

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OSHKOSH CITY EMPLOYEES UNION, LOCAL 796, AFSCME, AFL-CIO
AND AFFILIATED WITH THE
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES**

and

CITY OF OSHKOSH, WISCONSIN

Case 373
No. 69057
MA-14457

Appearances:

Mary B. Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, for the Oshkosh City Employees, Local 796, AFSCME, AFL-CIO, and affiliated with Wisconsin Council of County and Municipal Employees, which is referred to below as the Union.

William G. Bracken, Labor Relations Coordinator, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, for the City of Oshkosh, Wisconsin, which is referred to below as the City or as the Employer.

ARBITRATION AWARD

The City and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this matter and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to serve as Arbitrator to resolve a "Class Action" grievance concerning overtime payment for employees called in to work while on vacation. Hearing was conducted in Oshkosh, Wisconsin on November 13, 2009. The hearing was not transcribed. The parties filed briefs by January 11, 2010.

ISSUES

The parties did not stipulate the issues. The Union states the issues thus:

Whether the Employer violated the Collective Bargaining Agreement when it denied employees twice their rate of pay when they were called in to work while on an approved vacation day?

If so, what is the appropriate remedy?

The City states the issues thus:

Did the City violate Article XII, Call In Pay, paragraph 2, when it followed its Street Division vacation scheduling policy and compensated employees at straight time when they were called in on November 24, 2008?

If so, what is the remedy?

I adopt the Union's statement of the issues as that appropriate to the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE II

RECOGNITION AND UNIT OF REPRESENTATION

The Employer recognizes the Union as the exclusive collective bargaining representative for the purposes of conferences and negotiations with the Employer or its lawfully recognized representatives, on questions of wages, hours and conditions of employment for the unit of representation, consisting of all regular full-time employees of the Employer, employed by the following departments and divisions, excluding only the non-working supervisors and professionals:

<u>Department</u>	<u>Divisions</u>
1. Public Works	Street, Central Garage, Sanitation
2. Parks	Parks, Forestry, Cemetery
3. Sewer Utility	Wastewater Treatment Plant
4. Water Utility	Filtration Plant, Water Distribution
5. Transportation	Transit, Traffic Engineering

...

ARTICLE III

RULES AND REGULATIONS

The Employer shall adopt and publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be first submitted to the Union for its information, prior to the effective date.

The rules shall become effective on the day following the fifteenth (15th) day of submission to the Union. In the event of dispute as to such rules or regulations, the dispute shall be referred to the grievance procedure for settlement and shall be initiated at the level of their origin. All rules shall bear the signature of the Director of Administrative Services. . . .

ARTICLE VII

SENIORITY

The Employer agrees to the seniority principle. . . .

ARTICLE X

NORMAL WORK WEEK, NORMAL WORKDAY AND NORMAL WORK SCHEDULE

The normal work week shall be forty (40) hours, Monday through Friday. The normal work day shall be eight (8) hours per day, Monday through Friday. The normal work schedule shall be five (5) consecutive eight (8) hour days, Monday through Friday, for the following divisions:

- a. Street Department
- b. Parks Department
- c. Sanitation Department
- d. Cemetery
- e. Water Department, Outside Crew
- f. Electrical Division
- g. Forestry Division

. . .

In the event it is necessary to change employees from one regular schedule of hours to another schedule of hours the employees shall be given at least 24 hours notice of change. Work performed on a revised schedule during the 24 hour notice period shall be compensated at 1 1/2 times the normal rate of pay whether or not total working hours for the week are in excess of 40 hours, except as otherwise provided herein for emergencies.

For an emergency such as snow removal, ice control, flood control, sickness, and so on, the Employer shall have the right to schedule the work week as may be necessary and from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his/her normal work week schedule shall not be sent home early on subsequent days or denied his/her regular work week schedule to avoid over-time payment without his/her consent. The spirit of this provision is that the Employer shall not be penalized during emergency conditions through overtime payment during the 24 hour notice period, but neither shall the Employer adjust the working hours after emergency conditions (e.g. to less than 8 hours per day) so as to deny employees legitimate overtime.

