BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 284, AFSCME, AFL-CIO

and

CITY OF EAU CLAIRE

Case 273
No. 66722
MA-13610

Appearances:

Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Stephen Bohrer, Assistant City Attorney, City of Eau Claire, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2006-2008 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve a grievance regarding overtime. A hearing was held on May 10, 2007, in Eau Claire, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on July 9, 2007.

ISSUE

The issue is:

> Did the City violate the collective bargaining agreement when it directed seasonal employees rather than a permanent employee to work overtime on July 19, 2006? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

Article 14 – OVERTIME

Section 8. Seasonal full-time employees shall not be scheduled to work overtime. However, they shall be eligible to work up to two (2) hours of overtime with their assigned crew when an extension of the normal work day is required. For call-in or call-back situations, the seniority provision for overtime shall prevail.

BACKGROUND

This grievance arose when overtime was given to a seasonal employee rather than a permanent employee on July 19, 2006. Erik Smith and Nick Kurth were working as full-time seasonal employees. Their regular duties on the day in question were to line and drag baseball fields at a park called Mt. Simon. They were supposed to end their day at 4:00 p.m. The baseball games were supposed to start at 10:30 a.m., 1:00 p.m., and 3:30 p.m. The games are expected to run around one to two hours. On July 19, 2006, the games ran late. The 1:00 p.m. game started late, and the 3:30 p.m. game could not start on time.

Terry Deetz and Jered Shaw are permanent employees also assigned to the Parks and Recreation Department, and they were teamed up to work on lining and dragging fields in a different set of baseball fields at Carson Park. The Department supervisor, Devon Schoening, told Deetz and Shaw to checking in during the day at Mt. Simon Park in case the other crew was not there. Deetz and Shaw prepared the fields at Mt. Simon around noon for the next game, and went back to work at Carson Park. As Deetz and Shaw returned to Mt. Simon about 3:30 p.m., they checked with Smith and Kurth and found out that the games at Mt. Simon fields were running late. Around 3:30 to 3:45 p.m., Deetz, Shaw, Smith and Kurth all met with Schoening.

Shaw testified that Schoening asked him if he could stay and work overtime, but he told Schoening that he could not stay. According to Deetz, Schoening asked Shaw if he could stay and Shaw said no. Deetz told Schoening that he could work overtime. Smith did not recall whether Schoening asked Shaw or Deetz to stay and work. Kurth did not testify. According to Schoening, Shaw blurted out that he couldn't stay if he wanted to. Schoening said that he was not going to ask Shaw to stay anyway. Schoening said he did not hear Deetz say that he would work. Schoening told Smith and Kurth to continue to work. Schoening said he was not aware of the need for overtime until around 3:30 p.m., as he was not there until the end of the day. Employee Al DeSouza testified that he was at Mt. Simon about 1:30 or 1:45 p.m. and saw Schoening there at least before 2:45 p.m. or 3:00 p.m.

Deetz wanted the hour of overtime but it was not offered to him. Deetz thought that he and one of the seasonal employees should have worked the overtime. He has worked with a seasonal employee in the Streets Department. In October of 2006, Deetz stayed on overtime for two hours in Carson Park laying sod while Kurth went home.

Schoening has been the supervisor of the Parks and Recreation Department for 10 years. He understood the practice to be that if he could see at the end of the day that there was a need for overtime, anyone on a job assignment would stay, depending who was on a crew. Whoever was on the crew would stay on, according to Schoening. Seasonals could be paired up with other seasonals or with permanent employees. He was not aware of anytime that a permanent employee bumped a seasonal from finishing out the day on overtime. If he knew at the beginning of the day that work would run over at the end of the day, it would be considered scheduled overtime and go to permanent employees.

