

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF GREEN BAY**

and

**CITY OF GREEN BAY AREA MUNICIPAL EMPLOYEES UNION,  
LOCAL 1889 AFSCME, AFL-CIO**

Case 451

No. 67871

MA-14043

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**Appearances:**

**Randall Etten** and **Laurence Rodenstein**, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 803 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union.

Ruder & Ware, L.L.S.C., Attorneys at Law, by **Christopher M. Toner**, 500 First Street, Suite 8000, Wausau, Wisconsin, appeared on behalf of the Employer.

**ARBITRATION AWARD**

City of Green Bay Area Municipal Employees Union, Local 1889, AFSCME, AFL-CIO herein collectively referred to as the "Union," and City of Green Bay, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Green Bay, Wisconsin, on November 24, 2008. Each party filed a post-hearing brief, the last of which was received January 16, 2009.

**ISSUES**

The parties were unable to agree to a statement of the issues. I state them as follows:

1. Did the Employer violate Article 11, Section B by not paying Grievant Luann La Violette time-and-one-half for hours worked in excess of her normal work day in the periods December 12-13, 2007?

2. If so, what is the appropriate remedy?

**RELEVANT AGREEMENT PROVISIONS**

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Article 11 WORK SCHEDULE-OVERTIME PAY  
- CALL IN PAY-SHIFT DIFFERENTIAL

(A) Work Schedule

- (1) Unless otherwise specified, seven and one-half (7½) hours shall constitute a normal work day and thirty-seven and one-half (37½) hours Monday through Friday, shall constitute a normal work week. Eight (8) hours shall constitute a normal work day and forty (40) hours, Monday through Friday shall constitute a normal work week for clerical positions in the office of the Parking System Division of the Public Works Department. City Hall custodians, Building Maintenance Workers, employees who work at the City garage, maintenance employees, employees of the Transit Department, and full-time Ramp Cashiers shall work forty (40) hours per week, Monday through Saturday. Part-time Ramp Cashiers shall be scheduled Sunday through Saturday. . . .

(B) Overtime

- (1) Overtime will be offered first to employees whose primary job duties are the same as the duties to be performed on an overtime basis. If more than one employee performs those duties as their primary function then the overtime will be offered by seniority. Also, if insufficient staff exists to carry out the necessary duties then addition overtime will be offered to other qualified employees based on master seniority.
- (2) One and one-half (1½) times the base pay will be paid for:
- (a) All hours worked in excess of seven and one-half (7½) hours per day or thirty-seven and one-half (37½) hours per week for those employees on a thirty-seven and one-half (37½) hour week.
- (b) All hours worked in excess of eight (8) hours per day or forty (40) hours per week for those employees on a forty (40) hour week.

- (3) Employees shall be allowed to accumulate compensatory time according to the Fair Labor Standards Act. . . . .

. . . . . “

### FACTS

The Employer is a Wisconsin municipality. The Union represents various non-supervisory employees in its City Hall, Parking System Division and Transit Department. They are party to a collective bargaining agreement which was in effect at all relevant times. Grievant Luann La Violette is a member of the bargaining unit represented by the Union and has been employed by the Employer at all relevant times in its parking division. She is a part time employee who is normally scheduled to work less than either 40 or 37.5 hours per week. On December 12 and 13, Ms. La Violette worked a total of 19.9 hours for the Employer. She was paid straight time for all of those hours and was not paid overtime for any of those hours. On January 7, 2008, the Union filed a grievance alleging that she was entitled to overtime and the same was properly processed to arbitration. The parties have agreed that there is no consistent past practice concerning paying overtime to part-time employees.

