability to reschedule individuals to avoid overtime until the date the contract terminated. The date December 31, 1998 is specifically in the agreement. The City believes that there is also some supporting documentation that would lead to that conclusion, as well as the notes of two individuals on the City negotiating team that come to that conclusion as well. It is clear, at least in the City's mind, that the five-day rule provision was amended by the grievance on a permanent basis and the exception to using the scheduling provision was to be effective until January 1, 1999. The Union's position is that the prohibition of using the contractual language in regard to changing schedules to avoid overtime was to continue as a contract term through hiatus. It appears that there is a dispute on this issue and rather than proceed to arbitration, we have been discussing a settlement.

You previously forwarded to me a document that estimated what you believed the outstanding amounts due were. Attached you will find our calculations that we believe bring us up to the date of our recent meeting. The City proposes the following:

- The City would pay those custodians involved, as listed on the document, 50 cents on the dollar of what they would have earned, with the following understandings:

    1. That the prohibition on the use of the provision of the contract that allows management to reschedule custodians would be immediately suspended. That is, from this date forward, management would be allowed to implement that procedure.

2. As per the memo of understanding, the five-day rule, as stated in the memorandum settling the Tilot grievance, would remain in effect as a permanent part of the contract.

The City feels that it is clear that the five-day rule is now in effect, however we want to clarify that issue as part of this settlement offer.

Please let me know if this settlement is agreeable to you.

On December 16, 1999, Kalny wrote to McGowan as follows:

Re: Custodian Grievances

Dear Mr. McGowan:

This letter is in response to your December 7, 1999 letter regarding the above. In an effort to settle the matter, the City would offer to make 75% payment on the grievances, with the understandings listed below:

1. The Memorandum of Understanding regarding the Tilot grievance, signed August 24, 1998, remains in effect, with the exception of the first paragraph regarding the City filling all full-time custodian vacancies in a manner utilized prior to the filing of the grievance.

2. The parties agree that temporary vacancies created by absences of full-time custodians will be filled as described in paragraph 2 of that memorandum, that is that the five-day rule would apply. The five-day rule, which is described in the attached letter and explanation, dated June 9, 1997, means that regular custodians would fill vacancies of four or less days. If the vacancy is five or more days, relief custodians would fill it. *The five-day rule would include consecutively scheduled work days. For example, an employee was scheduled to work Sunday through Friday; scheduled to have Saturday and Sunday off; and scheduled to work the following Monday through Saturday. If that employee took Thursday and Friday of the first week off and Monday, Tuesday and Wednesday of the second week off, those five days would be considered five consecutive work days and the time would be filled with a relief custodian* (emphasis in original; *emphasis* added).

3. It is understood that the City has the right to change custodian schedules to fill in during vacation periods, with a one-week notice, as provided for under the labor agreement. It is further understood that custodial vacancies created by temporary absences of regular custodians may be left vacant at the City's discretion.

4. It is understood that the one-week advance notice of changing schedules does not apply to relief custodians.

5. The class action grievances and other grievances filed in regard to changing schedules of relief custodians will be dropped.

Please contact me regarding the union's response to this offer.

The December 7, 1999 letter to which Kalny referred is not in the record. On January 12, 2000, McGowan wrote Kalny as follows:

RE: CUSTODIAN GRIEVANCES

Dear Jim:

I am in receipt of your December 16, 1999 letter, whereas you have offered a seventy-five (75%) percent payout to settle the above referenced grievances. The Union is offering the below listed counter-proposal as a settlement to the grievances.

1. The Union would be agreeable with the seventy-five percent (75%) payout with the following changes.

2. Addendum 1 – Delete – "When it becomes necessary to change an employees schedule during vacation periods, they should be given at least one (1) week advance notice." (In other words, employees would not be forced to work a schedule other than what they bid.)

3. Relief custodians will be given a minimum of a forty-eight (48) hour notice of a shift change, to fill in for a custodial vacancy.

The following will represent the seventy-five percent (75%) payout:

Jeff Schmecal	50 hours	$1132.00	x	75%	= $849.00
Frank Preble	86 hours	$1946.04	x	75%	= $1459.53

Please let me know if this will settle the issue.

On February 21, 2000, Kalny wrote McGowan as follows:

Re: Custodian Grievances

Dear Mr. McGowan:

The City is in receipt of your January 12, 2000 letter regarding the above. During the negotiation session of January 17, 2000, the City had given the Union a proposal, which incorporated the elements of the City's December 16, 1999 proposal in this matter. Since that time, you have indicated that it is not acceptable to the union and that the union wishes to maintain the deletion of the language giving the City the ability to change employees schedules to cover vacancies. It is important to the City to maintain the ability to change schedules, at least to some degree, as it is possible that there could be more than one custodian gone at any one time due to illness, etc. Accordingly, in a final attempt to settle the matter, the City would offer to make 75% payment on the grievances, with the understandings listed below:

1. The Memorandum of Understanding regarding the Tilot grievance, signed August 24, 1998, remains in effect, with the exception of the first paragraph regarding the City filling all full-time custodian vacancies in a manner utilized prior to the filing of the grievance.

2. The parties agree that temporary vacancies created by absences of full-time custodians will be filled as described in paragraph 2 of that memorandum, that is that the five-day rule would apply. The five-day rule, which is described in the attached letter and explanation, dated June 9, 1997, means that regular custodians would fill vacancies of four or less days. If the vacancy is five or more days, relief custodians may fill it. *The five-day rule would include five consecutively scheduled work days. For example, an employee was scheduled to work Sunday through Friday; scheduled to have Saturday and Sunday off; and scheduled to work the following Monday through Saturday. If that employee took Thursday and Friday of the first week off and Monday, Tuesday and Wednesday of the second week off, those five days would be considered five consecutive work days and the time would be filled with a relief custodian.* (emphasis in original; *emphasis* added).

3. It is understood that the City has the right to change the schedule of the day custodian to fill in during vacation periods, with a one-week notice. It is further understood that custodial vacancies created by temporary absences of regular custodians may be left vacant at the City's discretion.

4. Relief custodians will be given 48 hour notice of a change in schedule.

5. The grievance filed in regard to changing schedules of relief custodian will be dropped.

Please contact me regarding the union's response to this offer.

On April 3, 2000, Kalny wrote McGowan as follows:

Re: March 28, 2000 Letter

Dear Danny:

I am in receipt of your letter of March 28, 2000 and want to respond.

