

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LOCAL 97, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF WAUKESHA

Case 171
No. 65885
MA-13353

(Kevin Warras – Cemetery Layoff Grievance – Remedy Issues)

Appearances:

John Maglio, Staff Representative, AFSCME Council 40, Post Office Box 044316, Racine, WI 53404-7006, appearing on behalf of the Union.

Donna Hylarides Whalen, Assistant City Attorney/Human Resources Manager, 201 Delafield Street, Waukesha, WI 53188-3646, appearing on behalf of the City.

SUPPLEMENTAL ARBITRATION AWARD
CLARIFYING THE REMEDY

The City of Waukesha (hereinafter referred to as the City or the Employer) and Local 97, AFSCME, AFL-CIO, (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the layoff of Kevin Warras from the City's Prairie Home Cemetery. The undersigned was so designated. A hearing was held December 4, 2006, in Muskego, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. No stenographic record was made of the hearing. The parties submitted post hearing briefs, and reply briefs, the last of which was received on January 12, 2007, whereupon the record was closed. An Award was issued on February 9, 2007, wherein the grievance was granted, and the Employer was directed to make the Grievant whole for his losses:

...

The City violated the collective bargaining agreement by employing seasonal employees while a regular employee was laid off with recall rights.

The appropriate remedy is to (1) cease and desist from employing seasonal employees while a regular employee is laid off with recall rights, and (2) make Kevin Warras whole for his losses during the period in 2006 during which seasonal employees were employed by paying him his regular wages for those times, less interim earnings, and providing him the benefits specified in the contract for full-time regular employees for those periods.

The arbitrator will retain jurisdiction over this matter for the sole purpose of clarifying the remedy if requested.

...

Following the issuance of the Award, the parties engaged in discussions of the remedy, and invoked the arbitrator's assistance to determine the amount of the Grievant's interim earnings. By July, the remaining remedy issues had been narrowed to (1) the amount of orthodontia benefits the Grievant was entitled to receive during the period of his layoff, and (2) the amount of overtime the Grievant was entitled to during the period of his layoff. At the direction of the arbitrator, the parties submitted position statements on these issues, the last of which was received on July 9, whereupon the record was closed.

RELEVANT CONTRACT LANGUAGE

ARTICLE 10. - WORKDAY AND WORKWEEK

...

10.03 Overtime.

(A) Overtime - Full-Time

1. Overtime pay at the rate of time and one-half (1 ½) shall be paid for the following:
 - a) All work outside the daily work schedule or an authorized shift operation change;
 - b) Any work performed on Saturday;
 - c) All work performed over eight (8) hours in any one work day or in excess of forty (40) hours in a work week.

. . .

(C) Overtime – Seasonal Employees Only

1. Overtime pay at the rate of time and one-half (1 ½) shall be paid for all work performed over eight (8) hours in any one work day or in excess of forty (40) hours in a work week.

. . .

10.06 Overtime shall be divided as equally as practicable among the employees able to do the work.

. . .

**ARTICLE 18. – INSURANCE AND
WISCONSIN RETIREMENT SYSTEM**

. . .

18.03 Dental Insurance. The Employer agrees to offer a group dental plan to eligible employees in the same manner and with the same benefits as provided by the City of Waukesha to its Streets and Parks employees (See appendix A).

. . .

APPENDIX “A”

GROUP DENTAL INSURANCE PROGRAM

DELTA PREMIER

. . .

Orthodontics:	50% to \$1,500 Lifetime Maximum	. . .
Straightening of Teeth	Up to age 19	. . .

THE DISPUTE OVER THE ORTHODONTIA BENEFIT

The City offers an orthodontia benefit to employees through Delta Dental. The benefit is 50% of the charges up to the benefit maximum. Dependent children are eligible for up to \$1500 of orthodontia benefits over the lifetime of their coverage. The Grievant’s child was fitted with braces in May of 2006, during the period of the Grievant’s layoff, at a cost of \$4953.80. A secondary plan through another employer paid \$1000, leaving a balance of \$3953.80.

The Delta Dental Plan describes its method of paying orthodontia benefits as:

Delta Dental calculates all orthodontic treatment schedules according to the following formula: One-fourth of the total case fee is considered the initial or down payment fee. The remainder of the allowed fee is divided by the total number of months of treatment. Monthly payments are made by Delta Dental at the coverage percent stated on the Summary of Benefits page.

Arguments:

The City calculates that its liability for the orthodontic work in this case is:

- 50% of the case fee - $\$4953.80 / 4 = \$1238.45 \times 50\% = \$619.23$ as the initial fee
- 50% of the monthly treatment cost - $\$3715.35$ balance divided by 25 months of treatment per the treatment plan = $\$148.61$ per month $\times 50\% = \$74.31$ per month $\times 6$ months of treatment during the time the Grievant should have been employed per the Award ¹ = $\$445.86$.
- A total of $\$1065.09$.

For its part, the Union takes the position that the payment arrangements between Delta and its various providers are not relevant to the benefit due the Grievant. He paid nearly \$4,000 out of pocket, even taking into account the \$1,000 provided by secondary insurance. The orthodontic benefit for full-time City employees is 50% of the cost up to a maximum of \$1500. The separate banding fee benefit is \$187.50. The Union argues that he is entitled to reimbursement of \$1687.50, the maximum benefit allowable under the plan. The Union rejects the City's effort to pro-rate the cost over 25 months, noting that this would mean that any employee who terminated employment within two years after incurring orthodontia costs would be denied at least a portion of his or her contractually guaranteed fringe benefits. ²

¹ The City's argument states that there would be six months, but in the same sentence, it lists seven months: June, July, August, September, October, November and December. As discussed below, the correct figure is seven months.

² The City does not address the banding fee of \$187.50. In an earlier calculation sent by e-mail to the Union on May 30, the City listed the banding fee as the only portion of the initial charge it would pay. In this subsequent calculation, the City concedes that it is liable for 50% of the initial charge. According to Delta Dental, there is no separate stand alone banding fee or benefit. It is part of the initial charge.

DISCUSSION:

The Grievant is entitled to be made whole, and that means that he is to receive no more and no less than he would have if he had been a full-time employee at the time he incurred these orthodontia costs. The dental insurance program specified under Appendix "A" of the collective bargaining agreement is Delta Dental. With the approval of the parties, the arbitrator contacted Delta Dental to determine what these benefits would have been.

According to Delta's Customer Service Department, a full-time employee whose child had braces fitted at the end of May would have received one-quarter of the total cost as the initial fee at the time of the fitting, and 50% of that amount would have been paid as a benefit. The benefits are thereafter payable on a monthly basis, based upon 50% of the remaining cost divided by the projected months of treatment. These monthly payments continue until the earliest of (1) the lifetime maximum benefit is reached; (2) the treatment ends; or (3) the employee terminates employment or becomes otherwise ineligible to participate in the insurance group. Benefits are paid on a one month delayed basis, so that, for example, an employee terminating employment in November would still receive a monthly benefit payment in December.

Applying this to the Grievant's case, he would have received benefits largely on the basis of the City's calculation, adjusted for the fact that the monthly fee payments would have extended into December, for a total of seven months. Thus the initial benefit would have been \$619.23, and the monthly benefits would have totaled \$520.17, for a total benefit of \$1139.40.

THE DISPUTE OVER THE OVERTIME PAYMENTS

The City pays time and one-half to all cemetery employees for hours in excess of 8 in a day or 40 in a week. During the period of the Grievant's layoff, seasonal employees received 39.5 hours of overtime.

Arguments:

The City argues that the Grievant is entitled to the average amount of overtime worked by each seasonal employee, amounting to 7.9 hours. The Union argues that, since the violation consisted of employing seasonal employees while the Grievant was on layoff, the remedy must assume that seasonal employees would not have been hired and the Grievant would have worked all 39.5 hours of overtime.

Discussion:

The City employed five seasonal employees while the Grievant was laid off, and those seasonal employees worked the same schedule as regular full-time employees. Between the five of them they worked 39.5 hours of overtime, an average of 7.9 hours apiece. Section 10.06 of the contract provides that "Overtime shall be divided as equally as practicable among the employees able to do the work" and does not distinguish between the regular full-time and the seasonal employees. Contrary to the argument of the Union, I cannot assume for remedy purposes that the Grievant would have supplanted all five seasonal employees if he had been retained, as they all worked a full-time schedule during those months. Per the terms of the contract, I conclude that the Grievant's entitlement to overtime pay would have been 7.9 hours, the amount that he would have received had the available overtime been equalized.

On the basis of the foregoing, and the record as a whole, I have made the following

SUPPLEMENTAL AWARD

1. The Grievant is entitled to receive \$1,139.40 in reimbursement for orthodontia expenses incurred during the period of his layoff.
2. The Grievant is entitled to receive 7.9 hours of overtime pay.

Dated at Racine, Wisconsin, this 27th day of July, 2007.

Daniel J. Nielsen /s/

Daniel J. Nielsen, Arbitrator

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