

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME, LOCAL 73**

and

**CITY OF APPLETON**

Case 448  
No. 66930  
MA-13688

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**Appearances:**

**Mary B. Scoon**, Wisconsin Council 40, AFSCME, AFL-CIO, Staff Representative, W5670 Macky Drive, Appleton, Wisconsin, appearing on behalf of the Union

**Ellen Totzke**, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin, appearing on behalf of the Employer

**ARBITRATION AWARD**

AFSCME, Local 73, herein referred to as the "Union," and City of Appleton, herein referred to as the "Employer," agreed to have a member of the staff of the Wisconsin Employment Relations Commission ("WERC") serve as the impartial arbitrator to hear and decide the dispute specified below. The WERC assigned John R. Emery, a member of its staff, to act as the Arbitrator. A hearing was conducted on August 2, 2007, in Appleton, Wisconsin. Each party filed a post-hearing brief and reply brief; the last of which was received October 15, 2007, whereupon the record was closed.

**ISSUES**

The parties did not stipulate to the statement of the issues, but they agreed that I might frame them. I frame them as follows:

Did the Employer violate Article 13 of the agreement by requiring Richard Fleury to work more than 12 hours in a 24-hour period without securing his agreement to do so?

If so, what is the appropriate remedy?

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE 13 – NORMAL WORK DAY AND WORK WEEK/OVERTIME/SHIFT  
DIFFERENTIAL/CALL-IN PAY**

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Employees cannot work more than 12 hours in a 24-hour period without having a break of at least 7 hours between work periods. This provision can be waived by mutual agreement between the employee and the supervisor.

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**APPENDIX “A”  
AFSCME, AFL-CIO WATER PLAN EMPLOYEES  
Fill-In Procedure**

These call-in procedures are subject to Article 13, NORMAL WORK DAY AND WORK WEEK OVERTIME SHIFT DIFFERENTIAL – CALL-IN-PAY

1. Water Plant Operator absences on the second shift (7 a.m. - 3 p.m.) on Monday through Friday:
  - a. A Relief Operator/Maintenance Helper fills the shift if available.
  - b. If a Relief Operator/Maintenance Helper is not available, the off-going 11-7 Water Plant Operator will have the option of working the first four hours of the day shift. The on-coming 3-11 Water Plant Operator will have the option of working the last four hours of the day shift.
  - c. If the off-going or the on-coming Water Plant Operator(s) are not available or accepts the work, the time will be offered to the off-duty Water Plant Operators, by seniority.
  - d. If no one is available to work or accepts the work, the shift will be filled by inverse seniority (least to most), by qualified Relief Operator/Maintenance Helpers and then by Water Plant Operators.
  
2. Water Plant Operator absences on the third shift 3 p.m. – 11 p.m. first shift 11 p.m. – 7 a.m., on Monday through Saturday, Holidays, and Kelly Day shifts and authorized day off on a Kelly Day for Relief Operators:

- a. The off-going Water Plant Operator will have the option of working the first four hours of the next shift and the on-coming Water Plant Operator will have the option of working the last four hours of the previous shift.
  - b. If either the on-going or on-coming Water Plant Operator decline the four-hour block, off-duty Water Plant Operators will be called by seniority.
  - c. If no Water Plant Operators are available, or accepts the work, the shift will be offered to qualified Relief Operator/Maintenance Helper by seniority and in four-hour increments for the first half and the second half of the shift.
  - d. If no one is available to work, or accepts the work, the shift will be offered by inverse seniority (least to most), by qualified Relief Operators/Maintenance Helper and then by Water Plant Operators.
3. Water Plant Operator absences for Sundays will be as follows:
- a. Unscheduled off-duty Water Plant Operators will be called by seniority.
  - b. If a Water Plant Operator is not available, or accepts the work qualified Relief Operators/Maintenance Helpers will be called by seniority.
  - c. If no one is available to work, the shift will be filled by inverse seniority (least to most), by qualified Relief Operators/Maintenance Helpers and then by Water Plant Operators.
4. Extended Absence:
- a. Bargaining Unit Employee taking a sick call from an employee will ask the employee calling if he/she will be returning to work for his/her next regularly scheduled shift. The answer to this question will be documented on the call-in list.
  - b. If the employee notifies the employer that the employee will be out for an extended absence, (more than three days) the shift will be filled by Relief Operators/Maintenance Helpers.
5. Employees will be called using only one primary number. It is the obligation of the employee to notify management if that number changes.