In regard to item 1 on the Custodian Issue, I propose the following:

a. A 75% pay-out

b. Clarify the 5 day rule as per our last offer

c. Immediate implementation of the Tilot grievance settlement memorandum

d. 48 hour notice to relief custodians

Under this grievance settlement you will gain the clarification of the relief custodian notice issue. That clarification could not be reached in grievance arbitration. In regard to the contractual language regarding the ability to change an employee's schedule, understand that I do not have the authority to amend contractual language without Council approval. Therefore, I am asking that the deletion issue be brought to the bargaining table. Rest assured that we would delete this language only upon ratification of a labor agreement.

Be further advised that we reserve our right to put language on the table regarding overtime in the custodial position or elsewhere in the Public Works Department.

In regard to the Vehicle Equipment Repair proposal, we remain willing to implement a pilot proposal, but it still appears to me that there are several loose ends to tie up. For example, the proposal does not address who will be on the committee, how we will determine if this proposal is saving money, who will determine if the DPW workers are qualified or can be scheduled to make the repairs, etc.... After conferring with the Mayor, we suggest that you meet with Carl Weber to iron out some of these details and refine the offer.

I understand that Lorrie will be, or has already contacted you, to schedule the step 3s.

As to those matters going to arbitration, I would be happy to discuss settlement of those matters by phone if you would like.

Also on April 3, 2000, McGowan wrote Mayor Paul Jadin as follows:

Re: Custodians grievance settlement
Performing mechanics work-in-house

Dear Mayor:

The following will represent my understanding of the settlements, pertaining to the above referenced issue.

1. Custodian Grievance

   A. Each grievant will be paid 75% of the sum requested in their grievances:

   Jeff Schmechel – 50 hrs x 75% = 36.5 hrs = $849.00
   Frank Preble – 86 hrs x 75% = 64.5 hrs = $1,460.28
   Geri Kidd – 6 hrs x 75% = 4.5 hrs = $101.88
   Kathy Tilot – 46 hrs x 75% = 34.5 hrs = $781.08

   B. The parties will agree to the application of the five (5) day rule (including modification to contract language)

   C. Relief custodians will be provided with a 48 hour notice.

   D. The City will agree in bargaining to delete the following sentence in addendum 1: "When it becomes necessary to change an employee's schedule during vacation periods he/she shall be given at least one week advance notice."

2. Mr. Jim Kalny and Mr. Carl Weber will meet with the Union as soon as possible to discuss/implement the Union's proposal sent to you on December 28, 1999 re: Vehicle/Equipment Building Repair and Maintenance.

If you have any questions regarding the above, please contact this writer immediately.

On April 10, 2000, Kalny wrote McGowan as follows:

Re: Custodian Settlement Issue

Dear Mr. McGowan:

As per our recent conversation, I wanted to clarify my understanding of the settlement of the above-referenced matter. We would be agreeable to the payout as set forth in your letter to Mayor Paul Jadin, dated April 3, 2000. I agree that we should sit down and clarify the five-day rule, which we will then draft into language that can be inserted into the labor agreement at the bargaining table. Likewise, we will agree to delete the language concerning moving of schedules at the bargaining table. We will also create some language dealing with the 48-hour notice provision for relief custodians. And finally, upon settlement, the Union will acknowledge that the City has no obligation to fill custodial vacancies.

I trust that this accurately reflects our understanding of the settlement of this matter.

As I also mentioned to you, the City will be placing on the table the desire to modify the schedule of the custodians.

On May 11, 2000, Kalny wrote McGowan as follows:

Re: Custodian Grievance Settlement

Dear Mr. McGowan:

Attached please find a redraft of the Building Custodian Addendum to the contract. We would submit that this is a tentative agreement between the parties and will agree not to withdraw it, even in the event that this goes to arbitration. As you can see from your review of the attachment, I have struck out the portions to be deleted and have put the new language in italics. Also, per our discussion, I have attached the schedule document.

In regard to payment on the grievances, as per your April 3, 2000 letter to the Mayor, I would submit those payments are as follows:

Jeff Schmechel	$ 849.00
Frank Preble	$1,146.28
Geri Kidd	$ 101.88
Kathy Tilot	$ 781.08

Upon your response that you concur with the attachments, I will request that the Payroll Department make payment.

Finally, so that there is no misunderstanding concerning this, as you are aware, we have placed on the table the notion of amending the regular work schedule shifts for the custodians. We reserve the right to continue our efforts in that regard.

The amended attachment to which Kalny's letter referred read, in part, as follows:

Custodians shall receive one and one-half (1½) times the regular rate of pay for all work performed over 40 hours in a seven (7) day work sequence. ~~It is agreed that any full time custodial positions are afforded any scheduled overtime opportunities before being offered to relief custodians not including the two hours of overtime in their regular scheduled work week.~~

~~When it becomes necessary to change an employee's schedule during vacation periods, s/he shall be given at least one week advance notice.~~

2. In the event a custodian shift is vacant for any reason, any of the following procedures may be used (this language shall not affect the application of Article 8, Seniority and Job Posting (New Jobs and Vacancies):

F. The City is not obligated to fill any vacant custodian shift.

G. Vacancies of less than five (5) days may be filled by full-time custodians.

H. Vacancies of five (5) days or more may be filled with relief custodians.

I. When an employee is required to substitute on his/her regular off duty weekend, s/he shall be granted time off during the week to compensate for such time worked. The Employer will allow the employees to trade days (by mutual agreement between the employees) providing it causes no operational problems.

J. Long-term vacancies may be filled as a temporary vacancy as provided at Article 8 Seniority and Job Posting (Disputes).

The parties subsequently reached an agreement on the terms of a successor contract, which they signed on October 31, 2001, incorporating the language included in Kalny's attachment to McGowan of May 11, 2000, which remained the language in force as of the date of the grievance.

On January 20, 2005, full-time custodian Fred Johnson submitted a leave request for vacation on May 11, 12, 13, 16, 17, 18, 19 and 20. On March 24, he added a request for May 10. The city granted Johnson his leave, and filled his shifts with a part-time custodian. On May 18, 2005, custodian Jeff Schmechel filed the following grievance:

> The city used a part time custodian Nathan Zelzer to work on 5/10, 11, 12, 13, 2005 7:00 PM to 1:00 AM. The city did not ask me to work on these days. This is under the 5 day rule. My grievance is for 24 hr of overtime.

