

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MARSHFIELD CITY EMPLOYEES
LOCAL 929, AFSCME, AFL-CIO**

and

CITY OF MARSHFIELD

Case 172
No. 68338
MA-14201

Appearances:

Mr. Houston Parrish, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, on behalf of the Union.

vonBriesen & Roper, S.C., by **Attorney James R. Korom**, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202, on behalf of the City.

ARBITRATION AWARD

At all times material, Marshfield City Employees Local 929, AFSCME, AFL-CIO (herein the Union) and the City of Marshfield (herein the City) were parties to a collective bargaining agreement covering the period from January 1, 2008 to December 31, 2010. On October 17, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the City's failure to pay a minimum of two hours of call-in pay at time and one-half to William Schroeder (herein the Grievant) for calling him in to work outside his regular work hours on April 25, 2008. The Undersigned was selected from a panel of arbitrators to hear the dispute and a hearing was conducted on January 12, 2009. The proceedings were not transcribed. The parties filed briefs by February 27, 2009, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the City violate the contract as alleged in the grievance?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 11 – Report Time – Overtime – Call Time

Section 1. When an employee reports for work and is then sent home, the employee is entitled to two (2) hours pay for reporting. Whenever an employee is called out after working hours, the employee shall be paid time and one-half (1-1/2).

Section 2. The overtime pay rate of time and one-half will be paid for all hours worked over the scheduled work day, Monday through Friday, and all work performed on Saturdays, Sundays and holidays shall be paid at the rate of time and one-half (1-1/2).

Section 3. The City shall post, on or about December 1 of each year, a notice requesting that names of employees who are interested in volunteering for weekend call duties for the succeeding calendar year. Those employees who are interested shall sign said posting. The City shall then schedule one (1) employee from the list to be on call each weekend. The captive time for an employee on weekend call shall start as of 3:00 p.m. on Friday and end at 7:00 a.m. on Monday. All employees who signed the posting shall be scheduled for a weekend before an employee is rescheduled a second time, etc. However, employees may change assigned weekends so long as the Employer is notified. The employee who is on call shall receive four (4) hours pay per day at the employee's normal classified hourly rate for weekend on-call days. When the employee responds to a call, the employee shall be paid at the rate of time and one-half for all hours worked on each call with a minimum of one (1) hour's pay per call. The employee on weekend call will be issued a pocket paging device for which he/she is responsible in the event it should be lost, stolen, or damaged. The employee who is on weekend call shall have the authority to call in another employee, without approval of management, when circumstances warrant the need for assistance.

BACKGROUND

The Marshfield City Employees Local 929, AFSCME, AFL-CIO and the City of Marshfield have had a collective bargaining relationship for many years. The Union represents the hourly paid employees of the City's Street Division, Building Services Division and Parks and Recreation Department, excluding managerial, confidential, temporary, part-time and student employees. Since at least 1961, the parties' collective bargaining agreement has contained the following language, which is currently contained in Article 11, Section 1:

“When an employee reports for work and is then sent home, the employee is entitled to two (2) hours pay for reporting. Whenever an employee is called out after working hours, the employee shall be paid time and one-half (1-1/2).”

The question raised in this arbitration is whether the foregoing language, as applied by the parties over the years, guarantees a minimum amount of pay to employees who are called out after working hours. Over the years City has approached this question in a number of different ways. Allan Esser, who worked for the City and was a member of Local 929 from 1955-1994, testified that at least until 1979 the City paid two hours of call-in pay at straight time whenever an employee was called in outside of regular work hours. Jeff Becker, who has been a Street Division employee and a member of Local 929 since 1981, testified that from the early 1990's until 2000 the City paid one hour of call-in pay at time and one-half whenever an employee was called in outside of regular work hours. After 2000, payment of a set amount of call-in pay for employees called in outside of regular work hours was discontinued, but any employees who were called in were paid time and one-half for all time actually worked.