### POSITIONS OF THE PARTIES

#### Union

The Employer violated Article 11, (B),2,(b) by not paying Grievant for the 3.9 hours she worked in excess of her eight hour day on December 13, 2007. The designation of work week in the disputed provision does not distinguish between full-time and part-time employees. A full-time 40 hour employee would invariably work more than 40 hours if he or she worked any overtime because the Employer does not allow them to otherwise vary their schedules. The qualifying “or” means in this context that the 8 hour provision was specifically meant to apply to part-time employees. The letter of the City Attorney, Exhibit D indicates that the Employer is selectively trying to apply the language to grant overtime to some employees and not to others. The offer of settlement by the Employer is nothing more than an attempt to change the agreement.<sup>1</sup> The language of the agreement is ambiguous. The purpose of the general statement of this provision is to distinguish between types of “full-time” employment and the provision does not expressly reach part-time employment. The Union contends that the language is clear and precise in the inclusion of part-time employee’s ability to earn overtime as to that part which in excess of the eight hour day.

#### Employer

The Employer did not violate Article 11(B)(2) as the provision only applies to full-time employees. The doctrine of *expression unius est exclusion alterius* applies. Having expressly

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<sup>1</sup> It is not proper to consider offers of settlement and the same is not given any consideration in this matter.

provided for overtime for full-time employees, the parties excluded part-time employees. The Employer seeks to have the grievance dismissed.

## DISCUSSION

### **1. Issue**

The parties stated the issues in this case differently. However, these differences do not affect the resolution of this matter. I have stated them above.

### **2. Merits**

The role of the arbitrator is to apply the parties' agreement as it is expressed. When language is clear and unambiguous, the arbitrator applies it as it is written. When language is reasonably susceptible to alternative meanings, it is said to be "ambiguous." When language is ambiguous arbitrators determine the parties' intent by looking at the past practices, if any, of the parties, the context of the language, the rules of construction applied by courts and arbitrators and the purposes of the provision.

Article II(B) is ambiguous. It can be read to provide overtime for part-time employees or to provide overtime only for full-time employees. Essentially, it can be read, for example, as ". . . will be paid for all hours worked in excess of eight (8) hours per day .. for those employees working on *the basis of* a forty (40) hour week." It can also be read ". . . will be paid for all hours worked in excess of eight (8) hours per day . . . *only* for those employees *normally* working on a forty (40) hour week." Either interpretation is plausible.

The Employer's interpretation tends to be strained and is not directly supported by the language. The main purposes of the provision are 1 to define what is overtime and 2 distinguish between those groups of employees on 37.5 hour and 40 hours weeks. The "for those employees" provisions are primarily intended to make that distinction. It is, in this arbitrators' experience, somewhat unusual to exclude part-time employees from daily overtime.

When language is ambiguous, arbitrators look to the provision as whole to obtain guidance. Here there is compelling guidance in Section A. It states that 7.5 hours is the normal work day for those on 37.5 hours work week and 8 hours is the normal work day for those scheduled on a 40 hour work week. There is express reference in that provision to part-time employees and, thus, it establishes that part-time employees who work in work groups where full-time employees work 40 hours are to have a normal work day of 8 hours whereas those who may be scheduled in work groups of 37.5 hours will have a normal work day of 7.5 hours. Section B parallels this construction and the phrase "for those employees" is more likely to mean "on the basis of."

Finally, Section A does establish a "normal" work day for part-time employees of, in this case, 8 hours. Section A intends that all employees, full-time and part-time, are entitled to

expect that they work 8 hours except under circumstances which are not “normal” and require overtime. Under these circumstances, the purposes of the time-and-one-half penalty in Section B apply to full-time and part-time alike. They are: 1 to compensate the employee for his or her inconvenience of having to work more than a normal work day and 2 to discourage the Employer from requiring employees to work more than a normal work day. It makes sense to read Section B to be consistent with the purpose stated in Section A. For the reasons expressed above, the Employer violated the agreement by not paying the Grievant time-and-one-half for hours worked in excess of her normal work day.<sup>2</sup>

### AWARD

That since the Employer violated Article II, Section B by not paying Grievant La Violette overtime on the day in question, it shall make her whole for all lost wages.

Dated at Madison, Wisconsin, this 28th day of January, 2009.

Stanley H. Michelstetter II /s/

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Stanley H. Michelstetter II, Arbitrator

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<sup>2</sup> The Union stated in its brief that Grievant worked on a 40 hours week basis. The stipulation did not reach that far and, therefore, the order in this case is based upon making Grievant whole for hours worked in excess of her normal work day.