

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MENOMONIE CITY EMPLOYEES, LOCAL 734 OF THE
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME, AFL-CIO, OF MENOMONIE, WISCONSIN**

and

CITY OF MENOMONIE, WISCONSIN

Case 102
No. 68170
MA-14144

Appearances:

Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, for the Menomonie City Employees, Local 734 of the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, of Menomonie, Wisconsin, referred to below as the Union.

Stephen L. Weld, Weld, Riley, Prens & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for the City of Menomonie, Wisconsin, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant here and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve a grievance filed on behalf of Steve Lande. Hearing on the matter was held on November 3, 2008 in Menomonie, Wisconsin. The hearing was not transcribed, and the Union and the City requested an expedited decision based on the evidence and arguments submitted at the November 3 hearing.

ISSUES

The parties stipulated the following issues for decision:

Did the City violate the collective bargaining agreement by not assigning Steve Lande the overtime work on May 26, 2008, Memorial Day?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7 – HOURS

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Section 7.02 Overtime.

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3. Holidays: All employees shall receive twice the regular rate of pay for all work performed on holidays, including Easter.
4. Distribution: Distribution: Overtime work shall be distributed by seniority among employees whose normal duties include the tasks to be performed on the overtime basis, and if such employees are not available, such overtime shall be offered by seniority to employees capable of performing the work.
5. Call-in Minimum: Employees called in to work overtime shall receive a minimum of two (2) hours of overtime pay. This shall apply to all time not consecutive with scheduled working hours.
6. The City will notify employees of planned overtime. This notice should be given by noon for same day overtime and two (2) days in advance of weekend or “days-off” work, except in emergency situations. . . .

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ARTICLE 11 – GENERAL PROVISIONS

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Section 11.12 Pagers. Pagers are to be carried by all water and waste water employees as required by the employer. . . .

APPENDIX A
AFSCME LOCAL 7234 – CITY OF MENOMONIE
JOB CLASSIFICATIONS AND WAGE RATES

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Any employee who is required by the employer to carry a pager shall be compensated at the rate of 50 cents per hour for those hours he/she is required to carry the pager. This payment is not applicable to those hours he/she is actually working. . . .

BACKGROUND

The grievance asserts that “overtime work was not distributed by seniority to Lande, who had the most seniority and whose normal duties include the tasks to be performed.” The grievance seeks, “Compensatory time equal to 15 hours or 15 hours Holiday Pay.” Lowell Prange, the City Administrator, responded to the grievance in a letter dated June 6, 2008 (references to dates are to 2008, unless otherwise noted) which states,

The question has arisen due to an emergency contractor repair because of a failure of the temporary situation at well #6. Based on the administration’s understanding of the current practice, the pager procedure in both the Water and Sewer Utilities is to have the on-call person respond to non-scheduled/emergency situations. In this event, the failure of well #6 was unexpected and the exact timing of the repair was unknown due to the contractors availability during the Memorial Day weekend. City staff did not know when the well repair company would arrive. The supervisory staff believes this was an emergency not a scheduled repair . . .

The pager procedure referred to by Prange came into effect sometime in 1998 or 1999, prompted by concerns of emergency-response dispatchers. In the absence of a pager system, dispatchers would have to determine whom to call from the Water or Sewer Department to respond to emergencies, and might have to make a number of calls to do so. The City implemented a system to provide dispatch staff a rote order of phone numbers to call outside of normal working hours. The first number is that of the pager carried on a rotating basis by a Water or Sewer Department employee. Dave Dowd, the City’s Water Superintendent, is the next number on the list.

Pager assignments follow charting duties and rotate through the unit on a Tuesday through Tuesday basis, with a separate rotation for holidays falling within a normal work week. Unit employees can switch holiday assignments. Ron Bien was scheduled to chart on the weekend preceding Memorial Day, and thus carried the pager. Lande was scheduled to chart on Memorial Day Monday.

Water demand supplied by the City Water Department varies seasonally. The City pumps over three million gallons per day during high demand Summer months and pumps somewhere around two million gallons per day during lower demand Fall and Winter months. Three main wells serve this demand, with each well being served by a pair of pumps. One pump clears the well and the other pushes the water through a filtration system. Well #3 is the primary source of water for the system. In January, the City experienced filter problems on

well #3 which demanded that a series of valves and filter media be replaced. Those repairs were not completed until late June. In late February or early March, the pump to well #6 went down. Mineral Services Plus (MSP), an independent contractor operating out of St. Paul, Minnesota, maintains the pumps driving City wells. MSP removed the defective pump from well #6 and installed a “loaner” to operate during the other pump’s repair.