In negotiations over the parties' 1999-2000 collective bargaining agreement, the Union, represented by AFSCME Staff Representative Jeff Wickland, proposed the following additional language to Section 11(3), relating to call-in pay for employees who were called in to work while scheduled on weekend call:

When the employee responds to a call outside of his/her normal work day, the employee shall be paid at a rate of time and one-half for all hours worked on each call with a minimum of one (1) hour's pay per call.

The proposal was rejected by the City and was not included in the eventual contract.

In the bargain over the 2001-2002 contract, the Union was represented by AFSCME Staff Representative Jerry Ugland and proposed amending the second sentence of Section 11(1), as follows:

Whenever an employee is called out after working hours, the employee shall be paid time and one-half (1½) *for a minimum of two hours.* (proposed addition in italics.)

Once again, the City rejected the proposal and the language remained unchanged. It does not appear that any changes to Article 11 were proposed in the 2003-2005 bargain. Up to this time there does not appear to have been a belief among the Union's representatives or the bargaining unit members generally that Section 11(1) provided a guaranteed minimum amount of call-in pay.

In negotiations over the parties' 2006-2007 collective bargaining agreement, the Union was represented by AFSCME Staff Representative Houston Parrish, who had only recently become the bargaining unit's representative at the time the parties developed their bargaining

proposals. Prior to developing bargaining proposals for the 2006-07 negotiations, Parrish received a memo from Union President Jeff Becker concerning the bargaining unit's interests in the upcoming bargain. Specifically regarding Section 11(1), the memo stated:

- 2. Call in bonus for employees called to work outside of their normal shift if work required is one hour or less. This would not include scheduled overtime or assigned weekend call.**

Currently we have no provisions other than [sic] time and one half for employees who are called for work outside of their shift. Most of our comparables offer some type of call in language. The intent of this proposal would be to compensate an employee for the inconvenience of being bothered for call ins that take less than [sic] one hour. There is numerous provisions on this in our comparables contracts. We are open to suggestions on this.

Parrish then formulated bargaining proposals for the upcoming negotiations based on Becker's memo, including the following regarding Section 11(1):

PROPOSAL #3: CALL IN PAY FOR EMPLOYEES CALLED TO WORK OUTSIDE OF THEIR NORMAL SHIFT IF WORK REQUIRED IS ONE HOUR OR LESS.

There are no provisions other than time and one half for employees who are called for work outside of their shift. Most comparables offer some type of call in language to compensate an employee for the inconvenience of being called in for one hour or less.

The employees propose the following language, which is identical to that in the Wisconsin Rapids DPW Agreement.

- A, Any employee called in to work at any time other than his/her established work schedule shall receive two (2) hours of call time, in addition to the hours actually worked. Such extra time is to be computed on the basis of time and one-half for weekdays and double time for holidays and Sundays. If the hours worked are continuous into his/her normal workday, he/she must work in excess of a normal eight (8)-hour day before he/she receives overtime pay.**

Parrish asserted that in formulating the proposal he did not first read the existing contract language, but relied on Becker's memo and representations regarding the fact that the contract did not already provide for call in pay. The City did not agree to the proposal and it was withdrawn before the contract was settled.

In negotiations over the parties' 2008-2009 collective bargaining agreement, the Union proposed the same language revision for Section 11(1) that had been proposed for the 2006-2007 agreement. During negotiations, however, Parrish concluded that the current language of Section 11(1) already provided for two hours of call-in pay at time and one-half. He therefore put the City on notice that the Union was repudiating the past practice of ignoring the provisions of Section 11(1) regarding call in pay and would expect employees to be paid a minimum of two hours of call in pay in the future for all employees called in to work outside of regular working hours. The parties reached a tentative agreement on the 2008-09 contract on December 11, 2007. On December 21, Parrish followed up with a letter to Lara Baehr, the City's Human Resources Director, which stated, in pertinent part:

“Per my verbal representation at our first bargaining session December 4, 2007 and my written notice prior to both parties signing the Tentative Agreement on December 11, 2007, local 929 DPW repudiates any past practice of failing to follow/declining to enforce the call in provisions of the contract, specifically, Article 11, section 1. The Union understands the contract to clearly state that an employee is always guaranteed 2 hours pay (at time and one-half after working hours) whenever an employee reports to work, regardless of whether the employee works less than 2 hours. This repudiation is effective January 1, 2008.”