On May 20, 2005, Sanitation Superintendent Debbie Epping denied the grievance, referencing line 1844, Addendum 1: "Vacancies of five (5) days or more may be filled with relief custodians." The union thereafter appealed the grievance to Public Works Director Carl Weber, who on June 21, 2005, wrote DPWLA president Steve Lardinois as follows:

> RE: Jeff Schmechel – 5-18-05 Grievance
>
> You have asked that I review the subject grievance, which regards the failure of the DPW Operations Division to offer overtime to the grievant for custodian shifts for 4 days on 5/10 thru 5/13/05. Sanitation Superintendent Debbie Epping denied the grievance on the basis that the 4 days in question were part of 9 consecutive work days of vacation that were taken by the employee regularly assigned to the shift. Ms. Epping cited item 2.C of Addendum 1 of the labor agreement which states that "Vacancies of 5 days or more may be filled with relief custodians." As this vacancy exceeded 5 days, a relief custodian was utilized.
>
> At a meeting with yourself and John Wied on 6/14/05 the Union argued that since the 9 vacation days were interrupted by 2 weekend days during which the employee taking vacation was not on duty, the 9 day vacancy should have been considered 2 vacancies, one of 4 days and one of 5 days. The 4 day vacancy should have been filled with a full time custodian as requested by the grievant. The 5 day vacancy after the weekend was appropriately filled with a relief custodian.
>
> The regular custodian took 9 days of vacation without working a day between. This represented 9 consecutive scheduled work days for that employee. Addendum 1 does not reference calendar days when referring to vacancies of 5 days or more. Therefore I do not believe that management is precluded from considering consecutively scheduled work days in 2 consecutive weeks to be one vacancy. For this reason I will sustain the denial of the grievance.

On October 7, 2005, Assistant City Attorney Steve Morrison [(2)] wrote union attorney Thomas J. Parins, Jr., as follows:

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[2] As the parties are aware, Atty. Morrison has since returned to his staff position with the Wisconsin Employment Relations Commission. As I promised the parties at hearing, I attest that I have not discussed this matter in any form or fashion with Atty. Morison.

October 7, 2005

Re: Jeff Schmechel Grievance

Dear TJ:

Thank you and your team for meeting with us today regarding the above.

I have considered the arguments of the Union and those of the City. The issue, as agreed to by you and me during the meeting, essentially revolves around the question of what consecutive days mean. In this case the Grievant was on vacation for four work days (Tuesday through Friday) during one week and for another five work days (Monday through Friday) during the following week. He was not scheduled to work on the Saturday and Sunday between these two weeks.

According to Addendum 1 of the contract, the City may fill vacancies of five days or more with relief workers (part-time workers). Less than five days would result in overtime being given to full-time custodians. The five-day period (or greater), all parties, agree, must be consecutive days rather than days interspersed over a longer period of time. The City maintains that the days the Grievant was on vacation (nine days) were "consecutive" because they constituted his actual work days and occurred one after the other with no interruption of work days. The Union, on the other hand, contends that the weekend between the Grievant's two work weeks caused an interruption of the consecutive nature of the nine-day period and consequently the City should pay the Grievant (the most senior man who would have worked the overtime if any had been available) whatever overtime he would have received had the City filled the four days (during the first week) with a full-time custodian. The Union does not make a claim for the second week's five-day period and says that it was appropriate to fill those days with part-time people.

I believe that the contract language fully supports the proposition that the periods set forth under Addendum 1, B. and C. refer to consecutive days. Otherwise the language would not make any sense. I also believe that "consecutive days" refers to "consecutive *working* days" and does not encompass days the employee is no scheduled to work. So in this case, the employee took off for four work days followed by five more work days for a total of nine work days. I do not agree that unscheduled work days which all within the employee's vacation time interrupt the consecutive nature of the time period so as to prevent the employer from filling those positions with part time employees. That construction is simply too much of a stretch.

The grievance is denied at this step.

The union thereafter advanced the grievance to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

> Because a vacancy can only exist when there is not a full complement of employees on a particular shift, and the full-time custodian who took vacation was not scheduled to work on the intervening weekend, there were two vacancies created in May, 2005. Both parties interpret the contract language to mean there was no vacancy on the weekend of May 14-15; therefore, this break caused two separate vacancies to occur, for four and five days respectively.
>
> The City, which is advancing an interpretation it first raised in 1990, should not be able to secure in grievance arbitration what it could not achieve in negotiations.
>
> The language of the collective bargaining agreement must be construed to give meaning to all portions of the contract. Addendum I cannot be isolated from the rest of the agreement, which uses several different methods to refer to the number and counting of days, including "working days," "calendar days," and "regularly scheduled work days." Acceptance of the county's position would render the reference to "regularly scheduled work days" meaningless, as the terms "days" and "regularly scheduled work days" would then have the same meaning. This would also have dramatic affects on other areas of the contract where there are specific terms for the manner of counting time.
>
> The original 1990 tentative agreement used the term "days," which did not appear in the Tilot Memorandum of Agreement or in the final contract language, nor in Article 24. Either the language the City proposed or the parties used in Article 24 could have been adopted if that was the intent of the parties; it was not adopted because that was not their intent. The interpretation that would give effect to all parts of a contract is the one that should be chosed; the only interpretation that does so is the Union's. Adopting the City's position would add language to the contract in a *de facto* manner and render the terms in Article 24 as surplusage and meaningless, thus violating normal standards for contract interpretation.
>
> The parties negotiated the existing language fairly and extensively, and it should be followed. Both parties were trying protect their interest concerning overtime: the City was trying to reduce the overall amount of overtime through the use of relief custodians, while the Union was trying to protect the full-time custodians and the overtime they had received in the past. The language

eventually incorporated into the agreement was a compromise where each party sacrificed some but was able to protect its major interest. Acceptance of the City's position would expand the situations where relief custodians could be used which would be sacrificing a major interest of the DPWLA, thus taking away the fair bargain that was made by the parties.

The City is attempting to achieve through arbitration an interpretation of Addendum I that it could not achieve in negotiations over two contracts and one grievance settlement. This cannot be allowed. If the City wants to have this interpretation it must be done through the collective bargaining process, not arbitration.

It is clear the DPWLA's position is the only position that can be upheld in this matter. There were two separate vacancies: May 10-13 and May 16-20. Since the language of the collective bargaining agreement and the clear intent of the parties requires a vacancy of less than five days be filled by a full-time custodian, the grievance should be granted and Jeff Schmechel paid twenty-four (24) hours of overtime pay for the four days at six hours per day he was not offered the available work.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

The five-day rule in the agreement is subject to only one logical interpretation, which is that any request for time off that spans five days or more may be filled by relief custodians, rather than full time custodians. In this instance, the custodian who went on vacation asked for nine days off.

Nowhere does the agreement require that the vacancy be consecutive days; in fact, the Union witnesses testified that the Union did not want such language in the agreement. The logical understanding, as testified to by a union witness, is that the five-days rule refers to a custodian's workdays.

As the Union witness understood, there is a difference between consecutive days and consecutive workdays; clearly, an employee would not include in a request for time off those days the employee was not scheduled to work. Therefore, the only reasonable interpretation is that the reference to five days in the agreement refers to a request for time off consisting of more than five consecutive workdays. If the days off are consecutive in the custodian's schedule, and the request is for more than five days, the time may be filled by a relief custodian.