James Fletty has worked for the Street Department for 31 years and has been on the negotiation committee for the Union for 20 years. He recalled that Article 14 was amended in 1989 when the Union proposed a one-hour limit on seasonals working overtime. The City proposed a three-hour limit, and the parties settled on two hours. The reason for this proposal, according to Fletty, was that the hot mix crew was running into problems. If employees were needed to work overtime, they would have to get full-time people to work by going back to the shop, breaking up the crew, getting permanent employees to work to finish the hot mix job. The purpose of the language was to give management some flexibility and keep seasonal employees on overtime to finish a project. Rather than switch crews, the language would allow seasonals to work for a short period of time. It was not a daily thing but there were situations where a short period of work would finish up a job.

According to Fletty, if both seasonal and permanent employees are working together and overtime is needed, the permanent employees would get the overtime by seniority. The seasonal would not work if enough permanent employees were available. Seasonals do not have any seniority. Fletty found this to be the practice throughout his employment with the City.

Robert Horlacher, a City employee for more than 35 years, has been the president of the Union for more than 20 years. Horlacher also testified that the hot mix situation was the original reason for bringing the two hour limit for seasonals overtime into the contract. The discussion revolved around the fact that if the crew had a load of hot mix and it rained, they would need to stay and get rid of the hot mix. Management never said at the bargaining table that they wanted the two hour limit in order to use seasonals anytime. Horlacher said that full-time or permanent employees always get overtime if some overtime is available before any seasonal employees are offered it. If the work runs over close to the end of the day, management has not gone off the overtime roster. But if a permanent employee could do it, then the seasonal employee leaves. This was a practice for all of his 35 years with the City.

Erik Smith, the seasonal employee who worked one-half hour of overtime on July 19, 2006, had worked overtime only one other time. Smith's understanding of the overtime practice is that permanent employees are given the overtime first. He was told that by other employees.

When Shaw was a seasonal employee, he rarely worked overtime. The crew that he worked with was not broken up when he was a seasonal employee.

Horlacher noted that several grievances have been filed by employees in the Parks and Recreation Department. In 1995, a grievance was filed regarding the scheduling of seasonal employees for overtime and was withdrawn without prejudice after step 3. The grievance was untimely, and the Union reserved its right to grieve this issue (under Article 14, Section 8) in the future. In 1998, the Union filed another grievance regarding the scheduling of overtime for seasonal employees. The Union withdrew that grievance when a witness would not testify, and it reserved the right to grieve any future violations of Article 14, Section 8. In one document, the parties wrote up a settlement that states that this grievance was withdrawn without prejudice, and in another document, it was withdrawn with prejudice. At any rate, the incident is clearly non-precedential by the language in both documents. Another grievance was filed in May of 2001 regarding seasonals working overtime at Carson Park. There is no documentation following the oral grievance that was denied.

In 1989, the Union grieved an incident in the Utilities Division where a seasonal employee was called back for overtime without permanent employees first being offered the overtime. The parties settled the grievance with an agreement that the seasonal employee would be called only after employees in the sewer call list were called, and the seasonal employee would not be asked to work scheduled overtime.

The Parks and Recreation Superintendent is Phil Johnson. He has worked for the City for 21 years, and he testified that this issue has been an ongoing discussion for as long as he could remember. Johnson's understanding of the practice regarding overtime is that if there is a work group and a need to continue after 4:00 p.m., that same work group would continue to work. The work group could be composed of seasonals, permanent employees, or a combination of them. He stated that it was not the practice that the permanent employees had a right to the work where the seasonals were working as a work group.

City records show that since May of 1999 to June 1, 2006, there were 481 examples of seasonals working overtime in Parks and Recreation and Cemeteries. Johnson noted that in Cemeteries, there is a practice of seasonals working one hour overtime every day in the month of May. Johnson said that could be a contract violation because it is scheduled overtime, although this work is different from other types of work.

Johnson noted that there are a lot of extensions of the work day. On 2005, there were 60 overtime situations, primarily in sports field maintenance. In 2005, there were 4 times that overtime was needed for sports fields marking, or lining and dragging. Between 1999 and June of 2006, there were 25 times that marking sports fields created overtime.