The City did not concur in the Union's interpretation.

On April 10, 2008, DPW employee William Schroeder was called in outside of his normal hours to replace some street barricades which had turned over. The project took approximately one hour and Schroeder was paid for his actual time at time and one-half. He grieved the issue, asserting that the City had violated Section 11(1) and the grievance was denied. The grievance was processed through the contractual procedure to arbitration. Additional facts will be referenced in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the contract provides for a guaranteed two hours of call in pay whenever an employee is called in to work outside of his or her normal working schedule, regardless of how long the assignment lasts. The historical basis for this payment is established by the testimony of Allan Esser, who stated that while he was working for the City DPW employees were always paid a minimum of two hours pay whenever called in outside of regular work hours. He himself was paid call-in pay on numerous occasions. This occurred even before the contract was amended to provide for call-in pay for employees scheduled to be on-call during weekends. It is also notable that none of the employees who testified indicated that they had ever been sent home early from their regular shift, lending credence to the understanding that Section 11(1) only applies to call in situations.

The Union further asserts that the language of Section 11(1) is clear and unambiguous and should be applied as written. The provision clearly specifies that whenever an employee is called in he or she is guaranteed a minimum of two hours pay at time and one-half no matter how long the assignment lasts. There is no support for the City's position that the two hours pay only applies to an employee's regular shift. It is conceded that the language could have been more artfully drafted, but that does not make it the less unambiguous. BAY AREA MEDICAL CENTER, Case 20, No. 66489, A-6260 (Emery, 1/4/08); WASHBURN SCHOOL DISTRICT, Case 59, No. 63509, MA-12610 (Emery, 2/1/05). This is not obviated by the fact the previous bargaining representatives did not assert the Union's rights or try to enforce the language. It is unknown why they took the positions that they did, but even an error by a bargaining agent does not change unambiguous language. It is clear that the Union has not sought to enforce the language for many years, either through error or unwillingness to assert its rights. It is also clear, however, that such error or failure does not make the language less unambiguous or prevent the Union from enforcing them later. Further, the City cannot claim past practice to support its position, because the different ways the language has been applied over the years make it clear that there has never been a clear, consistent understanding by the parties as to any fixed set of principles for its application.

The Union further asserts that the contract, read as a whole, supports its position. Section 11(1) is internally consistent. It provides for pay at time and one-half when an employee is called out after normal working hours within the same section that provides two hours of pay whenever an employee reports for work and is sent home. Clearly the two sentences were intended to be related to the same circumstances, otherwise the time and one-half reference would more properly be included in Section 11(2), which addresses overtime. It is of no importance that other contracts have clearer language because it is unknown when those other provisions were added relative to this one. Section 11(3) also supports the Union's position. It provides for four hours per day of standby pay for employees who are on call, as well as one hour minimum of pay at time and one-half when an employee is actually called in. This language did not exist when Section 11(1) was added to the contract, yet employees called in on weekends still received a minimum of two hours pay. This shows that when Sec. 11(3) was added the reduction to one hour of call in pay was a trade off for the four hours per day of standby pay. It also shows recognition that call in pay is understood to be warranted in such situations and it would be inconsistent for call in pay only to apply to standby employees and not to employees called in at other times. Section 13(2) also provides for an additional two hours of pay at overtime rates whenever employees schedules are changed for purposes of plowing snow, which supports the presumption that the parties recognized that call in pay was appropriate whenever employees are required to work outside the normally scheduled hours.

