BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF GREEN BAY (DPW)

and

CITY OF GREEN BAY DEPARTMENT OF PUBLIC WORKS LABOR ASSOCIATION

Case 377
No. 65812
MA-13330

Appearances:

Mr. Thomas J. Parins, Jr., Esq., Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin, 54305, on behalf of the Association.

Mr. James M. Kalny, Esq., Davis & Kuelthau, S.C., 200 South Washington Street, Suite 300, Green Bay, Wisconsin, 54305-1534, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 2004 labor agreement between the City and the Association's predecessor Union, Teamsters Local 75, the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and resolve a dispute between them involving time off in lieu of overtime given to Relief Custodian Nate Zelzer in October, 2005. The Commission appointed Staff Arbitrator Sharon A. Gallagher to hear and resolve the dispute. A full and fair hearing was held at Green Bay, Wisconsin, on October 5, 2006. A stenographic transcript of the proceedings was made and received by the Arbitrator on October 21, 2006. The parties submitted their initial and reply briefs (which were exchanged by the Arbitrator) on December 21, 2006, whereupon the record was closed. At the hearing the City raised the issue whether the grievance was timely filed. The parties agreed that the Arbitrator should decide the timeliness issue before proceeding to the merits of the case only if she found the grievance was timely filed.

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ISSUES:

The parties were unable to stipulate to the substantive issues for determination herein but they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument in the case as well as the parties' suggested issues.

The Association suggested the following substantive issues for decision if it prevailed on the issue of timeliness:

1. Did the City violate the collective bargaining agreement by giving Nate Zelzer days off on Monday, October 10, 2005 and Friday, October 21, 2005 outside of his duties as a Relief Custodian?

2. If so, what is the appropriate remedy?

The City suggested the following substantive issues for determination herein:

1. Did the City violate the collective bargaining agreement when it filled the Custodian vacancy of October 13 through 17, 2005 with a Relief Custodian in the manner provided in paragraph 2(D) of Addendum 1 of the Contract?

2. If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein and for the reasons stated below, the Arbitrator has found the grievance timely. Having then considered the parties' suggested substantive issues, the Arbitrator finds that both parties' issues contain argument, and that the following issues should be determined in this case:

1. Did the City violate the collective bargaining agreement by giving Nate Zelzer time off on Monday, October 10, 2005 and Friday, October 21, 2005, rather than paying him overtime for work performed on October 15 and 16, 2005?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2: MANAGEMENT RIGHTS

(A) The City retains all rights, powers or authority that it had prior to this contract as modified by this contract, subject to any challenge by the union.

(B) The City shall have the right at all times during the existence of this contract, and subject to provisions herein, to conduct its affairs according to its best judgment and the orders of competent authority, including the power of establishing policy to hire all employees, to dismiss and discipline for just cause, to lay off subject to provisions in the contract, and to determine the methods, means and personnel by which City operations are to be conducted.

(C) The City agrees it will not use these rights to interfere with the employee's rights established by law or by this agreement.

ARTICLE 4. EXTRA AGREEMENT

The Employer agrees not to enter into any agreement with the employees, individually or collectively, to circumvent this Agreement. If and when particular changes are desired to meet unusual circumstances, the parties requesting such change shall notify the other parties in writing at least one week in advance of the change.

ARTICLE 10. GRIEVANCE PROCEDURE

It is agreed by the parties that all disputes or grievances shall be settled in accordance with the procedure outlined as follows:

(1) All complaints and grievances shall be in writing and in triplicate copies. One copy to be given to the supervisor, one to the steward, and one kept by the employee registering the complaint. All complaints and grievances shall be filed within ten (10) working days of the date the alleged claim arose. It is understood that no employee will be harassed or assigned less desirable jobs by their supervisor as a result of filing a grievance.

. . .

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 (1 ½) shall be paid for all hours worked in excess of eight (8) hours per day and/or forty (40) hours per week, whichever is greater, but not both.