Compensation for work on any regularly scheduled shift shall be at the straight rate time of pay, unless otherwise specified in this Agreement. . . .

ARTICLE XII

CALL IN PAY

In the event employees are called for work after their normal work days have been completed they shall receive a minimum payment of two (2) hours pay at the rate of time and one half (1 1/2) their rate of pay. The Employer may change the employees shift upon giving 24 hour notice, except in case of emergency, at which time the 24 hour notice shall be waived.

In the event employees are called in to work on an approved vacation day, they shall receive a minimum payment of two (2) hours pay at twice their rate of pay for all work performed.

ARTICLE XIII

AUTHORIZED ABSENCE

. . .

Holiday Leave: . . . All regular full-time employees who are required to work on an established holiday shall receive double (2) their regular rate of pay for all hours worked in addition to the Holiday Pay. . . .

ARTICLE XIX

GRIEVANCE PROCEDURE

. . .

Step 5. . . . The decision of the arbitrator shall be “final and binding” on both parties, however, he/she shall have no right to amend, modify, ignore, add to or delete the provisions of this Agreement. The decision of the arbitrator shall be based solely upon his interpretation of the express language of the Agreement. . . .

ARTICLE XXVII

MAINTENANCE OF BENEFITS

The City will not change any benefit or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.

BACKGROUND

The grievance is a “Class Action”, dated December 30, 2008 (references to dates are to 2008, unless otherwise noted). The grievance form cites Articles XII and XXVII as the governing provisions and seeks that the City “Make all employees whole” for having “Called Drivers on vacation to plow.” The affected employees were Chris Langenfeld; Douglas Putzer and Bill Wittkowske, all from the Street Division. Kevin Uhen is the Division Superintendent.

The grievance traces to a November 24 snowstorm. Langenfeld worked from 5:27 a.m. through 3:15 p.m.; Putzer worked from 10:38 a.m. through 4:07 p.m.; and Wittkowske worked from 5:13 a.m. through 2:43 p.m. The City calculated Langenfeld’s hours at 9.75, paid at 8 hours of straight time and 1.75 hours of Overtime/Comp Time. The City calculated Putzer’s hours at 5.25, paid at 5.25 hours of straight time. The City calculated Wittkowske’s hours at 9.50, paid at 8 hours of straight time and 1.50 hours of Overtime/Comp Time. Each employee had previously obtained approval to take 8 hours of paid leave on November 24. The City did not debit Langenfeld and Wittkowske for vacation on that day, thus replenishing their vacation allowance by 8 hours. The City did not debit Putzer for 5.25 hours of floating holiday for that day, thus reducing his balance by 2.75 hours.

Each of these employees had requested paid leave for November 24 on February 11. They made the requests on a Vacation Request Form (the Form) maintained by the City. The Form contains three entries to denote City action on the request. The three entries read thus:

() REQUEST APPROVED – EMPLOYEE NOT SUBJECT TO CALL.

() REQUEST APPROVED – EMPLOYEE SUBJECT TO CALL BECAUSE MORE SENIOR EMPLOYEES HAVE ALREADY HAD REQUESTS APPROVED NOT SUBJECT TO CALL. THE EMPLOYEE UNDERSTANDS THAT HE/SHE MUST BE AVAILABLE FOR EMERGENCY CALL-IN AND IF CALLED IN ON A SCHEDULED VACATION DAY THE EMPLOYEE WILL RECEIVE STRAIGHT TIME PAY FOR THE FIRST EIGHT (8) HOURS OF WORK (MONDAY –FRIDAY). IN THE EVENT AN EMPLOYEE IS CALLED IN, HE/SHE WILL BE ALLOWED TO RE-SCHEDULE THE VACATION.

() REQUEST DENIED – REASON _____

When approved each request, and each Form has the first entry checked. The Forms are maintained under a Street Division Vacation Scheduling Policy (the Policy).