Finally, the Union asserts that, even if found to be ambiguous, the contract should not be interpreted in such a way as to lead to a harsh, absurd, or nonsensical result. The City asserts that whenever an employee is called in it is fair to pay the employee only for the time actually worked, even if the amount of time worked is only fifteen minutes, even though the employee must be available, change clothes and travel to and from work, in addition to performing the assigned task. This would clearly be unreasonable and one could not expect the

employees to be willing to volunteer for such duty. Also, both internal and external comparables support a finding of call in pay in this instance. All comparable DPW and Highway units from surrounding communities and counties, and all other internal Marshfield units, provide for some level of call in pay. Even the City's unrepresented employees are guaranteed call in pay. Only this unit does not receive it. Thus, if the language is found to be ambiguous, the arbitrator should interpret it to produce a fair result, rather than a harsh one.

The City

The City asserts that the Union cannot repudiate a past practice that interprets contract language. BROWN COUNTY, Case 527, No. 50880, MA-8414 (Buffett, 1/31/95). In that case, the arbitrator held that practices that are based on language in the contract can be repudiated during bargaining over a successor contract. Thus, the City maintains that, whether or not the language is ambiguous, if the practice is based upon the language it cannot be repudiated by the Union. Further, if the provision is ambiguous and the practice clarifies it, the practice cannot be repudiated in bargaining and the Union must bargain for language that eliminates the ambiguity in order to eliminate the practice. CALUMET COUNTY, Case 139, No. 67328, MA-13835 (McLaughlin, 8/20/08). Here, the practice is clearly tied to the language of Section 11(1). Further, reading the entirety of Section 11(1) reveals that it is ambiguous because it is not clear that "reports for work" refers to call ins or just to regularly scheduled work.

Past practice and bargaining history also support the City's case. The Esser testimony is not probative. In fact, the Union was not aware of Esser's testimony at the time the grievance was filed or nearly up to the date of the hearing. The undisputed evidence is that for nearly 30 years the City's practice regarding call ins of DPW employees has remained unaltered. During that time the parties bargained numerous contracts and the Union made proposals to change Section 11(1). One must presume that the Union's negotiators make specific proposals with the knowledge of an existing practice they understand that the language must continue to be interpreted consistent with the practice. In effect, the Union is now trying to obtain in arbitration what it could not obtain in bargaining, which must be rejected. The Union asks the arbitrator to believe Mr. Parrish when he claims he did not read the specific language in question when he made the bargaining proposals in 2005 and 2007, but that does not explain why his predecessors did not challenge the language. Further, it strains the credulity to believe that he did not read the contract for that period of time and that he did not question Mr. Becker about his memo before the 2005 bargain, specifically about the language of Section 11(1). Even if true, the Union should not be rewarded for these oversights.

The other contracts offered by the Union in this case to support its comparability argument also favor the City's position. These provisions all contain clear language setting forth the terms of call in pay, which the contract in this case do not. It is clear from the difference between the provisions that the one at issue here was not intended to create the same rights set out clearly in the others.

The Union argues that the current language and practice are unfair because they would require an employee to come to work, with all the extra time involved in preparation and travel, for a mere fifteen minutes pay. In fact, this situation has never arisen. Also, the Union's fairness argument does not take into account the unfairness of expecting the taxpayers to pay two hours wages at time and one-half for fifteen minutes work. Fairness cuts both ways. The Union asserts that the City demands too much for improvements in the contract, but it could be equally argued that the Union offers too little. In short, this is an issue that should properly be addressed in bargaining, not in arbitration.

DISCUSSION

The parties in this case are in dispute as to the proper interpretation and application of Article 11, Section 1 of the contract. The Union asserts that the language clearly and unambiguously provides for a minimum of two hours of guaranteed pay at time and one-half for any employee who is called into work outside of regular working hours. The City maintains that the language is capable of multiple interpretations and is, therefore, ambiguous. Over time, however, a practice has developed that reporting pay is not paid for call-ins, but employees who are called in are paid for all time worked at time and one-half.