Work Day –Traffic Signs Marking*:*

The Employer shall schedule a regular workday schedule determined by the needs of the department which shall generally coincide with the Street Section "day shift" hours, and shall encompass an eight (8) hour period.

. . .

Except as noted above, Traffic signs and marking section personnel will work 6:00 a.m. to 2:00 p.m. instead of 7:00 a.m. to 3:00 p.m. during summer hours.

. . .

Work Day – Others:

The regular workday schedule shall be 7:00 A.M. to 3:00 P.M. with a one-half (1/2) hour on-the-job lunch period and elimination of any other work break, unless otherwise changed by mutual agreement. Employees may take their lunch break at the shop, provided the break is not extended. It is understood that the lunch break will be at 11:30 A.M. unless an exception is granted by a supervisor. (This will allow employees passing near the shop either prior to 11:30 AM or after 11:30 AM to take their lunch at the shop, if desirable. (sic) The work schedule for the Sanitation Section and Motor Equipment Section Mechanics and Shop Helpers shall be 6:00 AM to 2:00 PM from the Tuesday after Memorial Day to the Friday before Labor Day.

. . .

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 (1 ½) 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 one 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 shifts.

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.

. . .

(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

Example #2

Example #3

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.

FACTS CONCERNING THE TIMELINESS ISSUE

It should be noted that in its initial (November 7, 2005) answer to the grievance, the City failed to raise the issue of the timeliness of the grievance. However, in the DPW Director's December 22, 2005 answer, Mr. Weber questioned the timeliness of the grievance and also completely answered the merits of the grievance, as follows:

. . .

As to the issue of the timeliness of the filing of the grievance, the Association stated that the employee involved is a new employee and therefore not familiar with the terms of the agreement and that the officers filed within 10 days of learning of the matter.

As to the question of timeliness, the employee took off two days, 10/10 and 10/21/05. The selection of these days was made prior to the 10th. The grievance was filed on 11/3/05, 14 days after the 10th and 9 days after the 21st. It is therefore timely only for the second day taken off and then only if it was filed on behalf of the employee as opposed to in opposition to the employee engaging in an extra agreement with management.

While I am open to discussion of correction of any perceived conflicts in contract language, given the circumstances described above and the language of Article 2.D I will sustain the denial of the grievance at Step II.

. . .

The involved employee, Nate Zelzer, stated herein that as of October, 2005 he was the least senior employee who had signed on the Relief Custodian (RC) posting; that his regular job at that time was Sanitation Laborer (SL); that as an SL he regularly worked 7 a.m. to 3 pm. Monday through Friday with every weekend off; as of October, 2005, Zelzer was unaware how contract provisions indicated Relief Custodians should be assigned; that prior to and after October 13 through 17, 2005, Zelzer was never asked or required to take time off in lieu of overtime pay for performing custodian work as an RC on the weekends.

Prior to October 10, 2005, Sanitation Superintendent Debbie Epping and Supervisor Dick Litkey met with Zelzer and asked if he wanted to work as an RC replacing Custodian Gerri Kidd while Kidd was on vacation from October 13 through 17, 2005. This time period included Kidd's regular work weekend on October 15 and 16, 2005. Epping and Litkey told Zelzer that if he did not take the RC vacancy it would be offered to someone else who had signed the RC posting; and that if Zelzer took the offered RC work, he would have to take two days off rather than be paid overtime for Kidd's regular weekend work on October 15 and 16th. It is significant that no Union representative was present during this meeting and that the City in no way notified the Union of its meeting with or its treatment of Zelzer concerning the October 13 through 17, 2005 Relief Custodian vacancy.

In regard to when the Association knew of the City's actions toward Zelzer, it is undisputed that Union Representative Wied did not find out about Zelzer being allowed to take leave on October 10 and 21 without putting in a leave slip until the week of October 24th. Wied promptly investigated the situation, and he filed the instant grievance nine working days later, on November 3, 2005.