The Policy applies to “all Street Division employees” and states:

The following procedure will be used for scheduling vacations during the calendar year of 2008. Reservation of weekly and single day vacation requests will be scheduled in the lunchroom on the following date: February 11, 2008.

The vacation scheduling will be conducted in its entirety on the above date. This will first be done for full week (Monday through Friday) vacation requests. Seniority will prevail with as many weeks as desired (subject to minimum amount of full week off noted below) being scheduled per employee through the seniority list. The maximum number of employees to be approved for vacation for any calendar week shall be a total of four (4) employees off per day.

...

Another exception to this shall be for the holiday weeks of Thanksgiving and Christmas. Ten (10) employees will be the total amount of employees allowed off per day for the holiday weeks of Thanksgiving and Christmas. Additional employees will be allowed to request vacation for the holiday weeks of Thanksgiving and Christmas contingent on the employee agreeing to be “subject to call”.

...

Once the annual vacation scheduling date has passed, all single day vacation requests will be done on a first come, first serve basis as allowed by staffing requirements. All requests must be submitted to the street superintendent and dated to eliminate any confusion regarding the order in which employees submitted their vacation request. These requests for remaining vacation hours must be scheduled by October 1st.

(Note: It is extremely important that you attend the scheduled session with a prepared list. Please remember to have selected alternate dates since your first choice(s) might be filled prior to your selection. Any employee who is off work and unable to attend the scheduled time must submit a preference list to the street superintendent in order that their choices are considered when their name appears on the seniority list.)

General requirements:

The clerk/dispatcher position will not be counted for the total amount of employees allowed off per day.

Submittal and approval of a vacation request must be made 24 hours in advance of the day requested. No changing of scheduled time off will be allowed without supervisor approval.

The minimum time off for vacation shall be eight (8) hours. Vacation requests for less than eight (8) hours will not be approved unless the employee is clearing a balance of vacation time or has approval from management due to mitigating circumstances.

This document will replace the document titled "Vacation Signup for Street Division" that was effective January, 2007.

The Policy is dated January 25, and is signed by John Fitzpatrick, the City's Director of Administrative Services and Uhen.

The balance of the **BACKGROUND** is best set forth as an overview of witness testimony.

Bill Sitter

Sitter has worked in the Parks Department for the past ten years. Prior to that, he worked in the Street Division for nine years. He is the Union's President. The three employees covered by the Grievance were "above the line" for Thanksgiving week, which is to say they were among the ten employees "not subject to call" under the Form.

Article XII demands double time for employees called to work on an approved vacation day. This view has strong roots in the past. In early 2006, the parties processed a number of grievances, including one filed on behalf of Gary Stahowiak. The Union took the position that a vacation day was a twenty-four hour period, and the City took the position that a vacation day was an employee's normal shift. After considerable discussion, the City proposed to the Union that an employee's normal eight hour shift constituted a day for all paid day benefits. The Union

took the proposal back to its membership, which voted to accept the City's proposal. In Sitter's view, this meant Article XII demanded double time for any work performed by an employee who worked part or all of a normal shift on a paid day. The Union confirmed its view in a letter from Mary Scoon to Fitzpatrick, dated February 6, 2006, which states:

5/16 (Gary Stahowiak): The Union has decided not to appeal the grievance to arbitration. The Union waives no rights and arguments by not proceeding in this matter.

For clarification purposes, a vacation day is an employees normal hours of work. When an employee is called into work on an approved vacation day, he/she shall receive a minimum payment of two (2) hours pay at twice their rate of pay for all work performed per Article XII of the parties' agreement. When an employee is called into work on a scheduled vacation day, but after their normal scheduled hours, he/she shall receive time and one half pay for all hours worked.

For sick leave purposes, a sick leave day shall be considered the hours an employee would normally be scheduled to work. Thus, employees could be called into work after their normal hours of work.

Feel free to contact me with any questions or if (you) would like to discuss any of these matters further.

Fitzpatrick did not respond. The parties did not execute a formal settlement agreement, but the Union voted to drop the grievance after the City made its proposal to use a normal shift to define a paid day.