The first question that arises in this case is whether the language in question is clear and unambiguous. If it is, it must be applied according to its terms and any extrinsic interpretive devices, such as past practice or bargaining history are unnecessary. If, however, the language is ambiguous, then extrinsic evidence of its meaning are appropriate to consider.

The specific language is:

Article 11 – Report Time – Overtime – Call Time

Section 1. When an employee reports for work and is then sent home, the employee is entitled to two (2) hours pay for reporting. Whenever an employee is called out after working hours, the employee shall be paid time and one-half (1-1/2).

The crux of the issue is the meaning of the first sentence. The Union's position is that the language means that any time an employee reports for work, whether regularly scheduled or whether as a result of being called in outside of regular work hours, the employee is entitled to a guaranteed minimum two hours of pay, even if he or she is sent home in less than two hours. The meaning of sentence two is that if the employee reports as a result of being called in he or she is entitled, in addition to the two hours of pay, to be paid at time and one-half. The City asserts that the language is not clear as to whether reporting pay is due in call-in situations and that an equally plausible interpretation is that reporting pay only applies to employees who are regularly scheduled to work and that the only benefit attached to being called in outside of regular hours is that all time worked will be paid out at time and one-half.

In my view, the City's argument regarding the provision is more persuasive and I find that the language is ambiguous. Facially, it is noteworthy that the parties used two different terms within the provision to identify two different types of pay guarantees. Two hours of pay are guaranteed when an employee reports for work and time and one-half is guaranteed when an employee is called out after working hours. These are two different concepts and it is not clear whether reporting pay was intended to apply to all situations or only to situations when an employee reports for his or her regularly scheduled shift. It is suggestive that the two provisions were included in the same section that they were intended to be read together. On the other hand, Section 11(3) contains language specifically providing one hour of guaranteed pay for employees who are called in when on-call during weekends. Notable here is that the employee is entitled to be paid when he or she "responds to a call," whereas in Section 11(1) the employee is entitled to be paid when he or she "reports for work and is sent home." Again, these are not necessarily identical concepts. Furthermore, the language in dispute here has been in the contract since at least 1961, at which time there was no contractual on-call provision. The language of Section 11(3) covering weekend on-call duties was added later. The record does not provide detail about the negotiations surrounding the addition of Section 11(3) so it is not possible to determine what considerations went into the negotiations or how, if at all, Section 11(3) was intended to relate to Section 11(1). In short, therefore, it is not clear from the language itself that the phrase "reports to work" was intended to apply in call-in situations and so the language is ambiguous and requires interpretation.

One of the typical interpretive tools used in determining the meaning of ambiguous language is past practice. Where the parties have a history of applying ambiguous language in a particular way the arbitrator may rely on that practice in determining the intended meaning of the language. In order to be binding on the parties, however, a practice must have certain characteristics. It must be clear and unequivocal, mutually accepted by the parties and consistently applied over time. The City asserts that such a practice exists here in that reporting pay has not been paid to employees in call-in situations for at least thirty years, thereby establishing a binding practice of not paying reporting pay in those circumstances. The Union disputes the existence of a practice and, in the alternative argues that any existing practice was repudiated in December 2007 and was not effective thereafter.

The record reveals that over the years the issue of compensation for call-ins has been addressed a number of different ways. Allan Esser, a retired DPW employee, testified that he was called in to work on a number of occasions between 1961 and 1979 and always received at least two hours pay. Union President Jeff Becker, who has worked for the City since 1981, testified that he never received a guaranteed two hours for call-ins, but that from the early 1990's until around 2000 employees who were called in received a minimum one hour of pay for reporting. After 2000, the City stopped guaranteeing the one hour minimum, which led to the Union beginning to make bargaining proposals to include a call-in minimum thereafter. Becker also told him that he was informed by both management personnel and two successive Union representatives, Jeff Wickland and Jerry Ugland, that the existing contract language did not guarantee two hours of pay for call-ins. Duane Schueller was a member of the bargaining unit and served as a Union officer between 1961 and 1977 and served as Street Superintendent