POSITIONS OF THE PARTIES – TIMELINESS

Association:

The Association argued that the grievance was timely filed as it was filed "within ten…working days of the date of the alleged violation" pursuant to Article 10. In this regard, the Association noted that the 10 days should be counted from the day the claim arose – that is from the last date Zelzer took off in lieu of being paid overtime which completed the "deal" Epping and Litkey made with Zelzer. This is so because Zelzer was new to the Relief Custodian position and he did not know that any provisions of the contract dealt with RC assignments. By Epping's own admission, had Zelzer, been unable or unwilling to complete any part of the deal (from October 10 through October 21) prior to its completion, Epping stated Zelzer would have had to take leave to get either Monday, October 10th, or Friday, October 21st or both dates off. In addition, Union Representative Wied did not find out about the deal offered to Zelzer by managers until the week after October 21st, Zelzer's second day off. Wied stated that a full-time custodian came to him and reported that Zelzer had taken time off without putting in a leave slip. Wied investigated the custodian's report, including questioning Zelzer, whereupon he filed the instant grievance on November 3, 2005, less than 10 days after October 21st.

The Association noted that no evidence was presented herein to show that the Association improperly delayed in filing the grievance after Wied became aware of the situation and no evidence was proffered to show that the City had been prejudiced by the timing of the Association's filing of the claim. In the circumstances, the Association urged the Arbitrator to find the grievance timely and to proceed to decide the merits of the case.

City:

The City argued that the language of Article 10 is old and does not allow for the Association's approach (not contained in the contract) to count the 10 filing days from when the Association knew of the contract violation. By any count of the 10-day period,[1] the Association was late filing this grievance and the City urged the Arbitrator to strictly construe the time limit contained in Article 10, given that such a strict construction would not adversely affect/impact any employees other than Zelzer.

REPLY BRIEFS - TIMELINESS

Association:

The Association noted that the tolling dates used by the City in its initial brief were unsupported by the contract language and the facts. Indeed, Epping demonstrated herein that she was unsure of the dates involved. The Association asserted that Article 10 clearly states that the 10 days for initial grievance filing are "working days" and that October 21st is the proper tolling date to use in this case, as it was on that date that the City's deal with Zelzer was fully completed. As the grievance was filed on November 3rd, nine working days after October 21st, it was timely filed pursuant to Article 10.

The Association urged that Zelzer's reasons for not filing the grievance are irrelevant. The Association argued that this Arbitrator's decision in Village of Ashwaubenon, MA-10551 (Gallagher, 8/2/99) cited by the City in its initial brief is in fact on point for its arguments herein. In addition, the Association asserted that the instant grievance will affect all Relief Custodians in the future and a remedy for Zelzer would merely make him whole for the City's contract violation herein, and not constitute a windfall for Zelzer.

City:

On reply, the City made no arguments regarding timeliness.

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1 The City described the timeliness of this case as follows. It noted that Epping stated she spoke to Zelzer during the week of September 25, 2005 and that he accepted the deal on September 27th; Zelzer stated that he met with Epping between October 3 and 6, 2005, the assignment began on October 13 and Zelzer took his second day off on October 21.

DISCUSSION OF TIMELINESS

The Association is correct that Article 10 clearly and specifically requires that the parties count days using working days, not calendar days, when filing an initial grievance. The question arises, what dates should fairly be used to begin tolling the 10 working day period for timely initial filing herein. To determine the correct date, an analysis of the facts and the exact language of Article 10, (1) is necessary.

In this case, Epping and Litkey offered Zelzer a deal to work from October 13 through 17, 2005 for full-time custodian Kidd. The deal was begun by Zelzer on October 10 and completed by him on October 21, 2005 (when he took the second day off) and not before. I note that Epping admitted herein that had Zelzer been unable to complete every aspect of the deal, he would have had to take leave on October 10th and/or October 21st. In addition, the evidence was undisputed that the Association did not know that Zelzer had been allowed to take leave without putting in leave slips on October 10 and 21st until on or about October 24th when a full-time Custodian reported it to Wied.