The City maintains a computer system to monitor pump usage and water flow from its wells. That system responds to low water levels by phoning a Water Department employee. The employee phoned by the system must respond to the computer to acknowledge the call. The computer system will work through a list of employee phone numbers until an employee acknowledges the alarm. Dowd’s phone number is the first called by the computer system. During the morning of May 25, the computer system made a low water level alarm call to Dowd, who phoned Bien. Bien reported to the well site and noted that the pump was running but no water was being pumped. He asked Dowd to come in to assess the problem. Bien and Dowd determined that the problem was not fixable above ground and was traceable to the submersible pump, located roughly two hundred feet below ground. The City is not equipped to pull the pump. Dowd phoned Dan Nubby, the City’s contact for MSP. Dowd could not reach Nubby, and left a call back message with an answering service. Dowd did not receive a prompt call back and sometime around Noon on May 25 attempted to reach Nubby’s cell phone. He could not reach Nubby and left a call back message. He then called his supervisor, Randy Eide, to discuss the problem. Dowd was unable to reach Nubby until late in the evening of May 25. Nubby indicated that he would have to assemble a crew to pull the pump and would let Dowd know when he had done so.

Sometime during the evening of May 25, Dowd called Lande to inform him that he did not have to chart well #6 on May 26, but that he should check the water level status. Throughout the day on May 25, Dowd kept in contact with Eide and Prange. Decreasing water levels posed a water pressure problem. Low pressure increased the likelihood of drawing iron deposits into the water supply as well as posing a potential hazard in the event of a major fire that could place extraordinary demands on the water system. Dowd spoke with Prange and Eide concerning these issues, and phoned the City Fire Department on the evening of May 25 to alert them to the problem. Prange, Eide and Dowd discussed bypassing the filter system on well #3 to boost the water level in the water tower. This option could boost water pressure, but did so at a cost, since unfiltered water carries sediment. They agreed that if or when this option was exercised, it would be used for the minimum amount of time possible.

Early in the morning of May 26, Nubby phoned Dowd to advise him that Nubby had assembled a crew and would report to the City “in a few hours” to pull the pump. Dowd gave Nubby the pager number so that Nubby could contact Bien when they arrived in Menomonie. Dowd expected Bien to assist MSP and oversee the work for the City. At roughly 9:00 a.m. on May 26, Dowd assigned Bien to bypass the filter system to well #3.

MPS arrived at well #6 at around Noon on May 26. In mid-afternoon, Bien removed the bypass on well #3. At roughly 9:30 p.m., MPS finished its repair of the pump at well #6, and by roughly 10:30 p.m. City water towers were maintaining a constant water level.

The balance of the background is best set forth as a brief overview of witness testimony.

Steve Lande

Lande has worked for the City for roughly thirty-three years, and is currently the Water Department Foreman. At roughly 8:30 a.m. on May 25, Bien called Lande to advise him that he would not have to chart the pump for well #6 because it was out of service. This meant that Lande, who was on rotation to chart the wells for Monday, May 26, had to chart only a single well. Dowd called Lande late in the evening of May 25 to advise him to check the water levels and to do the charting he normally would. Lande reported to work on May 26 at roughly 8:15 a.m., noted the water levels and then returned home.

Lande testified that the City has been inconsistent in awarding overtime to the employee carrying the pager. For example, on March 24, Bien worked two hours of overtime when Scott Quilling held the pager. This had happened before, on October 13, 2007. On January 9, 2006, Lande held the pager, but Rod Schroeder, a less senior employee, received two hours of overtime. On August 28, 2004, Jeremy Hoyt had the pager and Bien worked four hours of overtime even though Lande has greater seniority than Bien. On May 5, 2004, Bien worked an hour of overtime even though Hoyt carried the pager.

Jeff Beguhn

Beguhn has worked as a Mechanic for the City for roughly twenty-four years and currently serves as the Union President. He was part of the bargaining team when the City and the Union created Subsection 6 of Section 7.02. This subsection came in as a result of staffing the City's landfill. For a period of time, the City scheduled Friday and Saturday work, without notice, to accommodate construction work. The parties agreed to the subsection so that the City would post such work by Wednesday to permit employees to arrange their personal lives, such as day care arrangements, so that the overtime would be less onerous. This is "planned overtime" which is distinguishable from emergency overtime such as that prompted by unanticipated snowfall.