from 1977 until 1989. Schueller testified that he was never aware of a practice of paying two hours minimum for call-ins. Further, Street Superintendent Brian Panzer, who has worked for the City since 1984, testified that the one hour minimum has applied to weekend on-call under Section 11(3), but not to call-ins under Section 11(1). In short, the hodgepodge of opinions and recollections about what has been done and why with regard to call-in pay over the years makes it difficult to discern any consistently agreed or implemented practice such that one can say there is any binding practice in this area. Indeed, Parrish's letter to Human Resources Director Lara Baehr on December 21, 2007 undercuts the existence of a binding practice. Parrish states, in part: "...local 929 DPW repudiates any past practice of failing to follow/declining to enforce the call in provisions of the contract, specifically, Article 11, section 1." Yet, it is clear from testimony of Becker that, prior to 2007 neither the Union members nor their representatives believed that Article 11, Section 1 provided for guaranteed call-in pay. Given that state of mind, there cannot have been a commonly understood and accepted practice, on the Union's part at least, of failing to follow or declining to enforce the contract language by not offering guaranteed minimum pay for call-ins.

Absent a binding practice, one must then rely on other interpretive tools to construe Section 11(1). One such is to give the words in the provision their normal or technical meanings. Here, particular attention is given to the phrases "reports for work" and "the employee is entitled to two (2) hours pay for reporting." It is clear that the two hours of guaranteed pay is tied to reporting for work. The question then becomes whether reporting for work has a specific meaning in this context. I find that it does. Reporting pay provisions are generally recognized as guaranteeing employees a specific amount of money for reporting to work as scheduled even if there is no work available. The intent is to meet the expectation of employees to be able to work for the amount of time scheduled. *The Common Law of the Workplace*, p. 258, Theodore St. Antoine, Ed. (1998). Call-in pay, on the other hand, is specifically intended to compensate employees at a minimum guaranteed level for the inconvenience of being called in outside of regular hours. *Ibid*, p. 264-65. This interpretation would suggest, therefore, that the use of the words "reports" and "reporting" in this provision were intended to specifically guarantee a minimum of two hours pay to employees for reporting for their regular work day. The Union argues that this is an unreasonable interpretation because there is no history in this unit of employees being sent home early so the provision is meaningless. Schueller explained, however, that when the language was originally negotiated many of the bargaining unit employees had previously worked for private contractors where workers were routinely sent home for lack of work and reporting pay provisions were common. The inclusion of the language in the contract, therefore, was not due to the working hours practices in the DPW at the time, but, rather, was due to the work environments from whence they had come

In support of the foregoing view, also, is the conduct of Wickland and Ugland, the previous Union representatives. According to Becker, both representatives had at different times told the bargaining unit members that Section 11(1) did not provide a two hour guaranteed minimum for call-ins. Neither representative testified, but one may assume that they had read the contract and familiarized themselves with its terminology. Current Union

representative Houston Parrish testified that when he read the provision he concluded that the minimum guarantee applied to call-ins and that Wickland and Uglund were mistaken. Nonetheless, it would appear that for a number of years the prevailing view of the bargaining unit's professional representatives was that the term "reports to work" did not apply to call-ins, which is consistent with the general view expressed above. This is also supported by the bargaining history, which shows that the Union made bargaining proposals in 1998 and 2001 to have a guaranteed minimum payment included for call-ins outside regular work hours. Again, the appearance is that the Union accepted the view that Section 11(1) as currently worded did not provide guaranteed minimum pay for employees called out after working hours. In sum, therefore, while different persons, even within the same camp, may, and clearly do, disagree as to what the contract language means, the Union has failed to persuade the Arbitrator that Section 11(1) should be interpreted to guarantee two hours of pay at time and one-half for employees called in outside of regular working hours.

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

AWARD

The Employer did not violate the collective bargaining agreement by failing to pay the Grievant a minimum of two hours for the call-in on April 10, 2008. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 12th day of August, 2009.

John R. Emery /s/

John R. Emery, Arbitrator