Significantly, Article 10 does not use the more stringent language often seen in such provisions which would require a grievance to be filed in reference to the date of the injury or occurrence. Nor does this contract require the Grievant/Association to file the grievance within 10 working days of the date they knew or should have known that a violation of the contract had occurred. Here, the language is much broader by use of the phrase referring to when "the alleged claim arose." Clearly, there can be differences of opinion between the parties as to when the "alleged claim" arose. In these circumstances Article 10 makes the Association's consideration and use of the last date on which the deal or transaction was completed by Zelzer as the tolling date fair and reasonable.

Significantly, no evidence was submitted to show that Zelzer spoke to anyone about the deal he had made until he spoke with Wied about the matter on or about October 24th. Wied quickly investigated the situation and filed the instant grievance, nine working days after he (Wied) became aware of the situation. In this Arbitrator's view the issue whether Zelzer should have been paid overtime or required to take time off arose only after Zelzer fully performed his part of the deal on Friday, October 21, 2005 by taking the second day off in lieu of overtime pay without putting in a leave slip.

Therefore, construing Article 10 liberally in order to avoid forfeiture as should be done in these cases, I find that the "date the alleged claim arose" in this case must be October 21, 2005, when Zelzer performed all aspects of the deal and the transaction could be said to have been completed in its entirety. This conclusion is further supported by Epping's admission that until Zelzer performed all aspects of the deal, the deal could have been changed/altered by Zelzer or the City's failure to perform some part of it.

The City has argued that denial of the grievance would not adversely affect any other unit employees. I disagree. This Award will affect how the parties read and apply Articles 10 and 4 in the future. Even if the City's argument were accurate, it is not a valid reason to deny a grievance, that an award thereon will affect none other than the grievant. Finally, I note that the Association has alleged a violation of Article 4 herein. This allegation further supports my conclusion that it was the completion of the alleged individual agreement made between Epping, Litkey and Zelzer which triggered the tolling time for filing instant grievance.

In all of the circumstances of these cases, I find the grievance timely.

POSITIONS ON THE MERITS

Association:

The Association argued that Section 2D of Addendum 1 does not apply to Relief Custodians (RC's) and it therefore should not be applied in this case. In this regard, the Association noted that it was undisputed that Section 2D was placed in the agreement prior to the time when RC's were employed by the City. Specifically, Section 2D was placed into the body of the contract to address the situation when a full-time custodian would be forced to work on his/her regular weekend off (resulting in his/her working 4 consecutive weeks) due to leave taken by other full-time custodians, as the City then consistently staffed full-time custodians 24 hours/day, 7 days/week. In addition, the Association observed in any event, that the express language of Section 2D could not apply either to RC's or Sanitation Laborers as they do not have regular off-duty or regular on-duty weekends. Indeed, full-time custodians are the only unit employees who have such regular off-duty and on-duty weekends. As Zelzer was employed in his regular position, (Sanitation Laborer) on October 10 and 21 when he was forced to take those days off in lieu of receiving overtime pay while working as an RC from October 13 through 17th, Section 2D did not apply to him and he should have been paid overtime for October 15th and 16th and he should have had to take leave in order to be off on Monday, October 10 and Friday, October 21.

Also, Zelzer volunteered to work as an RC when Epping offered him the work - he was not "required" to work the weekend of October 15 and 16, 2005. The Association urged that the parties' use of the word "required" showed their intent to apply the language of Section 2D only to the situation where a full-time custodian is forced to work his/her off-duty weekend and that all verbiage of Section 2D would be given affect by the Arbitrator using this approach.