## **BACKGROUND**

The Employer is a Wisconsin municipality which operates a waste water treatment plant and a water plant. The Union is the representative of various employees of the Employer in various bargaining units. It represents the employees of the Water Treatment Plant in one of those bargaining units (herein "Water"). It represents the employees of the Waste Water Division in a separate unit of Waste Water Division and Central Building Maintenance Divisions (herein "Waste Water"). Each is under a separate collective bargaining agreement. The parties have had continuous collective bargaining agreements in both units for all relevant times in the past. This grievance involves the Water unit.

The Water plant is operated seven days per week, 24 hours per day throughout the year. The Employer must have employees present at all times.

Relief Operator Richard Fleury is an employee of the Employer in the Water plant. He is a member of the Water collective bargaining unit. The primary duties of a relief operator are; general plant maintenance, routine cleaning of the plant and equipment and assisting maintenance personnel. The relief operator also fills in for employees who are absent on a Monday through Friday by virtue of scheduled absences. On Monday, October 30, 2006, Fleury was normally scheduled to work 7 a.m. to 3:00 p.m. He had signed a posting on October 25th, 2006, for an additional 4-hour block of overtime contiguous to the end of his shift on October 30. He, therefore, was scheduled to work a total of 12 hours. Fleury had a personal event scheduled shortly after his scheduled departure at 7 p.m. Accordingly, he did not want to work any additional overtime that day. Fleury's immediate supervisor is Mark Kessler. The Director of Utilities, who is Fleury's higher level supervisor, is Mike Buettner.

Overtime work is a common occurrence at the water plant. It occurs when vital work cannot be completed during the shift. It also frequently occurs when employees are absent. When employees are absent for any reason, the Employer often splits the absent employee's shift into two four-hour blocks and posts them for overtime selection in accordance with the agreement. The essence of the overtime selection process detailed in the agreement is that employees may volunteer to work overtime and are selected to do so by seniority. If no volunteers are available the least senior employee is assigned to the overtime. It has occurred on occasion that employees working an extended 12 hour shift were unable to finish their work in the 12-hour shift. In those cases, employees have been permitted to work more than 12 hours by mutual agreement of the employee and supervisors. Until the facts at hand, it appears that there has never been a situation in the water plant in which an employee has been required to work more than 12 hours without his or her consent. Accordingly, no one in the water plant has given any thought to the contract interpretation issue posed by the facts at hand.

Employees are normally free to leave at the end of their work day provided another employee is on duty and provided they are not performing an essential operation. On October 30, 2006, the production of water was unusually critical. At 5:15 p.m. Fleury spoke to Kessler. Fleury told Kessler he was doing a short "Clean in Place" (herein "CIP"). The

custom of the Water Plant is that a CIP is ordinarily completed without stopping. The CIP would normally have been completed by the end of the extended shift on October 30, but there was a problem with a malfunctioning valve which ultimately delayed the process past the end of the shift. Fleury told Kessler that he had concerns about the valve during the 5:15 p.m. discussion but expressed confidence that he would get the CIP done by the 7:00 p.m. scheduled shift-end. Neither expected that there was any significant risk that there would be a delay in getting the work done past the end of the shift. There was no discussion about what should occur if there was a problem in completing the CIP by shift-end. Fleury did not tell Kessler that he did not want to work beyond the end of his extended shift.

At about 6:48 p.m., a few minutes before the end of his extended shift, Fleury called Kessler. Kessler was at the gym and, thus, not available. When Kessler did not immediately respond, Fleury called Buettner. Buettner had medical appointments that evening and was not immediately available. Kessler and Buettner carry cell phones with them when they anticipate possible problems. Neither anticipated a problem. There is a call list on the bulletin board with copies posted at each telephone. Fleury did not resort to this list. It appears that it is not used for calls about overtime. Fleury was concerned about being able to complete his personal plans at the end of the shift. As of 6:48 p.m., he and a Water Plant Operator were the only two people at the water plant. A Water Plant Operator may be permitted to complete a CIP, but only by express permission of a supervisor. Fleury stayed because he could not leave with the CIP running and ordinarily those processes are not stopped in the middle of the cycle. Buettner called Fleury back at 7:43 p.m. and Kessler called back at 7:48 p.m. Fleury agreed to stay because it was too late for his plans. Kessler ultimately came back to the plant and assisted Fleury in completing the CIP. Fleury worked a total of 14 hours that day, leaving at 9 p.m. If the Employer had received the call from Fleury at 6:48 p.m. it is unlikely that it would have had sufficient time to call in another employee.