THE PARTIES' POSITIONS

The Union

The Union asserts that the first sentence of the language at issue in Article 14, Section 8, is the restriction that seasonals shall not work overtime, and the second time is the one allowable exception. The history of the language shows that its original purpose was to allow the City, under very narrow circumstances, to work seasonal employees after the end of the work day. The narrowness was illustrated by a hot mix example, where a crew of both permanent and seasonal employees is patching holes behind a hot mix truck, and at the end of the day, there is still some patching compound to be distributed. Before this language existed, a supervisor would have to dismiss the seasonal employees at the site and call down to the shop for permanent employees on the overtime list to travel to the site as replacements. The only time the language was amended was in 1989, which further restricted seasonal employees to no more than two hours at the end of the day.

The Union believes that the Parks and Recreation Department has tried to expand this limitation into an absolute right to work seasonals after 4:00 p.m. Management has interpreted the word "scheduled" in a nonsensical manner. In management's view, once a seasonal employee begins work at 8:00 a.m., the supervisor can then assign him or her – at any time during the day – to work after 4:00 p.m. In other words, at 8:05 a.m., the supervisor can tell the seasonal employee that he or she is staying over, and that would not constitute "scheduling" the seasonal employee to work overtime. That was not the intent of the parties when they bargained that language or when they amended it. If management is aware that overtime will be required, whether at 8:05 a.m. or 3:40 p.m., then such work assigned to seasonals has been "scheduled."

Schoening was aware before the end of the day that the baseball games were running late at Mt. Simon Park. He was at the baseball field early enough in the day to know that the games were running late. DeSouza recalled seeing Schoening at the Mt. Simon field around 2:00 or 2:30 p.m., or at the very latest, by 3:00 p.m. At that point, he knew the games were going to run late and he should have arranged for permanent employees to work overtime to prep the field. Instead, he scheduled seasonal employees to work the overtime.

The Union contends that by practice, when permanent employees and seasonal employees are at the work site, permanent employees work the overtime. Horlacher and Fletty testified to that practice. Even Smith understood this to be the practice. This practice has always been in existence and is protected by the "maintenance of standards" clause in Article 3, Section 2 of the contract. Overtime is offered to permanent employees on the basis of seniority, and seasonal employees hold no seniority. Seasonal employees can work overtime under the limitations in Article 14, Section 8, but even that overtime is allowed only after the work is first offered to on-site permanent employees. Schoening's offer to Shaw to work the overtime supports this practice. Schoening knew he had to offer it to the permanent

employee first. Shaw declined, and Deetz offered to work but was ignored by Schoening. The contract was violated when Schoening gave the overtime to Kurth and Smith, instead of assigning Deetz and one of the seasonals to work overtime. While Schoening would not admit to offering the work to Shaw on the stand, both Shaw and Deetz remembered the offer. Schoening's credibility in this matter must be doubted, along with his dubious claim that he was not at the field that day until after 3:30 p.m.

What the parties really need is a ruling on what the word "scheduled" means. Is it the management interpretation that anytime after 8:00 a.m. they can assign seasonal employees to work overtime, or is it the Union's interpretation that seasonals can work overtime only when an extension of their normal working day is required**?** The Union thinks it is the latter, and asks that the grievance be sustained and one hour of overtime pay be awarded to Deetz.

The City

The City asserts that the work at issue was not scheduled work and it had the right to direct overtime pursuant to the second sentence of Article 14, Section 8. The first two sentences of Section 8 are intended to be read together, as demonstrated by the use of the conjunctive work "however" at the beginning of the second sentence. The second sentence required two things – that the work to be done is part of "their assigned crew" and that the work be an extension of the normal work day. Smith and Kurth were assigned as a two-person crew. The first condition is therefore met. Their normal work day was lining and dragging the ball fields. Any assertion that Deetz had a contractual right to stay and work past 4:00 p.m. would result in a break up of the Smith/Kurth crew. If Schoening had chosen Deetz to stay and work with one of the members of the Smith/Kurth crew, it would have nullified the contractual precondition to keep whatever persons are assigned as a crew together. Such an interpretation would make the assigned-crew condition meaningless, which is not a favored interpretation.

The City also contends that the word "scheduled" should be harmonized with the same term elsewhere in the contract to mean an event which occurs prior to an employee's regular work day. There are 15 instances in the contract where the word "scheduled" refers to an event which occurs prior to an employee's regular work day.

The City claims that the bargaining history also supports its position. Going back to 1973, the only change in the language at issue occurred in the bargain for the 1989-1990 contract where the phrase "up to two (2) hours" was inserted to limit the amount of overtime that seasonals could take with their assigned crew. Fletty and Horlacher's testimony that this inserted language was only intended to cover specific instances where hot mix patch was used has no support. The language does not specify a narrow factual application of hot patch mix or any other kind of work. It simply says "up to two (2) hours." If the Union meant something more restrictive, it was incumbent upon them to secure it. The language is broad and the change in 1989 merely put a cap on the number of overtime hours that a seasonal could work.

It did not limit the type or nature of the work to be performed. The Union should not be allowed to gain through grievance arbitration what it did not gain in bargaining. Moreover, the City asserts, Fletty and Horlacher have never worked in the Parks Department and have no personal knowledge of how work is performed there.

Further, the City submits that the parties' past practice supports the City's position. Johnson testified that for years management has directed overtime to seasonals after the beginning of an employee's regularly scheduled work day. Johnson and Schoening both testified that if a seasonal employee is set to start his day at 8:00 a.m., management may direct that seasonal after 8:00 a.m. to perform up to two hours of overtime, so long as it's with the same crew and is an extension of the normal work day. If the directive is before 8:00 a.m., then it's considered scheduled. This practice has been in place for at least 21 years. There were 481 examples where management directed seasonals after the start of the work day to work overtime from 1999 through June 1, 2006. The number includes 25 instances for sports fields marking, with an average of 3 to 4 times a year. There is insufficient evidence of a past practice that if both a seasonal and a permanent employee are simultaneously working at a site near the end of a day, the permanent employee is first offered the work.

In Reply, the Union

The Union replies by noting that the word "scheduled" should be taken in a simple and clear meaning: "a timed plan for a project," according to New Webster's Dictionary. Article 14, Section 8 prevents management from the planning and or arranging of seasonal overtime. Yet according to the City's brief, management can plan to work seasonals on overtime at anytime after the start of the work day. That would render Article 14, Section 8 meaningless.

The Union agrees that management has the right to assign who is on a crew. However, the seasonal assignment does not bar any application of Article 14, Section 8. The fact remains that two permanent employees and two seasonal employees were present and together at Mt. Simon Park when management made the decision to schedule overtime. And the practice is that when permanent employees and seasonal employees are at the same work site, permanent employees work the overtime.

In Reply, the City

The City takes issue with the Union's use of the facts. A directive 20 minutes prior to the end of a work day does not equate to any pre-planned or scheduled overtime by management. The Union incorrectly states that it would not matter if this directive occurred at 8:05 a.m. or anytime after 8:00 a.m. This distinction is important because it wrongly suggests that management knew about the need for overtime well and in advance and acted in pretext. There is no evidence of that. DeSouza testified that he saw Schoening at Mt. Simon before 2:45 p.m. or 3:00 p.m. That does not prove that Schoening knew at that time that the game would run late or that he knew he had to offer overtime later that day.

The City also objects to the Union's allegation that Schoening first asked Shaw to work overtime. Schoening testified that Shaw blurted out that he couldn't stay before Schoening said anything, and Smith could not recall that Schoening first asked Shaw to work overtime. Smith stated that Deetz never expressed interest in overtime until after the meeting. Even if Schoening first asked Shaw to work, once Shaw stated he could not work, the other half of Shaw's crew – Deetz – would be disqualified from working the overtime. The evidence is clear that employees worked in assigned two-person crews. Kurth and Smith were specifically assigned as a crew to the field at Mt. Simon. Once Shaw said he could not stay past 4:00 p.m., Schoening was left with the only crew still intact, so he correctly assigned Kurth and Smith to work the overtime.

Contrary to the Union's claim, the insertion of the word "up to two (2) hours of" overtime is not meant to allow seasonals overtime under very narrow circumstances. Since the 1989-1990 contract, the City has examples of over 481 times where seasonals worked overtime. In the parks, the parties have a past practice of allowing up to two hours of overtime to seasonals, under the condition that they work with their assigned crew and where the work is an extension of their normal work day. While Smith testified that this was not the practice, he had no personal knowledge of any past practice. Deetz had only one example of a permanent employee working overtime while seasonals were sent home, and one example does not make a past practice.

DISCUSSION

The language in dispute here is certainly ambiguous. Article 14, Section 8 states: "Seasonal full-time employees shall not be scheduled to work overtime. However, they shall be eligible to work up to two (2) hours of overtime with their assigned crew when an extension of the normal work day is required." It is not clear what "scheduled" means, when an "extension of the normal day" occurs, or what the "assigned crew" means.

There are many, many reasons that the parties should go back to the bargaining table and work this problem out. The language has been the source of friction and grievances for years. This case will not solve all the problems that arise. Even the people from the management side of the table do not agree with each other on the meaning of "scheduled" and when scheduling overtime actually occurs. They don't even agree on what constitutes an extension of the work day. Johnson thinks anytime after 8:00 a.m. that management knows it needs overtime, they can extend the work day with seasonals. Schoening thinks it's late in the day. Johnson would say that overtime could be assigned to seasonals as early as 8:01 a.m. after employees start their shifts. Schoening would say that overtime may be assigned to seasonals later than that, but sometime before the end of the day. So somewhere between 8:01 a.m. and 3:59 p.m. – should the City have that much discretion to determine what's scheduled overtime and what's an extension of the work day**?** Both parties agree that this overtime provision has been a source of aggravation for them. The City admits it may even be

violating the contract on a regular basis in the month of May when it holds an employee over to mow every day. That looks a lot like scheduled overtime. There is much to work out here, and it has to be done at the bargaining table.

Having said that, the parties are entitled to a decision in this case. Given the ambiguous contract language, a strong past practice would be helpful in guiding an arbitrator, but there is a problem with the past practices in this case. The collective bargaining agreement covers employees who work in several different departments – streets, utilities, parks, engineering, maintenance, etc. There are different practices going on in streets, utilities and parks. A past practice that helps interpret contract language cannot be subject to different interpretations depending on different supervisors or different departments. An arbitrator has to be able to decipher the language in the contract and give it the same meaning for all employees covered by it. Otherwise, the language would have several different meanings and applications, depending on where an employee works. That situation only works if the parties agree and are not fighting about it. That's not the case here. The past practices here cannot be considered binding or conclusive in the interpretation of the language at issue.

There are two parts to the issue. The first is whether the overtime was "scheduled" and therefore it could not go to seasonal employees. The second is whether the "assigned crew" was the crew as Schoening saw it or whether it was the permanent employee who should have stayed on with the seasonal employee, since the permanent employee was on the site when the overtime was being directed.

As to the first issue, the arbitrator has no certain or bright line of when overtime becomes "scheduled" overtime. I believe it would be highly abusive of management to say that once people punch in at 8:00 a.m., they can then direct them to stay overtime as early as 8:01 a.m. and call this an extension of the work day in order to allow seasonals to work overtime. That has the potential for abuse written all over it. But at what point before 3:59 p.m. does the overtime work become an extension of the work day? Again, there is no bright line here (and again, another need to bargain over this). However, in this factual situation, the overtime work looks more like an "extension of the work day" rather than scheduled overtime. It arose late in the day and it was uncertain until late in the afternoon – sometime after 3:00 p.m. - that overtime would be needed. In fact, only 15 minutes of overtime worked was all that was actually required.

Therefore, I agree with the City on this point that the overtime was not scheduled. However, there is still the matter of whether the seasonal employees were entitled to overtime with their assigned crew - as originally assigned in the morning - or whether the crew should have been reconfigured to include the permanent employee on site and one seasonal employee. The City believes that once the crew is assigned, it should not be broken up.

The question is whether the seasonals were entitled to the overtime just because they still constituted a "crew" while the Deetz/Shaw crew was being split due to Shaw's unavailability for overtime. There is nothing special that goes with the assignment of these crews. All of these people – Deetz, Shaw, Smith, Kurth – were doing the same type of work. All were qualified to do it. There is nothing in the record that would tend to show that these people work so closely in tandem that they could not work with another partner at any time. They were lining and dragging baseball fields. There was no reason that Deetz could not have worked with either Smith or Kurth on the overtime job of lining and dragging the field for the next game. Permanent employees are sometimes assigned to work with seasonal employees.

While there is no past practice to be given any effect, there is some bargaining history, albeit limited, that is of some value here. When the Union and management agreed to a limitation of a two hour use of seasonals to extend the day, it was not a carte blanche use of working seasonals two hours whenever overtime was needed. It was limited to a circumstance where the overtime work came up late in the day where seasonals were working, and rather than have them leave and someone go back to the shop to get more permanent employees to replace the seasonals, the seasonals would be eligible to work up to two hours of overtime. This never was intended to allow management to give overtime to seasonals in place of giving it to permanent employees. When the parties talked about "assigned crew," those crews that they talked about were a combination of permanent and seasonal employees. In the examples they talked about in bargaining, all the permanent employees would be staying on the job, and rather than sending the seasonals home and getting more permanent employees from the shop to the site, they agreed to have the seasonals stay on to finish the job.

The City is correct when it says that seasonals are not limited to overtime only for hot mix work. However, the hot mix example used in negotiations is useful for defining what an assigned crew meant to the parties when they inserted the language in Article 14 in the first place. The hot mix work included both permanent and seasonal employees working on patching holes with hot mix. The seasonals were assigned to a crew with permanent employees, and rather than sending the seasonals home at the end of the day when there was some work left and calling permanent employees who were ending their day from other assignments, the parties agreed to leave the whole assigned crew stay on the job and let the seasonals work for two hours.

Thus, it would appear that the parties intended in their negotiations to preserve work for permanent employees first but allow seasonal employees to stay on in some situations. In this case, there was a permanent employee right on the site who was available to work overtime. He should have been given the chance to work overtime as a permanent employee. The parties clearly intended overtime to be preserved for permanent employees in the first sentence of Article 14, where it prohibits seasonals from working scheduled overtime. The second sentence is where things get a little muddy. But with the limitation of two hours and the limitation that it only is allowed when there is an extension of the work day, the intent is

one of limitation rather than expansion. It only says that seasonal employees "shall be eligible" to work under certain circumstances, which hardly creates a right to work in place of permanent employees. They are eligible but that does not mean they could displace permanent employees. Article 3, Section 2 states:

> The rights, power, and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this agreement.

The spirit and intent of Article 14 is to preserve overtime for permanent employees in most cases. In this case, it would have been a simple matter to assign Deetz and one of the seasonals overtime.

The City raised another interesting point about the equalization of overtime as demanded by Article 14, Section 4. The Union's interpretation of Section 8 – that permanent employees have first choice for overtime if they are on the job site – may run into conflict with Section 4 from time to time. Another reason to take this back to the bargaining table. This case should be given an interpretation that is no broader than the facts that led to this grievance. The need to straighten out the language at issue should be taken up in bargaining. The parties have much to iron out at the table, as noted in the earlier portion of the discussion section of this award.

While the July 19, 2006 incident was an extension of the work day rather than scheduled overtime, Deetz should have been offered the overtime along with a seasonal employee to finish up the work as the extension of the work day.

AWARD

The grievance is granted.

The City is ordered to give Terry Deetz one hour of overtime for the violation of Article 14, Section 8 that occurred on July 19, 2006.

Dated at Elkhorn, Wisconsin this 20th day of August, 2007.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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