Dave Dowd

Dowd has worked for the City in a supervisory capacity since 2000, and was a member of the bargaining unit prior to that. In his view, the situation that unfolded on May 25 and 26 was an emergency. The City never knew when MPS would arrive or how complex the repairs would prove to be. The loaner pump to well #6 was under-powered and not meant to function on a long-term basis. That the water system functioned on the pump to well #4 alone posed ongoing issues since that pump was not meant to supply the entire system.

Bien should not have worked the overtime on March 24. Dowd did not call him in, and guessed either that a dispatcher contacted Bien directly because Quilling did not answer the

pager or that Quilling received the dispatcher's call and routed it to Bien. Since Bien is not the most senior employee, this option would not have been appropriate. Dowd did not play any role in the assignment. He could not recall the October 13, 2007 fire, but speculated that Bien received the call out in the same fashion as on March 24. The January 9, 2006 incident would have been traceable to a call from the City's computer generated alarm system. The computer follows a list of numbers, ranked by seniority, until a unit member generates an acknowledgement. Schroeder is the least senior unit member and should have gotten the call only if no one senior to him acknowledged the computer generated call. Dowd played no role in the assignment. Dowd played no role in Bien's overtime call-ins during 2004. Dowd has informed the bargaining unit that a unit member who receives a page and routes it to another unit member should follow seniority. Dowd plays no role in such call-ins unless a dispatcher or unit member brings it to his attention.

Dowd did not check to see if Lande was charting on May 26 when he directed Bien to bypass the filters on well #3. He wanted to wait as long as possible before taking that action and felt that the pager system was the means to do so.

Randy Eide

Eide is the City's Director of Public Works and has served in that capacity for four years. Eide was in the Hayward area on May 25, at the limit of his cell phone's coverage. He had difficulty speaking with Dowd by phone for that reason, and got "excited" as he learned the details of the incident piece by piece based on his cell phone's reception. The City's water system relies on three pumps to meet even seasonally diminished levels of demand and operating the system on a single pump posed significant risk. Eide kept in touch with Prange throughout the weekend, suggesting that the City should consider issuing a water conservation alert. Prange determined that they should monitor the situation while they arranged repair through MPS, but alert the fire department to the issue. Eide did so by phoning the Assistant Fire Chief. They determined that the repairs would have to be performed as soon as possible, without regard to cost, because the system could not reliably operate on a single pump.

Lowell Prange

Prange has served as City Administrator for over twenty years. Eide first contacted him in the afternoon of May 25. Prange considered the matter an emergency but he did not want to issue a public water conservation alert until it became clear that the multiple pump system could not be promptly restored.

Prange affirmed Beguhn's recall of the bargaining surrounding the creation of Subsection 6 of Section 7.02. He felt the parties created the subsection to deal with planned overtime and specifically with the construction issues then present at the landfill. The purpose of the posting was to assure compliance with seniority in the distribution of overtime. Planned overtime is distinct from emergency overtime.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Position

There is no doubt that the City faced a serious problem, since the reliability of its water supply had been compromised by the failure of the loaner pump. A "serious problem" is not, however, an "emergency". Lande could have been called in to perform the work done by Bien on Memorial Day. There is no dispute that he was the senior employee nor is there any dispute that he was available. The contractual issue does not turn on whether or not the Memorial Day work was planned or unplanned overtime.

Beeper pay is not in issue nor is it relevant to the grievance's resolution. Work traceable to a beeper call is "same day kind of stuff." Here, the problem developed on a Sunday, and spilled over into Memorial Day Monday. By then, the City knew extensive repair work would have to be done. In fact it knew either late in the evening on Sunday or early in the morning on Monday. In either event, there was ample time to call in the senior employee, which is what is required under Section 7.02, Subsection 4.

The record shows that the City's distribution of overtime is something less than consistent. On the facts posed by the grievance, the City should have distributed the overtime to Lande. Their failure to do so should be remedied by paying him the overtime the City improperly assigned to Bien.

The City's Position

The facts are undisputed, but the parties disagree fundamentally on how to assign overtime on non-normal hours when an employee must carry a pager. The Union's assertion of Section 7.02, Subsection 4 ignores the operation of contractual provisions governing the pager. Bien was the employee carrying the pager on the Memorial Day weekend as required under Section 11.12. Appendix A notes the pay appropriate to that duty as well as the need to read Section 7.02, Subsection 4 in light of Section 7.02, Subsection 6.