The Association also urged the Arbitrator to give City Exhibit 1 no weight herein. In this regard, the Association pointed out that the document was not considered by Epping when she decided how to administer Addendum 1; that no evidence was submitted to show the circumstances surrounding City Exhibit 1 or how the Exhibit should be interpreted; and that no evidence was submitted to show whether or not the involved employee was "required" to work or volunteered.

The Association also asserted that the examples the parties included in Section 2D showed that Example 3 is fully applicable to Zelzer's situation and that nowhere among the examples did the parties list one where an RC is given days off in lieu of receiving overtime pay. Notably, on cross-examination, the Association noted that Epping could not explain how Example 3 was distinct from Zelzer's situation and that the City submitted no evidence to dispute Association Representative Wied's testimony concerning bargaining history and the past practice surrounding time off for full-time custodians.

Finally, the Association urged that the facts of the cases show that the City also violated Article 4 by its actions toward Zelzer as Epping's "deal" with Zelzer essentially amounted to direct dealing "to circumvent" the labor contract with Zelzer where no effort was made to include the Association in discussions surrounding the "deal" and where Epping failed to give the Association any prior notification as required by Article 4. Also, the deal Epping offered Zelzer was take-it-or-leave-it as Epping made it clear that if Zelzer did not accept the RC work she would offer it to another RC. In these circumstances, the Association argued that the City separately violated Article 4 by its actions toward Zelzer.

City:

The City argued (assuming the grievance was found timely) that the introductory language in Paragraph 2 of Addendum 1 clearly gives the City wide latitude to apply any part of Paragraph 2 (A through E) to any custodian shift vacancy. In addition, Section 2D is clear and unambiguous and is not limited by its terms to use with full-time custodians as Section 2D applies to "employees," a general term used throughout the Agreement. Here, Epping required an "employee," Zelzer, to substitute for another employee. As the Association failed to provide compelling evidence to support the Union's reading of the Agreement, the Arbitrator would be modifying the agreement were she to rule in the Union's favor herein.

In addition, the City argued that the phrase in Addendum 1, Paragraph 2D "required to substitute their regular weekend off" by its terms does not apply only to full-time custodians and it need not be read to mean that the employee must be forced to give up their regular off weekend. In addition, Epping stated herein that she conferred with Supervisor Litkey to confirm that her reading of Paragraph 2D was correct. Finally, Epping stated that in her two years as Superintendent, this issue never arose and that after the grievance was filed, Epping found an example (City Exh. 1) showing Epping's interpretation of Paragraph 2D was correct.

Furthermore, the City argued that the bargaining history evidence herein actually supports the City's case. In this regard the City noted that the only evidence proffered by the Association was the opinion testimony given by Association Representative Wied and Wied admitted his reading of Paragraph 2D is "archaic"; that no explanation was given why the language found in Paragraph 2D was moved to Addendum 1 in 1997 or 1998 and listed as one of the Addendum 1, Paragraph 2 "procedures to be used if a custodian vacancy occurs." On this point, the City urged that as Paragraph 2 contains a list of procedures applicable to all "employees" and given that the parties were addressing the use of RC's for the first time, that

they intended for Paragraph 2D to apply to all custodians. As Paragraphs 2B and C expressly limit the use of RC's, the City urged that the parties could have limited the applicability of Paragraph 2D but that they chose not to do so.

The City also urged that the Association failed to demonstrate why Paragraph 2D should not be applied to RC's except to say that the language of Paragraph 2D had existed in the agreement before the City created any RC positions and it had been used to protect full-time custodians by granting them time off when they were forced to work one of their two regular off-duty weekends. The City queried why the same clear and unambiguous language placed in new Paragraph 2D could not apply equally to RC's given the Association's failure to offer any evidence that the parties mutually intended to apply the language otherwise.