Even if the language is not held clear on its face, the bargaining history clearly reflects an understanding which comports with the City's application of the rule to the grievant. If the arbitrator must go beyond the text and ascertain the

parties' intent, the only credible evidence supports the City's application of the rule.

Further, the Union cannot assert that the interpretation of the five day rule it now proposes was ever its intended meaning. The rule's application to the current situation has never previously arisen, and the Union never rejected the city's clarification of the rule during earlier negotiations. The Union had at least three opportunities to respond with a written clarification of the rule in 1999 and 2000, yet it never objected to or modified the City's understanding of the rule.

Bargaining history supports the city's position as well. There is considerable history over the five-day rule, starting with negotiations to settle the Tilot grievance in 1997. The parties agreed that the five-day rule would be applied as it had been in the past and that the contract provision that full-time custodians receive all overtime would not be observed. The settlement did not alter the method of applying the five-day rule, but simply stated that it would be applied and that the parties could negotiate the particulars.

Because the Tilot grievance settlement did not settle all problems relating to custodian scheduling and overtime, further grievances followed, leading to much correspondence in 1999/2000. In one letter, city Human Resources Director James Kalny stated the understanding that the five-day rule to include "five consecutively scheduled work days," and gave an example directly applicable to this grievance. (emphasis in original). In its response, the Union proposed modifications of the settlement's proposed terms regarding notice relative to shift changes and language enabling the City to modify an employee's work schedule during vacations. Nowhere did the Union address the clear description of the five-day rule put forward by the City. By stating it would accept the settlement with those modifications, it is logical to conclude the Union accepted the City's clarification of the five-day rule. Responding to the Union request to modify some terms, Kalny again wrote the Union, reiterating the City's understanding of how to treat an absence taken on either side of a scheduled weekend off, and again the Union failed to address the City's stated understanding of the rule. After one final city communication again reiterating the City's understanding of the rule, the language was incorporated into the agreement, without any negative statement from the Union. For the Union to claim that it stayed silent to numerous letters from the City because it did not agree with the city's language does not make any sense.

The Union testimony regarding the five day rule lacks credibility and fails to overcome the documentary evidence in the record. Union officer Wied testified that he vividly recalled the bargaining session at which the Union rejected the City's statements regarding application of the five-day rule. But the witness

also testified that the relief custodians were created through the 1994-95 collective bargaining agreement, when in fact they were created in the 1989-90 agreement; the witness's recollection of the facts is not as clear as his testimony might suggest.

Further, the examples of the five-day rule in the agreement do not address its application in the event of an intervening weekend off during an absence exceeding five days. The examples support neither party's interpretation of the situation presented in this grievance.

Because the clear and unambiguous language, reinforced by the bargaining history, supports the City's interpretation and application of the five-day rule, the grievance should be denied.

In response, the Association posits further as follows:

The City errs when it asserts that the agreement grants it discretion to cover custodial shifts with relief custodians in the event a full-time custodian is absent five days or more. The provision allows for the filling of vacant custodial shifts; as City Human Resource Director Kalny testified, the only way a vacancy occurs is if a full-time custodian is scheduled to work and is not present; if there is a full complement of custodians at work there is no vacancy. It is the vacancy that this provision addresses, not absences. Applying Kalny's testimony that no vacancy is created when there is a full complement of employees on duty, it is evident that in the situation at hand there were actually two vacancies created. There was a four-day period in which a shift had to be filled, followed by a weekend with a full complement of employees and therefore no vacancy, followed by a second vacancy of five days.

The instant situation is no different than if a full-time custodian took off for four days, worked for two, and then took another five days off, which would be possible with custodians working 12 straight days. No vacancy would exist for the two days in the middle as there would be a full complement of employees, the same situation as this grievance. The clear and unambiguous meaning of "vacancies" has been ascertained and must be applied here. There were two vacancies created here, and the City violated the contract by filing the first one of four days incorrectly.

The City official whose ruling is being challenged was not present during negotiations, and therefore her interpretation of the language is neither persuasive nor helpful. Nor is the City's discussion of the word "consecutive" helpful, in that the term is not part of the contract language herein in question. The City makes quite a leap, inconsistent with other contract language, stating that "five days" means "five consecutive days," which in turn means "five

consecutive work days." The City mischaracterizes the testimony of union witness Deniel, which in no way justifies the city's position.

The City errs further in relying on bargaining history, which clearly shows that the City tried to negotiate certain language into the agreement and was unsuccessful. None of the language or examples the city proposed were included in the final agreement; the bargaining history favors the union, not the city. Each time the City tried to advance the language it is now asserting, the union rejected the language. The parties eventually agreed on language, none of which was that offered by the City; clearly, the intent to reject prevailed over the intent to include.

Even though this set of facts has never occurred, everyone knew what the application was because the City felt a need to make an offer to change the application. The City continued to make the offer over and over even after it was rejected several times. The City errs in claiming the Union's argument is inconsistent; it is the City that has been inconsistent and has tried to change the application, first by negotiation then by arbitration. Union testimony shows the consistency of the Union position throughout.

The City errs in contending the union never rejected the City's interpretation; union witnesses Deniel and Wied stated emphatically that the Union rejected the City's proposal and would never agree to it. The Union's counter-proposal was implicitly a rejection of the City offer. There is no evidence the Union ever agreed to the City's interpretation.

The City errs in describing its proposed clarification as Kalny's understanding of the rule's application; instead, it was his offer of settlement, by which he was attempting to add language.

The City knows the Union never adopted its application. If the Union had, it would have been included in the agreement; tellingly, it is not.

The City cannot put forth a convincing argument to attack the credibility of union witnesses. The City questions Wied's version of events, but provides no evidence that it is incorrect. The fact that Kalny did not testify that Wied was incorrect only bolsters Wied's version.

All the evidence in this matter supports the Union position. The City is attempting to achieve through arbitration what it could not achieve through negotiation. The City must be found to have violated the collective bargaining agreement by not offering the work available on May 10-13 to the senior

custodian, Jeff Schmechal, and ordered to pay him for twenty-four hours of overtime he should have been offered.

In response, the City posits further as follows:

The Union's statement that its position is supported by past practice is contrary to the evidence, which shows that this is the first occurrence of this set of facts. The only understanding of the language that was clearly enunciated, as required of a past practice, was the interpretation put forward by the City.

The Union commits a logical fallacy by claiming the City's position would have been included in the list of examples if it had been agreed to. The Union's position that the City must agree to its proposed application of the five-day rule unless specifically contradicted by one of the examples in the contract is simply unsupportable; had the Union truly objected to the City's statements, it would have included an example of its own.