More specifically, Subsection 6 distinguishes between planned and unplanned overtime. The overtime at issue here is unplanned and thus falls under Subsection 6 rather than Subsection 4. That Lande was scheduled to work on Monday cannot be seen as relevant to the resolution of the grievance. If it was, and if the rotation had placed the least senior employee on duty for Memorial Day, then the City's assignment of the overtime to that employee would violate Subsection 4. That the pump failure took roughly thirty-six hours to address cannot obscure that it was an emergency. The City exercised no control over when MSP could repair or replace the pump. The City has consistently awarded unplanned overtime to the employee responding to the pager, and this practice "makes sense."

It follows that the City properly assigned the overtime to Bien and that the grievance should be dismissed.

DISCUSSION

The issue is stipulated but demands a contractual focus. The Union focuses its case on Subsection 4 of Section 7.02. The interpretive issue is the intersection of the Union's view with the City's view that Subsection 4 must be interpreted in light of agreement provisions concerning the pager. More specifically, the City urges that Subsection 6 of Section 7.02 codifies the pager procedure and modifies the applicability of Subsection 4. Under this view, Bien carried the pager and thus was appropriately assigned the emergency overtime of May 26.

The Award below notes the denial of the grievance, but the Union's case is stronger on the contract than the City's. The grievance's denial reflects that the City's view has a sounder factual basis than the Union's.

Subsection 6 governs notice for "planned overtime." The reference to "emergency situations" frees the City from giving notice of "same day" or "weekend or 'days off' work" which constitutes "planned overtime." The difficulty with the City's attempt to read the "emergency" reference into Subsection 4 is that Subsection 6 addresses only notice of planned overtime and is silent on its "Distribution", which is the focus of Subsection 4. The Union's exclusive focus on Subsection 4 is, then, more faithful to the labor agreement. This does not render Subsection 6 irrelevant to the interpretive issue, but precludes using it as the focus.

This focuses the grievance on Subsection 4, but does not resolve the interpretive difficulty because the language of that provision is less than clear and unambiguous. The use of "shall" in the first sentence states a mandate that links "overtime work" to "seniority". Subsection 4 is less than clear on the procedure to do this, because it states the mandate in the passive voice through "be distributed" without specifying who does the distribution or how it is to be done. This becomes problematic under the pager and computer generated emergency call system. Either or both can produce assignments that are not strictly seniority based. The parties' arguments mutually acknowledge the difficulty of applying Subsection 4 in light of the pager procedure recognized at Section 11.12 and Appendix A.

Against this background, it is my view that Subsection 4 permits the assignment of overtime by "following the beeper" only if work performed due to a pager call reflects unplanned overtime and does not undermine seniority. Strictly speaking, the "emergency" reference of Subsection 6 is not relevant to Subsection 4, but Subsection 6 does point out a distinction between "planned overtime", which must be posted, and unplanned overtime. The standard noted above reconciles Subsection 4 to the contract provisions addressing pager pay. Any other conclusion will not reconcile the provisions of Subsection 4 to the pager system. If unplanned overtime can only go to the most senior employee, there is no reason for any employee other than the most senior employee to carry the pager. The parties' rotation system establishes that this is not an appropriate result. That employees can

trade holidays underscores this, for any trade that resulted in overtime work being performed on a holiday by a less senior employee would violate Subsection 4.

This establishes the contractual standard to be applied to the events of May 25 and 26. The initial determination is whether the repair work performed on May 26 was “planned overtime.” If it was, it was available for distribution under Subsection 4 to the most senior employee. There is no dispute that Lande is senior to Bien and no dispute that both employees’ “normal duties include the tasks to be performed on the overtime basis.” The issue is when, if at all, the City acted in violation of Subsection 4 on May 25 or May 26.

As I view the facts, disputable City conduct is the “planning” process of May 25 or the assignment process of May 26. More specifically, Dowd supplied MSP with Bien’s pager number in the morning of May 26; directed Bien to do the well #3 filter bypass work later that morning; directed Bien to remove the well #3 filter bypass work in the afternoon; and permitted Bien to oversee the afternoon and evening work.