The City then looked to the description of the RC pool which the parties included in Addendum 1 as support for its conclusion that Paragraph 2D should apply to all custodians. Furthermore, the City contended that Paragraph 2D must be read in light of Article 2 Management Rights, which requires the Association to meet the burden of showing that Addendum 1, Paragraph 2D prevents the City from using the option stated therein for RC's. The City concluded that the burden is on the Association to prove that both parties intended to limit Paragraph 2D to full-time custodians (ER Brief p. 25) and that it failed to meet this burden as no evidence was proffered to show the parties' true intent in creating Paragraph 2D.

In addition, the City asserted that the Chart/Examples at page 45 of the agreement does not preclude the City's application of Paragraph 2D to RC's. First, the City noted that the Chart does not state that it is an exclusive list of options for RC's, and every Example listed on the Chart involves seven vacation days taken by a full-time custodian which is more than the days Zelzer agreed to work. The City then looked at various ways of applying the Examples in that Chart and argued that the parties never intended RC's to gain a windfall from replacing a full-time custodian (50 hours' pay not 40 or 42 hours' pay).

The City contended that several of the Association's arguments herein were baseless or amounted to "red herrings" not relevant to the case. In this regard, the City noted that the submission of a leave request is not required by Paragraph 2D. Furthermore, the City did not force or direct Zelzer to take any actions; and Zelzer did not discuss receiving overtime pay rather than receiving time off with Epping. In the City's view, Zelzer must be charged with having knowledge of his rights under the labor agreement. Finally, the City asserted that the Association's proposed remedy was unclear. The City noted that the remedy could range from 8 to 18 hours of overtime, for Zelzer. As Paragraph 2D is more specific than Article 4, it should control so long as the City has not circumvented the agreement, which the City strongly urged it had not done. Based on the above, the City urged the Arbitrator to deny and dismiss the grievance.

Reply Briefs

Association:

The Association reiterated many of its initial arguments on Reply. In addition it noted that concerning City Exhibit 1, the City failed to prove who prepared the note whether it was accurate, whether the employee involved (Phillips) or the Association ever received a copy of the note and what circumstances prompted the note (e.g. whether or not Phillips was forced to work a weekend). The Association contended that the City's assertions require the application of more than one of the procedures listed in Paragraph 2 but that this is not allowed under the clear language of the Paragraph; that only Paragraph 2C describes the circumstances under which RC's may be used to fill vacancies and if 2C is not applied, a full-time custodian must be used to fill the vacancy under 2D. The Association asserted that the City's argument concerning the use of the word "employees" in Paragraph 2D was misplaced as there were other various references to different types of employees in the contract - - Building Custodians and Relief Custodian Employees.

Even if Paragraph 2D could be applied to RC's, Paragraph 2D states that they would have to be forced or required to work their regular off-duty weekend as RC's do not work on any weekends they cannot and do not have regular off-duty weekends. Here, Zelzer, as a Sanitation Laborer, had no duty/off-duty weekends when he volunteered to work the weekend Epping offered him in October. The Association urged that the City's reading of Paragraph 2D would read out the word "required" from the paragraph. Furthermore, the Association asserted that Paragraph 2D gives the City no options – it must give the employee time off. The Association also noted that Litkey failed to testify herein making Epping's testimony concerning Litkey's opinion of her actions at least self-serving if not incredible hearsay.

The Association contended there was no basis for the City's assertions that Representative Wied's testimony is questionable/incorrect as Wied's statements herein were corroborated by Kathleen Tilot and stand uncontradicted. The Association urged that the language of Addendum 1 is more specific and must trump the more generalized contractual management rights clause. Other City arguments, including those concerning the proper interpretations of the Chart/Examples in Addendum 1 and other language items were designed to confuse the issues, in the Association's view. The Association denied that Zelzer would receive a windfall if the Arbitrator ruled in his favor and noted that the Association's remedy herein would only make Zelzer whole for the overtime Zelzer should have been paid – 8 hours at time–and–one-half, for the 12 hours per day Zelzer worked on Saturday and Sunday less the time off he received at straight time (16 hours).