Sitter believed that employees have received double time when called in on a vacation day, but some of those examples involve divisions other than the Street Division. He believed that the Form determined whether or not an employee would be called if overtime was available. He was not aware if supervisors offered employees on vacation the opportunity to accept overtime on a vacation day. The City did not use the "above the line" distinction when he worked in the Street Division. He did not know if the employees covered by the grievance were offered the opportunity to decline the overtime.

The labor agreement does not define a normal shift, but refers to an eight hour work day. The City can alter shifts in certain events, including emergencies. Emergencies can include snowplowing, but Sitter did not believe an emergency rendered an employee's normal shift irrelevant. In his view, the February 8, 2006 letter meant that overtime within an employee's normal shift on a paid day off is paid at double time, while work outside of the normal shift is paid at time and one-half.

Greg Spring

Prior to accepting employment with the Wisconsin Education Association Council, Spring worked for AFSCME, and served as the Union's business representative. The Union has a strong contract and was aggressive in its assertion of its rights at the table and through grievance arbitration, particularly with regard to seniority. In the negotiations for a 1987-88 contract, Spring made the following proposal for the Union regarding Article XII:

Add to the present language:

In the event employees are called in to work during the 24 hours of an approved vacation day or compensatory day, they shall receive a minimum payment of two (2) hours pay at twice their rate of pay for all work performed.

This proposal did not dominate the parties' discussions, which focused more on a City subcontracting proposal flowing from a City decision to sub-contract the operation of its golf course. The parties were, however, able to agree to modify Article XII as proposed by the Union, with the deletion of "during the 24 hours" and "or compensatory day". The agreement on Article XII was a larger issue regarding the Utilities than the Street Department, because utility work, unlike snowplowing, commonly involved work of less than two hours. The agreement reflected the unit-wide application of a normal shift to define a paid day.

Kevin Uhen

Uhen has served as Superintendent since December of 2007, and has worked for the City since February of 2006. There are thirty-three employees in the Street Division. The Policy is implemented annually to permit the City and unit employees to plan. Changes from past policies to the Policy have been minimal. The City views the Policy as a work rule. It posts a proposed policy on employee bulletin boards to permit the Union to challenge the proposal within the fifteen day time limit under Article III, and executes the document to make it effective. The Union did not challenge the Policy. The purpose of the exception for Thanksgiving and Christmas weeks is to permit more employees the opportunity to take time off in those weeks.

The portions of the Form not requiring a signature may be filled out by employees or by supervisors. Uhen did not view the "subject to call" and "not subject to call" entries to be significant. He understood the Union's position to be that employees have to be called in for overtime on the basis of seniority, without regard to the Form. Uhen and the supervisors who report to him follow that call in procedure, including the November 24.

Employee shifts for snow emergencies start when the employee reports for work. Langenfeld and Wittkowske had approved vacation for November 24, Putzer was using floating holiday. Each was called in order of seniority to determine if they wanted to come in to plow snow. Each volunteered to do so. Two of the affected employees advised Uhen prior to their vacation days that they would be available for overtime call in during their vacation. Wittkowske

specifically asked if he would lose vacation and Uhen told him that he would not. Uhen has never compelled an employee in on overtime. In his view, compelled overtime would trigger the operation of the second paragraph of Article XII. He noted his opinion that if he would have been required to call in the entire unit for the November 24 snowstorm, the ten “above the line” employees would have received double time.

Uhen searched payroll records dating to 2000 and could find no example of City payment of double time for overtime hours. He was aware of no City/Union discussions following the February 8, 2006 letter that addressed the City’s ability to consider an employee’s shift to begin when the employee reported to work to plow snow in an emergency.

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

THE PARTIES’ POSITIONS

The Union’s Brief

After a review of the evidence, the Union contends that accepting the City’s view “renders Article XII meaningless.” This violates “boilerplate law” within arbitral and judicial precedent. Article XII is “clear and unambiguous”, but even if it was not, bargaining history evidence establishes that the 1987-88 change “was to mirror that of the holiday leave provision” which thus mandates double time for employees called in on a vacation day.