The Union filed a grievance alleging that the Employer's actions in effectively requiring Fleury to work more than 12 hours violated Article 13. The grievance was properly processed to arbitration.

## **POSITIONS OF THE PARTIES**

### **The Union**

The Union asserts that the Employer violated Article 13 (overtime, etc.) when it failed to seek agreement from Fleury to work more than 12 hours on October 30, 2006. It also contends that the Employer should have called in the next most senior relief operator to finish the shift of Fleury beyond the twelve hours he worked. The language of Article 13 provides that employees “. . . cannot work more than 12 hours in a 24-hour period without having a break of at least 7 hours between work periods.” It provides for waiver only by mutual agreement of the parties. The Union contends that the provision is based upon grievances filed in 1991 which were ultimately mutually settled. At that time, the Employer had a policy prohibiting employees working more than 12 hours because of Employer concerns about the

safety of having fatigued employees working. The agreement provided that employees could work more than 12 hours only if they and the Employer agreed to do so. The agreement was incorporated into the waste water collective bargaining agreement in 2000. The Employer proposed incorporating the same provision in the separate water department collective bargaining agreement in the 2000-01 agreement. The Union agreed. Since the parties expressly incorporated the language agreed upon in the waste water agreement, it should have the same meaning in this unit as in the waste water unit. In this case, Fleury was required by water department policy to continue to work until relieved. He called his supervisor before 7:00 p.m., but his supervisor did not call back until about 7:45 p.m. The result was that he was forced to work over 12 hours without his consent. The Employer's response that he should have called sooner is weak. He called at 6:48 p.m., which is the time he first realized that he could not finish by 7:00 p.m. The Employer's argument that he should have used the "call list" is without merit. It is a mandated form for documenting call times by employees essentially to insure that proper procedures were followed. As of the time in dispute, the only two supervisors employees ever called were Buettner and Kessler. The Union asks that the arbitrator order the Employer to cease and desist from violating the collective bargaining agreement by failing to seek mutual agreement before allowing employees to work more than 12 hours. It requests an order to require the Employer to make the next most senior Relief Operator whole for any lost wages and benefits.

### **The Employer**

The Employer tries not to have employees work more than 12 hours. However, it did occur on October 30, 2006. Fleury first made a call to his supervisor about 10 minutes before the end of his shift. His supervisor was not immediately available. Article 13 merely requires that an employee get seven hours' rest between shifts. It is undisputed that Fleury had more than 7 hours rest between the end of the disputed shift and the start of his next shift at 9:00 a.m., the next day. Fleury did not tell Buettner that he would not be able to finish by 7 p.m. when Buettner called at 5 p.m. Fleury did not make a reasonable effort to let his supervisors know that he would not be done by 7 p.m. and, therefore, he was responsible for the delay. Fleury testified there was only one other person on duty that evening. Employer's records show that there was a second relief operator on duty who could have finished the job. In any event, the bargaining history offered by the Union does not contradict the clear language of Article 13 which merely requires at least a 7 hour rest period between shifts. Fleury could not explain why he did not continue down the call list when he was unable to immediately reach his supervisor. His only explanation was that it had never been anything the employees normally did. This is not a case where the Employer worked the employee more than 12 hours, but one in which the employee failed to give the Employer adequate notice of the situation. For example, the process that Fleury was completing could have been stopped at 7 p.m. Instead, Fleury decided, on his own that it was "better" to complete it than leave it undone. He never contended that he needed authorization to leave. This is not a situation in which the Employer conspired or planned to have Fleury work overtime. The Employer posts overtime opportunities and employees select overtime. In short, the language is clear and unambiguous. It provides that an employee may not work more than 12 hours in a 24-hour

period without a 7 hour break and it does not provide that they can't work more than 12 hours in a 24-hour period.