Finally, the Association urged the Arbitrator to find that the City had violated the contract as the Association interprets it and to order the City to follow the agreement in the future.

City:

The City reiterated many of its initial arguments on Reply. In addition, the City argued that prior to 1998-99 RC's and full-time custodians were dealt with separately but after 1998-99 when Addendum 1 was created, the issues for both groups were combined. The City contended that the Association's argument that the City's failure to call Mr. Kalny regarding the bargaining history concerning Addendum 1 and its Chart/Examples should raise a presumption against the City's assertions herein. Indeed, the City observed that the Association failed to submit any evidence to prove the bargaining history surrounding Addendum 1 and that the record facts showed that the circumstances concerning the utilization of custodians have changed substantially since 1998-99. On this point, the City asserted that the Association failed to prove mutual intent of the parties in agreeing upon Addendum 1 and that three of the City's supervisors (Epping, Litkey and Lemerond) clearly agreed that Epping's interpretation of Paragraph 2D was correct. The City noted that if the parties had intended Paragraph 2D to apply only to full-time custodians they should have so stated and deleted the reference to "employees." In contrast, the City's interpretation gives full affect to all of the language of the Addendum.

Finally, the City argued that no "extra agreement" was entered into with Zelzer - - the City only offered Zelzer an assignment – and the City treated Zelzer fairly. The City therefore urged the Arbitrator to deny and dismiss the grievance.

DISCUSSION ON THE MERITS

The City has argued in depth regarding the proper interpretation of Paragraph 2D of Addendum 1. However, the only logical interpretation of that language which gives full meaning to every word in the Section is the interpretation advanced by the Association. This conclusion is supported by virtually every piece of credible documentary and testimonial evidence in this case. In addition, I note that it is undisputed that the language now contained in Paragraph 2D was applied only to full-time custodians before it was placed in Addendum 1 in 1998; that prior to the parties' agreement to Addendum 1 the City only employed full-time custodians; that full-time custodians are the only unit employees who have traditionally had regular on-duty and regular off-duty weekends. Thus, the phrase "regular off-duty weekend" can only be understood to apply to full-time custodians. This interpretation is further supported by the reference in Paragraph 2D to trading work days which could not apply to RC's as they are only assigned to fill custodian vacancies based upon the City's decision, on a case-by-case, basis to fill a specific vacancy.[2] Thus, the language of Paragraph 2A and D further supports the Association's overall interpretation of Paragraph 2D.

2 I note that Paragraph 2A clearly states that the City is not obliged to fill vacant custodian shifts.

Furthermore, to read Paragraph 2D as the City would have us do, would essentially require the reading out or deletion of the phrase "regular off-duty weekend." Also, the record evidence showed that the language of Paragraph 2D has been applied only to full-time custodians (with one alleged exception) prior to this case. In this regard, I note that Association Representative Wied's testimony regarding the past application of Paragraph 2D and the bargaining history of the language which now appears in Paragraph 2D stood uncontradicted by the City.

In addition, I note that the City's proffer of Epping's testimony regarding what Litkey told her he thought Paragraph 2D meant constituted pure, unsubstantiated hearsay. As no explanation was offered why Litkey did not testify and given Kathleen Tilot and Wied's unchallenged, credible testimony herein, Epping's testimony on this point was insufficient to undermine the Association's case on this point.

Also, the submission of City Exhibit 1 also constituted unsubstantiated hearsay, as no competent witness was able to properly identify, authenticate or explain its contents.

Furthermore, the record is clear that Epping did not rely upon City Exhibit 1 in deciding to offer Zelzer the RC work deal. Indeed, Epping admitted that she only found City Exhibit 1 after the grievance herein was filed and that she never spoke to anyone involved in the situation which lead to the creation of City Exhibit 1. In these circumstances and given the fact that Epping found only one arguable example from the past to support her approach, I find City Exhibit 1 to be unpersuasive and insufficient to undermine the Association's evidence and arguments herein.