Beyond this, the parties’ settlement of the 2006 Stahowiak grievance establishes mutual agreement that an employee’s normal hours of work establish the time period to which double time payment applies. This precludes accepting City argument that a call-in to work while on vacation “is merely changing the employee’s regular schedule of hours to another schedule”. Nor can the Policy or the Form trump the operation of Article XII or Article XXVII. The Policy is a convenience for the City and affords no basis to define overtime premiums under the labor agreement.

To affirm the agreement’s clear language, the Union concludes,

Given the employees already received credit for their vacation time, the union requests the employer make each employee whole for the time worked during their normal hours of work while on an approved vacation day.

The City’s Response

The City’s position “is straight forward.” Its vacation policy permits more employees to take vacation during holiday weeks than is allowed during non-holiday weeks. The Policy is authorized by Article III and is enforceable as a work rule. The City met all the procedural requirements of Article III, thus making Article XXVII inapplicable. The two provisions must be given meaning, and because the work rule is specific to vacation scheduling, it governs the grievance under standard norms of contract interpretation.

The application of Article XXVII would render Article III meaningless “by allowing the Union to object to any rule at any time.” Beyond this, the evidence shows that the City followed the Policy by paying affected employees their regular rate and restoring their vacation day. The Policy and the Form permit more employees to take time off during holiday weeks. All three of the employees covered by the grievance “chose to report for work voluntarily” and “were paid their regular hourly rate of pay for all hours worked, premium pay for hours worked in excess of eight (8) hours, and had their vacation hours restored.”

Any doubt concerning the City’s implementation of the Policy is addressed by past practice. Uhen “was unable to find a single instance in which the City paid double time to an employee who voluntarily reported to work on an approved vacation day.” Nor could Uhen find any evidence of a grievance challenging the Policy or its predecessors. The evidence demonstrates all of the criteria that define a binding past practice, and supports the City’s view. Even if the Union could show a contract violation, the evidence fails to indicate what possible remedy it could seek. The net effect of the City’s implementation of the Policy is that the three affected employees received double time compensation. Against this background, awarding the Union the remedy it seeks “would actually create a triple time windfall for the Grievants.” Even if such a remedy is arguably appropriate, it lies in the face of the language of Article XII. The Union reads the terms providing double time under Article XII as if it was identical to the terms of Article XIII, which provide a double time rate for hours worked on a holiday. This ignores that Article XIII provides that rate “for all hours worked in addition to the Holiday Pay.” The two provisions use different terms and the difference between those terms must be honored in arbitration.

Contrary to the Union’s assertions, the City’s view does not render the double time rate of Article XII meaningless. The Policy seeks to afford more employees time off during holiday weeks than the contract demands. Granting the Union’s view punishes the City “for attempting to provide additional vacation opportunities for its employees.” The City’s reading of Article XII does no more than put the City in the position it would be if it simply denied the vacation requests. Beyond this, the City interprets the double time rate of Article XII to be required if an employee is compelled to work on an approved vacation day. This view is well rooted in the language of Article XII and grants meaning to the double time rate, since it grants it in cases where the City compels overtime. The City’s view thus grants meaning to Article XII while expanding the vacation opportunities available to employees. This does not render any contract term meaningless and establishes a “mutual arrangement and understanding (that) has served both parties very well over the years.”

The February 8, 2006 letter is not a grievance settlement. The Union dropped the Stahowiak grievance. The City took no action to approve the letter and the letter notes the Union “waives no rights and arguments” by dropping the grievance. In the absence of mutuality, the letter provides no more than the Union’s view of Article XII. Viewing the record as a whole, the City concludes that “the grievance should be dismissed.”

The Union's Reply

The evidence makes “it clear that employees are entitled to twice their rate of pay when called in to work on a vacation day in addition to their vacation pay.” The City’s right to make a rule under Article III does not also provide it the authority to overturn other contract provisions. Beyond this, Article XII covers all departments and divisions within Article II, and allowing employees more vacation opportunities “does not allow the Employer to modify the terms and conditions of the labor agreement which represents many departments.”