With some reservation, I conclude that none of these acts violate Subsection 4. There is no evidence that supports the assertion that the City could or did plan work on May 25. Dowd and Bien informed Lande of the problems regarding the pump on well #6, but this reflects no more than updating him on what had to be charted, and there is no dispute he was responsible for charting on May 26. At most, Dowd, Eide and Prange were aware at the close of the day on May 25 that the City wanted MSP to pull the pump as soon as possible and that Nubby was trying to assemble a work crew to do so on May 26. The City had yet to plan any work. At most, the City hoped there would be work.

Early in the morning of May 26, Nubby informed Dowd that MSP had a crew and was heading for Menomonie. Dowd gave Nubby the pager number to contact upon his arrival. To conclude this violates Subsection 4 of Section 7.02 would read the pager rotation system out of existence. Dowd did no more than comply with the system noted by Section 11.12.

The balance of the work assignments reflects a closer issue. Lande could have performed the well #3 filter bypass work performed by Bien in the morning and the afternoon of May 26. The difficulty with concluding that these assignments should have been distributed to Lande is that the underlying work was, at the time, not planned overtime. Eide and Dowd had already concluded that if the bypass work was done, it had to be done for the least amount of time possible. No one, at the time the work was assigned, knew how long the MPS work would take. At the time of its assignment, the work could not be distinguished from the emergency type of work routinely assigned by following the pager.

Dowd’s decision to let Bien oversee the afternoon and evening work is the most questionable application of Subsection 4. The work lasted ten or more hours, which lends itself to the conclusion that the work was planned and was available for distribution on the basis of seniority. The difficulty with granting the grievance regarding this period of time is

the absence of any evidence regarding what actually happened. While the work spanned ten or more hours, it is not evident, when, if at all, the work permitted a change in oversight. It is not evident that the work permitted planning in the sense contemplated by Subsection 6 or whether it involved an ongoing response to a single troubleshooting problem. The pump problem was ultimately identified as a defective bearing, but it is not clear when that determination was reached or how a substitution of City employees would have affected the work. Whether or not the work is characterized as an ongoing emergency, the risk to the water supply is evident and the amenability of the work to reassignment speculative. It was, in any event, a “same day” work response. Against this background, I do not believe the City’s determination to leave it in the hands of the employee carrying the pager can reasonably be questioned under Subsection 4 of Section 7.02.

The closeness of this point must be acknowledged. A series of exhibits concerning pager assignments grants the appearance that Bien was the beneficiary of a number of out of seniority assignments. If this appearance reliably pointed to the undermining of seniority, then the conclusion reached above is unpersuasive. However, the evidence does not bear out the appearance and fails to link Dowd to any of the assignments. The inconsistency in City assignment of overtime shown by the exhibits is driven by the pager system and is as traceable to computer or to unit employee action as to the action of City supervisors. Since the interpretive issue is to reconcile the pager system to the application of Subsection 4, some more persuasive proof of the undermining of seniority is necessary to found a violation of Subsection 4 on May 26.

The City notes that Lande received four hours of pay for charting work on May 26 which took less than an hour, and asserts this represents “a pretty good gig.” Bien’s receipt of holiday overtime for the work he performed may well be “a pretty good gig.” MPS’ receipt of payment for their work on May 26 may well be “a pretty good gig.” None of these payments offers any guidance regarding Subsection 4. Lande’s payment for the charting work does underscore the ambiguity of the reference in Subsection 4 to “Overtime work shall be distributed by seniority among employees”. This reference, standing alone, fails to clarify if it means that “all overtime work” available on a given day must be distributed solely to the most senior employee. More specifically, it is less than clear that Subsection 4 demands that Lande had the sole claim, on the morning of May 26, to the charting work he performed in addition to the bypass work on the well #3 filter that was performed via the pager. The ambiguity of Subsection 4 in light of the events of that day should not be obscured. It is evident either Bien or Lande was capable of performing the work, but it is far from evident “whose normal duties include the tasks to be performed on the overtime basis.” The work performed on May 26 was, on this record, unprecedented.

In sum, Subsection 4 has to be applied without denying meaning to agreement provisions codifying the pager system. Doing so permits the City to make overtime assignments through the pager system if the work is not “planned overtime” within the meaning of Subsection 6 and does not undermine contractual seniority. Bien performed worked on May 26 which was not “planned overtime” and which did not undermine contractual seniority.

AWARD

The City did not violate the collective bargaining agreement by not assigning Steve Lande the overtime work on May 26, 2008, Memorial Day.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 7th day of November, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