In addition, I find the Association's analysis of how Addendum 1 should have been applied to Zelzer's situation to be logical and persuasive given the evidence herein. Here, the evidence showed that in October, 2005, Zelzer was employed 8 hours per day: Monday through Friday as a Sanitation Laborer, that Zelzer could only work as an RC if requested or required by the City based upon Zelzer's signing of the RC posting; that because on October 10 and 21, 2005, Zelzer was employed as a Sanitation Laborer, when Zelzer worked the weekend of October 15 and 16, 2005 for full-time custodian Kidd, Zelzer should have been paid for those days as shown by the Examples in Addendum 1.[3] In these circumstances, but for the deal he made with Epping, Zelzer normally would have had to put in a leave slip for the 16 hours he took off on October 10 and 21, 2005 while employed as a Sanitation Laborer. It is also clear based upon this record that Zelzer was not "required" to work the weekend of October 15 and 16, but that he voluntarily agreed to do so when Epping offered him the work as part of the deal to replace Kidd.[4]

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3 I note that the Examples contain no options for the City to give RC's or full-time custodians time off rather than paying them for the hours worked.

4 Epping's statement that she would offer the work to another RC if Zelzer refused was insufficient to destroy the voluntary nature of Zelzer's agreement to the deal.

Although the City argued that circumstances under which the City has used RC's have changed over time, it failed to submit any evidence to support this assertion. The parties have argued regarding the applicability of the Chart/Examples in Addendum 1. In my view, although the Examples do not address the situation before me, they show the parties' intentions - - to prefer full-time custodians as weekend overtime providers and that full-time custodians should be guaranteed 42 hours per week even at the expense of the RC's normal 40 hour work week.

The City has argued that the Association's requested remedy constituted a windfall for Zelzer or that it was unclear, and as only Zelzer was affected by this case, no remedy should be granted. I disagree with all of these assertions. The Association's requested remedy was 8 hours of overtime pay, that is the difference between the hours Zelzer worked on October 15 and 16 (24 hours) and the time off he took 8 hours per day (16 hours total) on October 10 and 21, 2005. The requested 8 hours at time–and-one-half would make Zelzer whole, not constitute a windfall. The City's assertion that because it feels the Award in this case will affect only Zelzer, no remedy should be ordered herein has no logical or reasonable basis. This Award will affect not only Zelzer but also the compensation paid to RC's in the future in similar situations.

I turn now to the Association's assertion that Epping's actions toward Zelzer also constituted a separate violation of Article 4. In my view, the evidence herein failed to prove that the City violated Article 4. This is so because Article 4 implicitly requires the City to possess the intention to "circumvent" the labor agreement. The undisputed evidence herein showed that Epping never had such an intention - - indeed, she believed she was following the agreement by offering Zelzer the deal described herein. Although in October 2005, Epping, was at least ill-informed regarding the use and application of Addendum 1 and she admitted she did not read all of Addendum 1 and its examples, and that she did not search City files for examples of how to treat Zelzer or seek advice (beyond Litkey's) before offering Zelzer the deal herein, in all of the circumstances herein, Epping's error in interpreting Addendum 1 did not rise to the level of an intentional attempt to circumvent the terms of the labor agreement.

Based on the above, the grievance will be sustained in part and denied in part, as follows

AWARD

The grievance was timely filed. The City violated the collective bargaining by giving Nate Zelzer time off on Monday, October 10 and Friday, October 21, 2005 rather than paying him overtime pay for work he performed on October 15 and 16, 2005. Therefore, the City is hereby ordered to make Zelzer whole by paying him 8 hours pay at time-and–one-half (of the effective rate of pay on and after October 10, 2005) and the City is also ordered to follow and apply the agreement in the future pursuant to this Award.

Dated in Oshkosh, Wisconsin, this 9th day of March, 2007.

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

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