The employees covered by the grievance were not subject to call in. Each was “above the line” and if each can be compelled to lose overtime, does it follow that each forfeits vacation if the overtime precludes carry over? The evidence falls short of establishing a binding past practice. Article XII is clear and unambiguous, which precludes the need to consider past practice. Even if relevant, the evidence shows no more than “an obviously mistaken view of a contractual obligation.” Article XIX underscores that a grievance arbitrator cannot change the terms of the contract, yet the City’s view of the grievance seeks such a result, for it modifies “the terms of the agreement that were mutually agreed during negotiations for the 1987-88 labor agreement.” City attempts to distinguish the reference “called for work” from the reference “called in to work” have no persuasive force. If the distinction means anything, it underscores the strength of the Union’s reading of the call in rate under Article XII. The City’s reading of the February 8, 2006 letter cannot be accepted without undercutting the Union’s ratification of a settlement. It follows that the grievance should be sustained and “all affected employees” should be made whole.

DISCUSSION

I have adopted the Union’s statement of the issues. The City’s specifies that the dispute involves the call in on November 24, but the absence of such a reference from the Union’s does not unduly broaden the issue. The evidence focuses on three employees called to work on November 24. The City’s statement of the issue highlights that the second paragraph of Article XII governs the grievance, but the Union’s statement highlights that Article XII cannot be given meaning without reference to other agreement provisions. At a minimum, the City’s obscures that Article III plays a critical role in the application of Article XII.

The strength of the Union’s case is that the second paragraph of Article XII is clear and unambiguous in its grant of double time for work on a vacation day. The Union’s case has considerable force, for if that provision stood alone, the grant of double time appears clear. The difficulty with the Union’s case is that it is impossible to make Article XII stand alone without unduly complicating the operation of other agreement provisions.

The fundamental difficulty with reconciling the Union’s view to other agreement provisions involves Article III. There is no dispute that the Policy served as a work rule in

2008. The relationship of Articles III and XII is less than clear. Uhen's view that he was obligated to call in by seniority is well rooted in Article VI, but impossible to reconcile to the Form's admonition that employees "above the line" are "not subject to call." If Article XII clearly mandates double time, then who is eligible to receive it? If Article III grants the Policy meaning as a rule, what does "not subject to call" mean? These questions permit more than a single, clear answer. The relationship of Article X to Article XII offers further complications. Is double time under Article XII "legitimate overtime" under Article X, or can it be avoided by shifting work schedules? Is a vacation "day" a twenty-four hour day or an employee's normal eight hour shift? Is there a "normal eight hour shift" under Article X? The parties' extensive discussions leading to the Union's February 8, 2006 letter highlight how unclear these points are. Beyond this, the Union's view that Article XII is unambiguous makes it unclear why the parties used different language in Article XIII to achieve the same result for holiday leave. However clear the language of Article XII may appear in isolation, its relationship to other agreement provisions is unclear.

The City's view of the relationship of these provisions is preferable to the Union's. The Union's reading of the second paragraph of Article XII makes the Policy's implementation unduly difficult. If Uhen honored the "not subject to call" provisions of the Policy, he could simply not ask employees "above the line" to work overtime. Doing this, however, exposes the call in to challenge under Article VI, since it arguably avoids the application of seniority. Reading the Policy to demand double time for employees "above the line" is impossible to reconcile to the parties' conduct. Why would employees "above the line" note their availability for call in while on vacation if they were not subject to call? Each of the employees covered by the grievance volunteered to work. None lost paid time off. This reconciles Articles III and XII, while the Union's view poses an unneeded conflict. There is no inducement for the City to broaden vacation eligibility if doing so mandates the payment of overtime that the provisions of Article X seem to point away from.