### **Union Reply**

The Employer's point is that Fluery did not attempt to reach a supervisor until roughly ten minutes prior to the end of his shift. This is irrelevant. Buettner testified that he spoke to Fluery at approximately 5:15 p.m. and Fleury indicated he had reservations about the valve working properly. Buettner testified that he knew the CIP was going to take about two hours which would bring it real close to the end of the shift. While it is true that Fleury believed at that time he could complete the project, Buettner could have asked at that time if Fleury would be willing to work longer than twelve hours. The Union disagrees with the Employer's characterization of Fleury's testimony to the effect that he never answered the question as to whether employees can leave at the end of their shift without permission. Fleury and Ed Valencic made it clear that employees never leave without permission during the CIP's. Thus, Buettner should have been aware of the risk that Fleury might be forced to work beyond 12 hours.

### **Employer Reply**

Common sense has to prevail. A management official can't be presumed to be available instantaneously when an employee calls. Nothing in the collective bargaining agreement requires this. The mere fact that Fleury worked more than 12 hours straight does not violate the collective bargaining agreement. To hold so would have absurd results. Should a replacement be called for 15 minutes?

## **DISCUSSION**

### **Contract Interpretation**

It is the responsibility of the arbitrator to interpret the collective bargaining agreement as it is written by the parties. Accordingly, if the language of a collective bargaining agreement is clear and unambiguous, the arbitrator must apply it so. Language is ambiguous if it is fairly susceptible of more than one meaning. It is important to note that words are given their ordinary meanings unless they are technical. If they are technical, they are given their technical meaning. When language is ambiguous, it is the responsibility of the arbitrator to interpret the language, by looking at the context of its usage, the purpose of the provision, the usage of similar phrases in the agreement, the bargaining history of the language, and the past practice of the parties. Arbitrators also use the rules of contract construction ordinarily used by arbitrators and the courts. These include, but are not limited to, giving ambiguous language the interpretation which gives it meaning as against an interpretation which leaves the language with no meaning.

Article 13's relevant provision is ambiguous. The Employer contends that the provision means that the Employer may require employees to work as long as the Employer desires beyond 12 hours as long as it affords the employee at least seven hours break between the extended shift and the employee's next shift. The Union contends that it means that the Employer cannot force employees to work more than twelve hours in one shift without affording them at least 7 hours rest. Either meaning is plausible. Therefore, the language of the agreement is ambiguous. The essence of the difference between the parties is the meaning of "work period." The Employer is using the term "work period" to mean the end of the extended shift. The Union is using the term to mean the end of the first four hour of extended shift. The language is fairly susceptible of either meaning.

Testimony in this case indicates that this specific provision was imported into the water agreement from the waste water agreement. The undisputed evidence in this case is that the provision was adopted in a resolution of a number of grievances in the 1990's. It was the policy of the waste water division that employees work no more than 12 hours where the Employer considered work in excess of twelve hours unsafe. It is further undisputed that the Union's interpretation prevails in the waste water division. A review of the language of the most recent wastewater agreement supports the Union's interpretation.

Testimony in this case indicates that the disputed language was adopted into the water agreement as a "housekeeping" matter and not discussed significantly over the bargaining table. Under this evidence, the interpretation given the language in waste water unit is highly preferable.

The practice here is somewhat different. Operators normally work 12 hour shifts on Sundays. The practice in the water plant is similar to the practice in the waste water plant that when employees are unexpectedly absent, or a relief operator is not available, an absent employee's shift is split into two four-hour blocks and then employees are offered overtime in these four-hour blocks. In this process it has not been uncommon for employees to have to work more than twelve hours when unforeseen circumstances arise requiring them to work past the end of a twelve hour day. Up to the date in question apparently management was more than willing to have employees work more than 12 hours and employees appreciated the longer work day. Accordingly, the issue of making someone to work a period longer than twelve hours against their will has not come up before.

The word "period" in this provision refers to a continuous shift or a shift extended by contiguous overtime. The more-than-twelve hour situation arises when an employee's shift is extended by a block of four hours fill-in overtime and some unforeseen event occurs. As clearly evidenced in exhibit B, these are four hour blocks. The better view is that the term "period" refers to the 12-hour extended workday.

Finally, the Union's interpretation is more practical. The Employer's interpretation would leave this language with little practical impact because it is rare that employees who work more than 12 hours in a shift would have less than 7 hours break before their next shift.



The lengthy overtime is generally accepted by employees through the bidding procedure. It is highly unlikely an employee would accept lengthy overtime without a break sufficient to meet his or her needs before starting the next shift. Additionally, the scheme of regulation in this agreement is that overtime is ordinarily voluntarily sought by employees. There is no evidence that least senior employees are being regularly forced to work overtime. Indeed, it is rare that employees would turn down the opportunity to voluntarily work more than twelve hours. In this context the safety considerations which existed in the waste water unit, exist here. This provision exists to prevent employees from being pushed beyond their limits and to give management the right to limit an employee from working too long even though the other overtime procedures might allow an employee to use seniority to get more than 12 hours of work in a day.

### **Notification Issue**

As of this incident, the management of the water utility was not aware of the correct interpretation of the disputed provision. Accordingly, there was no uniform practice to deal with similar situations. The responsibility to determine employee willingness to work beyond twelve hours generally rests with the Employer, provided the employee does not intentionally avoid complying with procedures reasonably designed to give the Employer a reasonable opportunity to keep operations going.

The weight of the evidence in this case is that a relief operator does not leave the plant without permission when a CIP is in process. The decision to stop a CIP or to delay its end affects the quality of the CIP and the ability to produce water. Both Fleury and Kessler effectively testified that these decisions are made only by supervisors. Fleury is correct in his view that a qualified employee had to relieve him before he could leave.

The Employer next argues that Fleury should have used the “call list.” This list is not used for overtime situations. There is no evidence that any other person on the list could have made the decisions necessary to allow Fleury to leave.

The Employer essentially challenges Fleury’s credibility and motive. Fleury did testify at tr. p. 33<sup>1</sup> that he and the operator were the only two employees at the plant “. . . at that time.” The Employer’s records show that there was another relief operator on duty for 12 hours that day. It suggests that Fleury had an opportunity to have another relief operator continue the work at the end of the extended shift. I find Fleury intended to be truthful in his testimony. There was no economic benefit to Fleury in bringing this grievance. By contrast, there is no evidence that the presence of another employee was ever discussed in the grievance procedure when the parties could have verified the correctness of the Employer’s records. Similarly, the records do not detail the hours employee George worked or if he left early.

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<sup>1</sup> References to the transcript are to “tr.” and the appropriate page number.

Fleury did not tell his supervisors that he could not work more than 12 hours before the last phone call. Neither he nor his supervisors expected that he would have to work more than twelve hours, although both were aware of the problem with the valve. There were no other procedures requiring advance notification of availability for extended overtime. Had Fleury known at the time of his first call that the procedure would have required him to stay past twelve hours the result in this case might be different. The Employer is correct that the late notification made it difficult to replace Fleury with other bargaining unit personnel. While I agree it would have been better for Fleury to have said something, Kessler is equally culpable by having not asked in the first phone call if Fleury could stay later. Fleury did not intentionally conceal the situation or unreasonably fail to promptly notify Kessler that he could not work more than 12 hours that day. The contract requires mutual agreement in order to keep an operator at work for more than 12 hours in a 24 hour period. By not obtaining Fleury's assent to do so when the potential existed that he could be required to stay past 7:00 to finish the CIP, the Employer violated Article 13 of the contract

For the reasons set forth above, and based upon the record as a whole I hereby issue the following

**AWARD**

The Employer violated Article 13 of the agreement by requiring Richard Fleury to work more than 12 hours in a 24-hour period without securing his agreement to do so. AS and for a remedy the most senior employee on the call list shall be made whole for all hours in excess of 12 worked by Fleury on this occasion at the appropriate rate. Also, the Employer will cease and desist from requiring employees to work more than 12 hours in a 24-hour period without their mutual consent.

Dated at Fond du Lac, Wisconsin, this 19th day of December, 2007.

John R. Emery /s/

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John R. Emery, Arbitrator

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