The Union assertion that the City has the burden of proving that the rejection of the City's proposed language ought not to foreclose its later application is built on a false premise, namely that the City proposed language addressing this situation which the union rejected. The City never proposed contract language and the Union never rejected contract language.

The Union also attempts to proceed on the false premise that prior to the Tilot grievance and the subsequent developments, that the five-day rule was clearly understood and in support of the Union's position. Based on that false premise, the Union asserts the City sought to change the rule and must prove its acceptance. This would be an interesting position if it were not based entirely on a false premise. This is the first instance of this set of facts, so the record does not support the Union claim that the City is seeking to modify the five-day rule. The entirety of the Union's position proceeds from one false premise to another, either unsupported by, or directly contradicted by, the record.

Further, the City's position in no way renders superfluous any language within the collective bargaining agreement. Nothing in this grievance could affect interpretation or application of the term "consecutively scheduled workdays" as used in Article 24, relating to payment for funeral or bereavement leave. The Union's position, however, would render the superfluous and without potential application Section (2)(E) of Addendum I, by preventing any vacancy longer than twelve days. The Union's position is that a vacancy can only occur during the twelve days of work between days off, and that a scheduled off-weekend terminates a "vacancy." Adoption of the Union position would by necessity mean that the "long-term vacancy" referred to in (2)(E) could be no longer than twelve days, which hardly qualifies as a long-term vacancy. It is the Union's position which would lead to an absurd result.

The Union errs in claiming that the City is attempting to obtain in arbitration what it could not get in negotiations. There is no support for the Union claim that its position represents any type of practice of *status quo*.

The Union's argument requires an illogical interpretation of the rule and would frustrate its purpose. The Union cannot produce any reliable evidence that it ever rejected the City's understanding of the rule. The Union misstates the facts in claiming past practice. The grievance should be rejected.

DISCUSSION

Although the issue of custodian overtime has been an active subject of collective bargaining and contract administration for over fifteen years, this grievance presents a new dispute – how to define the length of "vacancies." Specifically, whether a continuous nine-day vacation leave by a full-time custodian which encompasses the custodian's weekend off is a single vacancy of that length, or two separate vacancies of four and five days. If it is the former, the city was correct in scheduling a relief custodian for the entire period of Johnson's vacation; if the latter, the union prevails on its claim to four days of overtime in the first week.

Common sense and usage would seem to suggest that the entire period of the worker's absence constitutes the vacancy, without particular regard for any non-working days within. However, arbitrations are not necessarily resolved by common sense, but by precise and accepted methods of analysis.

The first step in that analysis, of course, is a review of the relevant language in the collective bargaining agreement. The provision at issue, in force since the 1999-2001 agreement, reads as follows:

> 2. In the event a custodian shift is vacant for any reason, any of the following procedures may be used (this language shall not affect the application of Article 8, Seniority and Job Posting (New Jobs and Vacancies):
>
> A. The City is not obligated to fill any vacant custodian shift.
>
> B. Vacancies of less than five (5) days may be filled by full-time custodians.
>
> C. Vacancies of five (5) days or more may be filled with relief custodians.

D. When an employee is required to substitute on his/her regular off duty weekend, s/he shall be granted time off during the week to compensate for such time worked. The Employer will allow the employees to trade days (by mutual agreement between the employees) providing it causes no operational problems.

E. Long-term vacancies may be filled as a temporary vacancy as provided at Article 8 Seniority and Job Posting (Disputes).

If the language in the agreement is clear, no further exploration is necessary or appropriate. But while the critical concepts may appear obvious on the surface, there indeed exists an underlying ambiguity over the meaning of paragraphs B and C.

Although the language involves the *length* of vacancies, the union seeks to establish the requisite ambiguity by first considering the *nature* of vacancies, and makes the very good point that "vacancies" don't exist when there is a full complement of workers (an assertion with which city witness Kalny agreed). Indeed, it seems self-evident, almost tautological; the presence of all workers assigned to a shift means no shift is vacant; if no shift is vacant, there are no vacancies. Since all employees scheduled to work on the weekend of May 14-15 did so, no vacancy was created; therefore, the union declares, Johnson's first four-day vacancy came to an end, short of the five days which would authorize use of a relief custodian. The union elaborates on this theory in its reply brief, and convincingly establishes that there were no vacancies in the custodial workforce on the weekend of May 14-15. By definition, if the vacancy which began on May 10 thus ended on May 13, there was then a vacancy of fewer than five days.

There is also the matter of the terms the parties used, and those they did not, in drafting the agreement. I believe that words have specific meaning, and that the parties use them knowingly. Although the city states that the text should be understood as implicitly reading, "consecutively scheduled work days," the agreement merely refers to "days." As the union correctly notes, the parties used various terms – "working days," "calendar days," "days," and "regularly scheduled work days" – each with a precise and distinct meaning. Clearly, the parties had the technical skill and understanding of how to draft an agreement that they could easily have used the phrase "consecutively scheduled work days" to further define the length of vacancies in the section under review. The fact that they used the simple, unmodified "days," the union asserts, must mean that they rejected the city's proffered and preferred phrase. The union cites this textual deviation – from what the city said the language meant to the language ultimately adopted – as evidence there was no meeting of the minds along the lines of the city interpretation.

As discussed in greater detail below, there is great merit in this argument.

However, there are countering arguments. The first arises from the language the union itself cites as the "most telling" of the examples of words having specific meaning, the

introductory paragraph of Article 24. The first two sentences of that article employ the phrase "regularly scheduled work days," while the third merely refers to "workdays." The parties thus appear to give two different phrases the same meaning – evidence of informality in drafting that could belie the point the union is trying to make.

Moreover, the union is not correct that an interpretation of the word "days" in the Addendum would necessarily affect the meaning of the terms "days" and "regularly scheduled work days" in Article 24. That article is not before me, there was no testimony about the application of that article, and nothing in this award can or does change the parties' understanding of how that article is interpreted.

Other interpretive techniques also argue for the city's position. Under the union's analysis, no vacancy could be longer than 12 days (the longest time-period between a custodian's weekend off); as the city argues, this would seem to conflict with the provision in the same addendum and section regulating how "long-term vacancies" are to be filled. It is axiomatic that arbitrators are to avoid awards that conflict with other contractual provisions; although "long-term vacancies" are not defined, it is unreasonable to conclude, as the union analysis would compel, that they are limited to 12 days in duration.

Further, the introductory sentence of this addendum and section declares that these provisions apply "(i)n the event a custodian shift is vacant for any reason." Therefore, under the union's own analysis, since there was no vacancy on the weekend of May 14-15, that weekend does not exist for the purpose of understanding Addendum 1, Section 2. I am not sure whether this trumps the union's argument and re-establishes one continuous nine day vacancy, or reinforces the union's argument by unequivocally separating the four and five day vacancies. I am sure, however, that, along with these other points, it establishes the requisite degree of ambiguity in the agreement to justify consideration of bargaining history, past experience and other matters beyond the text of the agreement.

Consideration of past experience will be brief, in that there evidently has not been any. Neither party offered evidence that such a circumstance -- a full-time custodian's vacation overlapping the employee's weekend off in a way that could impact administration of the five-day rule -- had ever occurred before. Indeed, both parties indicate to the contrary – that this was the first time such a situation was known to happen. Given that past experience applying this provision would be conclusive, and thus of the highest importance to the parties, I can only conclude that, in the fifteen years or so since adoption of this provision, an employee's vacation has never overlapped the employee's weekend off in this fashion.

As the city correctly notes, this simple fact unequivocally refutes the union's assertion that its interpretation is the past practice. The union may well have a long-standing *belief* in what the practice has been, and a conviction as to its position on this matter, but it offered no examples of its members being offered overtime when a vacancy of fewer than five days was created in this manner. The union offered testimony that prior supervisors had uniformly applied the provisions correctly in such circumstances, but provided no proof that the situation had ever arisen at all.

Although there is no record of this provision having meaningful application in the past, it is easy to analyze its prospective application. Such analysis overwhelmingly favors the employer's position.

First, there is the matter of disparate treatment of custodial absences, depending on which custodian is absent. Notwithstanding the contractual provision that "(e)ach employee will work a regular shift of six (6) hours per day Monday through Friday and twelve (12) hours per day on alternate Saturdays and Sundays, thus maintaining an average forty-two (42) hour week," unrebutted testimony established that the twelve-on/two-off schedule only applied to custodians at the west side garage, and that the east side custodian worked a normal five-day, 40-hour work week. Therefore, under the union's interpretation, the manner of filling a custodian's five-day absence could turn entirely on whether the custodian worked on the east side or west, and where in the employee's cycle the absence arose. Such a system leads to several inconsistencies, as the following table shows:

{W}Working {A}Absence {X}Weekend Off

	S	S	M	T	W	Tr	F	S	S	M	T	W	Tr	F	S	S
1	W	W	W	W	A	A	A	X	X	A	A	W	W	W	W	W
2	X	X	W	W	A	A	A	A	A	W	W	W	W	W	X	X
3	W	W	W	A	A	A	A	X	X	A	A	A	A	W	W	W
4	X	X	W	A	A	A	A	X	X	A	A	A	A	W	X	X

Under the union's analysis, if a west-side custodian took Wednesday to Friday off, then had an unscheduled weekend, then took Monday and Tuesday off – a five-day vacation – the city could not use a relief custodian (Example 1). But if the custodian took Wednesday to Sunday off (Example 2), including the custodian's scheduled weekend to work – also a five-day vacation – the city *could* use a relief custodian. That's an odd result.

Examples 3 and 4 show an even more egregious example – respectively, a west-side custodian taking off from Tuesday to Friday for two weeks, separated by the non-scheduled weekend, or the east-side custodian taking that same vacation. For each worker, this is a scheduled absence of eight days. Under the union's interpretation, the city could only use a full-time custodian. Given the policy's purpose of letting the city fill vacancies of five days or more with relief custodians it is hard to see how this makes any sense.

Further, since the union's theory is that a non-working weekend ends a period of vacancy, this would mean that the longest continuing vacancy that could occur at the east side garage is five days. But as noted above, the contract provides for the filling of "long-term vacancies;" yet if an extended absence by the east side custodian were interrupted every weekend – as the union's theory would compel – it is hard to see how a long-term vacancy could be created. I earlier stated that a long-term vacancy presumably is lengthier than twelve days; certainly, it is longer than five days.

Clearly, the employer offers a more reasonable and workable interpretation of this provision. Were I sitting as an interest arbitrator charged with determining what the collective bargaining agreement *should* be, I have little doubt that, based on this record, I would find in the employer's favor on this point. But to paraphrase George Bernard Shaw, as a grievance arbitrator, I am to see things not as they should be, but as they are.

And in determining how things are, bargaining history is more relevant than prospective application, and that bargaining history persuasively supports the union's position.

Admittedly, I am somewhat troubled by the ambiguities and uncertainties in that bargaining history. First, there are the several significant holes in the record relating to union correspondence (possibly due to the bargaining unit's switch from Teamsters Local No. 75 to an independent association). [3] Then there is the matter of the tentative agreement the parties reached on October 29, 1990, but which inexplicably was omitted from the list of stipulations when the parties went to interest arbitration. To compound the confusion, that tentative agreement used a third way to define the relevant time-frame: not "days," or "consecutively scheduled work days," but "five working days."

Further, it may be something of a misnomer to refer to the "bargaining history," because the relevant terms, first incorporated in the 1999-2001 collective bargaining agreement, were adduced through efforts (successful, if somewhat protracted) at settling a series of grievances. Still, the give-and-take resolving the Tilot and Schmecel/Kidd grievances does constitute the most significant evidence of what the parties intended Addendum 1, Section 2 to mean. [4] Finally, the history became muddled at its outset by the city's use of different and distinct terms seemingly interchangeably. As noted above, Kalny's letter of June 1997 referred to "temporary vacancies" in its text, but "vacation" in the legend to the three-example chart. Despite these problems in the record, however, I believe the evidence is sufficient to establish by a clear preponderance of the evidence that the collective bargaining agreement does not say what the city wishes it did.

At the time this saga began, the parties' contract and practices conflicted in sharp contrast. While the union enjoyed the contractual guarantee that "any full time custodial positions are afforded any scheduled overtime opportunities before being offered to relief custodians," it agreed that an enforceable practice had developed by which the city could use relief custodians for absences of five days or more. These two concepts obviously create a direct conflict, brought to a head by the filing of the Tilot grievance in January, 1997.

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[3] The import of the missing documentation is discussed below.

[4] Witnesses testified that these provisions were the product of collective bargaining. However, I believe the record clearly establishes that, while there may have been such bargaining going on contemporaneously, matters relating to custodian overtime were the subject of grievance settlement discussions in both 1997 and 1999-2000, and that the provisions incorporated into the respective collective bargaining agreements were arrived at through these grievance settlements.

Because the full-time custodian in the Tilot grievance took vacation overlapping his weekend to work, it offers me no direct guidance in a situation where the vacation overlaps the custodian's weekend off. However, there is something about supervisor Campshure's note to superintendent Darrow – the first extended statement by management on the "five-day rule" – that supports the union cause.

In advising his boss how to respond to the grievance, Campshure wrote that the vacation request "began on Monday Jan. 13 – Monday Jan. 20, *which included Gerry's weekend to work.*" (*emphasis* added). Why would Campshure add that specific detail if it didn't have meaning? Campshure first noted the existence of the unofficial five-day rule, then stated the length of the vacancy – which he explicitly defined in terms of the full-time custodian's work status on the intervening weekend.

If the five-day rule were based on "consecutively scheduled work days," as the city insists, then January 20 could have been filed by a relief custodian whether or not the two days prior were scheduled work days, as it would be either the 8th or 6th day of vacancy; only if the five-day rule were *not* based on "consecutively scheduled work days" would the full-time custodian's work status on January 18 and 19 affect the assignment on the 20th (which would be either the 6th day of a continuing vacancy, or the first day of a new vacancy). This conditional clause – "which included Gerry's weekend to work" – is strong evidence supporting the union's interpretation.

The Tilot grievance settlement, 20 months later, incorporated Kalny's letter and chart of June, 1997 to define how the "five-day rule" would serve as a permanent exception to the contractual language granting all overtime to full-time custodians. That definition, however, has at least two critical shortcomings. First, there is the ambiguity created by Kalny's use of vacancies/vacation; second, while the accompanying chart denotes clearly how several situations are to be addressed, none of the situations relate to the instant grievance.

Applying the analytical concept that the inclusion of one item or aspect is the exclusion of others, the union cites those three examples as indicating the parties meant to exclude non-working weekends from the calculation of the length of vacancies. In general, I accept and apply the rule that "*inclusio unius est exclusio alterius*." I am not sure, however, how dispositive the omission from this chart of an example relating to the precise question before me is.

On the one hand, Kalny testified that the five-day rule was a "hot-button issue" in the settlement discussions; this would make the absence of an example of how to treat an "off weekend" absence very telling. On the other hand, my impression of the testimony and contemporaneous correspondence indicates that the parties were focused primarily on how to protect both overtime for full-time custodians as well as a 42-hour work-week for relief custodians. The absence of an example dealing with how to measure the length of vacancies which overlap a full-time custodian's non-work weekend may be evidence that the union had rejected the city's position on that point, or it may only indicate that this specific issue did not arise at that time. I am just not sure which.

The next development in the "bargaining" history of this provision came following a 1999 grievance over the status, during a contract hiatus, of the provisions in the agreement giving the city the ability to change schedules to avoid overtime. Although this grievance was over an aspect of custodial overtime not directly related to the current dispute, its settlement did result in the contract language now under review.

The first written proposal of what became Addendum 1, Section 2, was union business agent McGowan's October 26, 1999 summary of what he understood the city's settlement position to be: the five-day rule as expressed in the Tilot settlement and June 9, 1997 letter; city ability to change or leave vacant custodial shifts; no items currently under bargaining, and an unspecified economic offer. It seems McGowan was correct in his understanding; on November 10, Kalny stated the city's settlement offer as: the five-day rule as expressed in the Tilot settlement and June 9 letter, maintaining city authority to reschedule custodians to meet vacation needs, and fifty cents on the dollar to the grievants. Unfortunately, McGowan's respnse of December 7 is not in the record. On December 16, Kalny countered with a proposal that increased the city's offer to seventy-five cents on the dollar, stated it was "understood" that the city held the authority to change schedules to address vacancies with a one-week notice, and contained several new elements: deletion from the Tilot settlement of the first paragraph regarding the manner of filling full-time vacancies prior to December 31, 1998; a statement it was "understood" that one-week advance notice of changing schedules did not apply to relief custodians, and a demand that several grievances regarding changed schedules for relief custodians be dropped. Kalny also included this paragraph:

> 2. The parties agree that temporary vacancies created by absences of full-time custodians will be filled as described in paragraph 2 of that memorandum, that is that the five-day rule would apply. The five-day rule, which is described in the attached letter and explanation, dated June 9, 1997, means that regular custodians would fill vacancies of four or less days. If the vacancy is five or more days, relief custodians would fill it. *The five-day rule would include consecutively scheduled work days. For example, an employee was scheduled to work Sunday through Friday; scheduled to have Saturday and Sunday off; and scheduled to work the following Monday through Saturday. If that employee took Thursday and Friday of the first week off and Monday, Tuesday and Wednesday of the second week off, those five days would be considered five consecutive work days and the time would be filled with a relief custodian. (*emphasis in original, *emphasis* added).

Although the letter and attachment of June 9, 1997 focused on other aspects of custodial overtime and failed to consider the issue before me, the rest of this explanation goes directly to the question at hand. If Kalny's commentary forms the binding bargaining history, this grievance must be decided for the employer; if the full history does not reflect incorporation of this provision, the union must prevail.

McGowan's response, on January 12, 2000, accepted the city's seventy-five percent payout, but rejected the city's claimed authority to alter work schedules, and demanded that relief custodians be given at least forty-eight hours notice of vacancy-related shift changes. McGowan did not address the city's proposals regarding amendment to the Tilot settlement (something without any practical impact), that the "five-day rule would include five consecutively scheduled work days" (something with great practical impact), or the demand that the grievances be dropped.

Kalny's February 21 response, which he called the city's "final attempt" to settle the grievance held to several of the items from December 16: a seventy-five percent payout; the Tilot settlement (again, its outdated first paragraph deleted); the use of "consecutively scheduled work days" to measure vacancies implementing the five-day rule; the understanding that the city could address vacation vacancies by changing schedules with one-week notice, and that the grievances over changed schedules for relief custodians be dropped. The city for the first time also acceded to the union's proposal to give relief custodians forty eight hours notice of a change in their schedule.

Again, unfortunately, McGowan's response of March 28 is not in the record. Kalny's April 3 proposal was much as before: seventy-five percent payout, the five-day rule as defined on February 21 and December 16, and forty-eight hours notice to relief custodians of schedule changes. But for the first time, the city agreed to delete – but only through collective bargaining – the contractual provision authorizing the city to change schedules during vacations on a week's notice. Kalny's offer of April 3 thus reiterated the city's position that the five-day rule "would include consecutively scheduled work days," as expressed in his letters of February 21, 2000 and December 16, 1999. (emphasis in original)

Characterizing the city's explanation of the "five-day rule" as applying to consecutively scheduled work days as an actual proposal, the union contends that the city must have known of the union opposition "because it continued to make the offer over and over even after it was rejected several times." At hearing, Kalny seemed to validate this interpretation – that this was proposed contract language, and not just supplemental commentary – when he testified, "Our purpose for putting this language in the proposal was to avoid what's going on now."

Apart from the issue of "consecutively scheduled work days," Kalny's April 3 letter formed the basis of the settlement, expressed by McGowan in his letter to mayor Jadin later that same day: a seventy-five percent payout, that the parties "will agree to the application of the five-day rule (including modification of the contract language)," forty-eight hours notice to relief custodians of schedule changes, and deletion through bargaining of the city's authority to change schedules to meet vacation needs.

Under the settlement, therefore, the union gave up the guaranteed first offer of scheduled overtime, the city gave up the ability to change a custodian's schedule to meet vacation needs, and the parties agreed to put into the collective bargaining agreement "the five-day rule." The city also agreed to pay pending grievances at 75%, which the union accepted,

and agreed to give relief custodians 48 hours notice – all of which shows significant movement by both parties since their respective initial positions.

As noted above, the draft of the relevant contract language which Kalny sent McGowan on May 11 was incorporated into the agreement which the parties executed in October, 2001, and remains in the agreement as the focus of this grievance.

The parties agreed that vacancies of five days or more could be filled by relief custodians, and that vacancies of fewer than five days, if filled, had to be filled by full-time custodians. In so doing, they must have known that a custodian's vacation could overlap a weekend during which the custodian was not scheduled to work.

On three separate occasions – December 16, 1999, February 21, 2000 and April 3, 2000 – Kalny explicitly stated the city's understanding that vacancies were to be measured by "consecutively scheduled work days." (emphasis in original). Yet the language subsequently agreed to and included in the contract omits that critical phrase – even though the provision was drafted five weeks *after* Kalny's letter of April 10, 2000, in which he wrote that he and McGowan "should sit down and clarify the five-day rule which we will then draft into language that can be inserted into the labor agreement at the bargaining table." It would have been an entirely unremarkable bit of draftsmanship to include these three words at any time prior to the parties' execution of the agreement 17 months later – draftsmanship which would have been expected had the parties agreed on their inclusion. Given the correspondence which had gone before, the absence of this critical clause is of paramount importance.

Although the union's case is weakened somewhat by the absence from the record of any written evidence that it rejected the city's concept of consecutive workdays, there is certainly documentary evidence that the union was upset at that notion; the contemporaneous highlighting of that phrase on former union steward Mike Deniel's copy of Kalny's December 16, 1999, coupled with Deniel's testimony, convinces me of that. Indeed, the fact that Kalny himself underlined consecutively in this letter and the two to follow indicates that the city understood this was a new understanding about which it wanted to be explicit.

That union witnesses may have been mistaken about when the relief custodian position was created does not fatally damage their credibility as to the union position on this point (especially since the provision in the various collective bargaining agreements relating to the pool of relief custodians is itself ambiguous and confusing).[5]

Kalny also seemed to validate testimony by union witnesses when he testified that "we couldn't get the Union to directly agree with us on any interpretation." That strikes me as a candid admission that there was no meeting of the minds on this point. Kalny also validated the

[5] From 1989 through to the present, the agreement provided that a pool of relief custodians "would be established," and that "these 'custodian relief' employees will be laborers." The use for over a decade of the conditional and future tenses in the same sentence clearly creates uncertainty as to when the pool of relief custodians was in fact created.

union assertion now as to its position then when he testified, "They were not agreeing to it.... I got the message I think after the first letter when it became clearer that this was language that they didn't like."

In discerning the official union position, I am severely hampered by the fact that the record does not include two critical letters from McGowan to Kalny, namely correspondence of December 7, 1999 and March 28, 2000. Normally, I would draw an inference adverse to the union from this; as the creator of the correspondence, wanting to document its stated opposition to the city's interpretation, the union would be expected to offer this evidence. However, as noted above, the bargaining unit has changed representation during the course of these events, from Teamsters Local 75 to the independent Green Bay Department of Public Works Labor Association. It is entirely possible, for various reasons, that the union's current counsel did not have access to the McGowan correspondence. Although McGowan copied several union members on his letter of October 27, 1999, there is no guarantee that individual union members received and retained the missing letters, or that the relationship between the bargaining unit and McGowan is such that current counsel would necessarily have access to McGowan's files. Nor am I entirely certain that the city retained the McGowan correspondence it received, although I do believe that to be the case. Ultimately, I cannot reach any definitive conclusion as to why neither counsel – who each provided thoughtful and well-prepared representation – offered this important evidence into the record. Given the critical role of bargaining history in this case, I can only regret the absence of the McGowan correspondence, and not draw any inferences.

I am concerned about the potential application of this award, whatever its outcome. Although all the testimony and evidence concerned absences created by the scheduled vacation of a full-time custodian, the collective bargaining agreement applies far more broadly: "In the event a custodian shift is vacant for any reason...."

In addition to vacation, the collective bargaining agreement provides for sick leave for personal or family use (earned one day per month, with no limit on accumulation), unpaid emergency leave, a week's paid personal leave, 7.5 holidays, two weeks' paid leave for state or federal military service, paid time off for jury duty, unpaid leave for pregnancy and three months thereafter, and a year's unpaid leave (with benefits as allowed by law) for union business. That is a lot of paid and unpaid leave to schedule around, and a lot of instances of long and short absences.

I am sure the parties have had considerable experience administering Addendum 1, Section 2 in the context of these many leaves. However, none of that experience is reflected in the record or the parties' arguments. Notwithstanding the contractual reference to "any reason," I do not want to affect the administration of something I know nothing about. Accordingly, I explicitly limit the precedental value of this award to vacancies caused by the scheduled vacation of a full-time custodian at the west side garage.

Although I have previously noted the operational problems that I find to arise from the union's interpretation, it is important to note that an award sustaining the grievance does not completely thwart the city's goal, which was to avoid long-term use of full-time custodians in overtime situations. The contact language as interpreted by the union preserves that interest. Even though the occurrence of the full-time custodian's weekend off ends one period of vacancy, there can still be an unlimited number of vacancies of twelve-days (i.e., of more than five days). Moreover, the city retains the right to leave vacant shifts unfilled. Thus, the cost-saving measure the city sought to implement by the initial development of the five-day rule is not unduly damaged (although some shorter vacancies may now require assignment to a full-time custodian, should the city choose to fill them).

In summary, I find the operational practicalities strongly favor the employer. However, the "bargaining" history – specifically, the reference to "days," and not the "consecutively scheduled work days," as the city repeatedly sought – just as strongly favors the union. And I believe that in a contract interpretation grievance such as this, the decision-matrix passes first through bargaining history; if an answer is found there, an arbitrator should not get to future operational issues (which themselves can be addressed in future bargaining).

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained.

2. The city shall make the grievant whole for 24 hours of overtime he should have been assigned for May 10-13, 2005.

Dated at Madison, Wisconsin, this 2nd day of February, 2007.

Stuart D. Levitan /s/
Stuart D. Levitan, Arbitrator

SDL/gjc
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