The basis and scope of this conclusion can be clarified by more closely addressing it to the parties' arguments. The Union is correct that Article XII must be given meaning, but permitting the City to enforce the Policy as a work rule does not render Article XII meaningless. As Uhen's testimony highlights, double time under Article XII is mandated if the City compels an employee to come in off of vacation to work overtime. A unit-wide call in would thus mandate Article XII overtime for employees "above the line." If a supervisor compelled an employee to come in from vacation, the same considerations hold. Here, the employees volunteered and did not suffer any loss of paid time off. As the City points out, this effectively pays double time without undercutting the Policy as a work rule. The Union's view is well rooted in Article XII, but is difficult to reconcile to the Policy. Why would the City broaden eligibility for vacation if the end result is to increase costs beyond the minimum it is obligated to pay under Article X?

Standing alone, this consideration offers limited support for the City. However, in the context of this grievance, the consideration is substantial. The Policy is an annual work rule. The parties are free to modify its terms on a recurring basis. It is possible and plausible that

the parties could agree that employees “above the line” could be considered not available for call in outside of unit-wide emergencies. Accepting the Union’s view would mandate this result without clear support in the Policy, thus imposing on the parties through arbitration a result not clearly bargained for. Adopting the City’s view permits the parties to consider the point and adopt it only if they agree to do so. This promotes the flexibility of the bargaining process.

The City’s citation of past practice has some bearing on this point. Evidence of past practice is not sufficiently strong to demonstrate Union agreement to the City’s view. However, it does show that the parties have consistently honored the ongoing viability of annual work rules regarding vacation selection. That the employees at issue here volunteered for overtime does not, as the Union persuasively argues, establish a waiver of Article XII. However, like other evidence of practice, it shows mutual willingness to be flexible regarding employees “not subject to call” under the Policy. City calls to “above the line” employees honor Article VI without reading Article XII out of existence. The absence of past payment of double time may not establish a binding practice, but it does highlight that caution is appropriate regarding a call to fix something that does not appear to be broken.

The February 8, 2006 letter falls short of establishing a settlement agreement bearing on the grievance. The letter states a clarification of position rather than an agreement, and does not waive any Union position. There is no express City agreement to its terms. Even if the clarification is implicitly a mutual understanding, it does not dictate the result the Union seeks. It remains unclear under the letter whether employees “above the line” can volunteer to come in to work overtime consistent with the Policy. As noted above, the parties could mutually agree to that result or to overturn it and still be consistent with the Policy’s terms. However, compelling double time under Article XII denies employee ability to volunteer for overtime under the Policy, without clear support in the letter. Would the City approve vacations “not subject to call” if doing so obligated it to pay Article XII overtime that it could avoid by denying the vacation request? If the letter is given the binding force the Union seeks, it would compel a result the letter does not reach.

Article XXVII does not compel the overtime payment the Union seeks. Past City non-payment of double time may not constitute a binding practice, but there is no solid evidence that the City has changed any mandatorily bargained benefit. Rather, it implemented an Article III work rule.

The Union raises potential issues regarding City shifting of hours under Article X. They are troublesome. However, whatever lack of clarity there may be in Article X regarding the grievance is not clarified by asserting that whatever Article X permits, Article XII trumps. It is not clear whether the Union’s view of Article XII reads the terms of Article X out of existence. More to the point, the issue is posed only if Article XII is read so expansively that it conflicts with Articles III and X. As noted above, the grievance poses no need to reach that far.

Bargaining history evidence is unhelpful. It highlights that Article XII is something other than clear. It underscores the significance of the Union's position that application of Article III must not deny meaning to Article XII. As noted above, the City's view grants meaning to each. It also underscores the need for caution. The bargaining history does not indicate the parties spent a great deal of time in the 1987-88 negotiations focusing on the changes to Article XII. This is easier to reconcile with the City's reading of Article XII than the Union's. The Union's view grants Article XII a broader scope than the bargaining history points to. There is no reason to believe the parties thought the changes to Article XII complicated its relationship to other agreement provisions. In this case, the City's view of Article XII is easier to reconcile to other agreement provisions than the Union's.

AWARD

The Employer did not violate the Collective Bargaining Agreement when it denied employees twice their rate of pay when they were called in to work while on an approved vacation day.

The grievance regarding the November 24 call in is, therefore, denied.

Dated at Madison, Wisconsin, this 12th of February, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator