

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF SHEBOYGAN FALLS**

and

**EMPLOYEES IN THE STREET DEPARTMENT, UTILITY DEPARTMENT,  
MUNICIPAL BUILDING, AND CEMETERY DEPARTMENT, LOCAL 1749-B,  
AFSCME, AFL-CIO**

Case 28  
No. 69177  
MA-14513

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**Appearances:**

**Crystal Fieber**, Attorney at Law, Hopp Neumann Humke LLP, 2124 Kohler Memorial Drive, Suite 110, Sheboygan, Wisconsin, 53081, appearing on behalf of the City of Sheboygan Falls.

**Samuel Gieryn**, Staff Representative, AFSCME, Wisconsin Council 40, 187 Maple Drive, Plymouth, Wisconsin, 53073, appearing on behalf of the Employees in the Street Department, Utility Department, Municipal Building, and Cemetery Department, Local 1749-B, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

The City of Sheboygan Falls (“City”) and Employees in the Street Department, Utility Department, Municipal Building, and Cemetery Department, Local 1749-B, AFSCME, AFL-CIO (“Union”) are parties to a collective bargaining agreement (“Agreement”) that provides for final and binding arbitration of disputes arising thereunder. On September 15, 2009, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a call-in dispute. The filing requested that the Commission provide a list of commissioners and staff members available to serve as arbitrator, from which the undersigned was selected. A hearing was held on March 15, 2010, in Sheboygan Falls, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties’ discretion, no transcript of the proceeding was made. Each party filed post-hearing initial and reply briefs, the last of which was received on April 22, 2010, whereupon the record was closed.

### ISSUE

The parties stipulated that the following issues are to be decided by the arbitrator:

1. Was the grievance filed in a timely manner?
2. Did the employer violate the Agreement when it disciplined employees Jay Comins and James Birschbach for failing to work a full two hours when called into work on May 16, 2009. If so, what is the appropriate remedy?

### RELEVANT PROVISIONS

The following provisions from the Agreement between the City and the Union are relevant to this matter:

#### ARTICLE I MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and direction of the working forces, including the right to hire, promote, transfer, demote, and suspend, or otherwise discharge for proper cause, the right to relieve employees from duty because of lack of work or other legitimate reason, and including the temporary transfer of employees from one department to another as work needs dictate, is vested exclusively in the EMPLOYER. Such transfer shall not be between the City and Utility work. The EMPLOYER may adopt reasonable rules and amend same from time to time, and the EMPLOYER and UNION will cooperate in the enforcement thereof.

#### ARTICLE X CALL-IN TIME

Employees who are called to work other than the regularly scheduled starting time, shall be entitled to at least two (2) hours work, or pay therefore, at time-an-one-half (1-1/2), regardless of the length of time less than two (2) hours which he may have worked. Any employee so called may be required to work the full two (2) hours.

**ARTICLE XXIV**  
**GRIEVANCE PROCEDURE**

A grievance is a violation of an expressed provision of this contract by the EMPLOYER or the UNION. Such grievance shall be settled promptly and at the earliest possible stage and it is therefore agreed that the grievance procedure must be initiated within ten (10) working days after the UNION had knowledge or should have had reasonable knowledge of the occurrence of the grievance as follows:

Step 1. The aggrieved employee, the UNION Committee, and/or the UNION Representative shall present the grievance to the Department Head.

Step 2. If a satisfactory settlement is not reached as outlined in Step 1 within one (1) week, the UNION Committee and/or the UNION Representatives shall present the grievance to the City Council. Such a meeting as outlined in this section shall be held within one (1) week or receipt of written request from the other party.

Step 3. If satisfactory settlement is not reached as outlined in Step 2, either party may, within thirty (30) days of the date of the Council's Step 2 grievance decision, request that the matter be submitted to arbitration by notifying the Wisconsin Employment Relations Commission and requesting the Wisconsin Employment Relations Commission to appoint an arbitrator.

Step 4. The cost of the WERC arbitrator shall be shared equally by the parties.

**BACKGROUND**

This case concerns the employees of the City's Department of Public Works ("DPW" or "Department"). Sometimes off-hours emergencies arise that require the attention of DPW employees. When that occurs, Department employees are contacted by telephone, on a rotating basis, by a dispatcher at a company with which the City has contracted to make such calls. When an employee receives a call, he or she is not required to accept the work. The dispatcher works his or her way through the rotation until an employee agrees to come in.

The provision that is currently Article X of the Agreement, regarding call-in time, has appeared in the collective bargaining agreements between the City and the Union since 1984. It is undisputed that, since that time, the City's practice has been to leave it up to the employee(s)

called in to do the work to determine the activities and amount of time required to complete the task that prompted the call-in. Particularly for major jobs, this determination would sometimes involve postponing a portion of the necessary remedial action to a regularly scheduled shift on another day. Regardless of the amount of time devoted to a task, DPW employees called in to work always have received a minimum of two hours of pay, as provided for in Article X.

At some point, DPW management began to perceive that employees were rushing through the jobs they were performing in call-in situations. As an illustration of this concern, a witness for the City described a situation in which an employee was called in to work on the weekend to deal with a clogged pump. Rather than unclogging the pump, the employee simply took the pump off-line and left the clog to be dealt with on Monday. The problem also arose with grave-closure work at the City cemetery. Sometimes employees called in to handle such work have left dirt on the DPW truck that should have been cleaned off and neglected to clear plywood pieces away from the grave site as they should have been. In all of these instances, the employees performing the work have stayed at the job for less than two hours. DPW management decided to take some measure to discourage these kinds of short-cuts.

On April 1, 2009, Mike Mersberger (“Mersberger”), the DPW director, distributed a memorandum to DPW employees which indicated that a new policy was being implemented whereby any DPW employee performing call-in work would be required to work a minimum of two full hours. Within a day or two of the distribution of this memorandum, Union president Dan Musch (“Musch”) and Union steward Bruce Kaboord (“Kaboord”) approached Mersberger and Department field supervisor Jerry Benzschawel (“Benzschawel”) to express concern about the new policy. Musch and Kaboord told Mersberger and Benzschawel that there probably would be problems with the policy and that grievances most likely would be filed. These individuals discussed ways that the policy could be revised to make it more acceptable to DPW employees.

On April 7, 2009, a revised policy was distributed. This version of the policy still imposed the two-hour minimum, but indicated that employees would not be required to comply with it between the hours of 8:00 p.m. and 8:00 a.m. and, in the case of cemetery burials, between the dates of April 1 and September 30. The policy also listed telephone numbers for Mersberger and Benzschawel and required employees to contact either of those individuals in the event that they could not stay for the required two hours. If employees were not able to reach Mersberger or Benzschawel directly, they were to leave a message explaining why they could not work the full two hours.

Musch, Kaboord, Mersberger, and Benzschawel also met to discuss the revised policy after it was issued. Both Mersberger and Benzschawel testified at hearing that, after the revised policy was issued, no other questions or concerns were raised by Union representatives regarding the policy and they understood that the revisions had made it acceptable. Musch testified at hearing that, while it was acknowledged that the changes to the policy were an improvement, he never indicated that the Union approved of the revised policy. Musch

testified that he reiterated to Mersberger and Benzschawel that some DPW employees would not be happy with the new minimum call-in requirement and that grievance might be filed. Kaboord also testified that he never expressed approval of the policy.

On Saturday, May 16, 2009, the City police determined that a damaged tree branch hanging over a street was a hazard and needed to be removed. Calls were made to the list of DPW employees by the dispatcher, and James Birschbach (“Birschbach”), who is one of the two Grievants in this matter, agreed to come into work to handle the situation. Birschbach had hesitated to take the call, because he had promised to take his son to the stockcar races and knew he would not be able to stay on the job for a full two hours. Nevertheless, he accepted the work with a couple factors in mind. He recalled at hearing that the dispatcher making the calls seemed desperate to find someone to take the work. Also, Birschbach was confident the work could be completed in the time he had available.

Birschbach knew that the tree removal project would require the use of a bucket attached to a truck and, therefore, the assistance of a second employee. He called Mersberger and Benzschawel to get permission to enlist another employee, but neither supervisor answered. Birschbach then reached Dennis Comins (“Comins”), another DPW employee and also a Grievant in this matter, and Comins agreed to come in to work. The tree removal work didn’t take long to complete. Time records reveal that Birschbach punched in at 4:24 and punched out at 5:05. Comins punched in at 4:35 and punched out at 5:08. Prior to punching out, neither Birschbach nor Comins spoke to or left a message with management indicating that they would be working less than the required two hours.

On his way home, Birschbach received a return telephone call from Mersberger, who apparently had noticed a missed call from Birschbach. During the ensuing conversation, Birschbach indicated to Mersberger that he and Comins had been called in to perform tree removal work, had cleaned up from the project, and had punched out. Mersberger reminded Birschbach of the two-hour minimum requirement. Birschbach explained to Mersberger that he could not stay for a full two hours because he had made a prior commitment to take his son to the stockcar races, and he stated to Mersberger, “do what you have to do”. In response, Mersberger did not indicate that any discipline would be forthcoming. He thanked Birschbach for having done the work, and the conversation ended.

On the following Monday, DPW management concluded that Birschbach and Comins had failed to follow the recently issued policy with regard to the two-hour minimum. They also had failed to exercise the alternative options of contacting or leaving a message for a supervisor regarding their inability to stay. For this, Birschbach and Comins each received a “minor written warning”. These disciplines were later reduced, by decision of the City’s common council, to “verbal” warnings that were documented and placed in the Grievants’ personnel files.<sup>1</sup> Pursuant to Article X of the Agreement, both Grievants received pay for two hours of work, regardless of the fact that they worked less than two hours.

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<sup>1</sup> The council’s decision to reduce the written warnings to verbal warnings was unrelated to the grievance that ultimately was filed challenging the disciplines.

After these disciplinary actions were taken, there appear to have been efforts on several fronts between Union and City representatives to informally resolve the issues surrounding the policy and its application to the Grievants. Birschbach objected to the discipline when it was first given to him by his supervisors. He also contacted City Clerk Joel Tauschek (“Tauschek”) regarding the matter, indicating to Tauschek that he thought it was inappropriate that he had been disciplined for having done his job. Tauschek offered no assistance. Birschbach then contacted City Mayor Randy Meyer (“Meyer”) to discuss the issue. Meyer testified at hearing that he wanted to check into the matter and that he told Birschbach to give him a week to do so. This was on May 22. During this conversation, Birschbach and Meyer discussed the fact that there was a ten-day filing deadline in the Agreement for grievances. Meyer testified that he never stated to Birschbach that he would extend the ten-day filing period. He testified that he had asked for six days to look into the matter because he was cognizant of the ten-day filing deadline and wanted some period of time less than that to investigate the situation. In any case, when Birschbach contacted Meyer six days later, on May 29, Meyer indicated that he would not overturn the disciplines. At that point, Birschbach contacted Musch to request that a grievance be filed.

Musch also was making efforts to get the matter resolved. Musch had run into Brian Passehl (“Passehl”), a City alderman and member of the city services committee, and discussed the matter with him. Passehl indicated that he wanted more of an opportunity to talk with Musch about the situation. After that, on May 22, Musch sent an e-mail message to Passehl describing the situation that had led to the grievances and requesting the opportunity to have a discussion with Passehl and Meyer regarding that and other issues. At the end of May, Passehl had a meeting with Meyer. Musch was not able to attend that meeting because of a scheduling conflict. Passehl also offered to meet with the Union and indicated his intention to meet with Mersberger and Benzschawel separately to gather information regarding the matter. Passehl indicated to Musch that, as chair of the city services committee, “it’s my job to work on problems like this”. In the end, however, the discussion involving Passehl was not productive. The Union has asserted here that the discussion came to a halt because Passehl resigned from his alderman position, at which point the Union decided to file the grievance that is the focus of this case. The City asserts, through a post-hearing affidavit signed by Tauschek, that Passehl’s resignation was not announced by Meyer until a City council meeting of June 16, and therefore could not have been the impetus for the filing of the grievance.

### DISCUSSION

The substantive question here is whether the two-hour-minimum call-in policy used as a basis for the Grievants’ discipline is inconsistent with and therefore constitutes a violation of the Agreement between the City and the Union. As a threshold matter, it is necessary to address the City’s timeliness objection.

### Timeliness

As the City contends, the Agreement contains clear language limiting the timeframe within which a grievance may be raised. The Agreement unequivocally indicates that the grievance procedure must be initiated within ten working days after the Union had or should have had knowledge of an occurrence or event giving rise to a grievance. The City argues that the filing of the grievance in this matter was untimely twice. First, the policy that established the two-hour minimum for call-ins initially was issued on April 1, 2009, and then revised and reissued on April 7, 2009. If the issuance of the policy was the event that should have been grieved, the City contends that the June 9, 2009 filing of the grievance was untimely. Alternatively the City argues that even if the properly grieved event was the May 16, 2009 imposition of discipline on the Grievants, the grievance was late because it was not filed until twelve working days later instead of the contractually required ten. Thus, the City's position is that, in either case, this matter is not arbitrable on procedural grounds.

The Union provides argument supporting the position that it was the imposition of discipline, rather than the issuance of the policy, that was the triggering event that properly gave rise to the grievance. The Union further makes the case that the discussions that occurred between City and Union representatives regarding the application of the policy and the resulting disciplines served to toll the contractually-established deadline for filing in this instance. The Union also argues that two days constitutes a *de minimis* delay that, under established arbitral standards, does not preclude a decision of this case on its merits.

While it is true, as the City contends, that arbitrators generally expect parties to comply with the technical requirements of a grievance procedure, it is also true that doubts as to whether contractual time limits have been met should be resolved against forfeiture of the right to process a grievance. *How Arbitration Works*, Elkouri & Elkouri, 5<sup>th</sup> Ed., p. 277. Given the circumstances of the present case and the defenses raised by the Union, it would be inappropriate to dismiss this case on a timeliness basis. First, the defenses raised by the Union weaken the City's argument in this area. Even though it was established on the record that no City representative ever expressly waived the timeline for filing the grievance, it is also possible that the parties' efforts to resolve the dispute with regard to the policy through informal discussions constituted an implied waiver of the timeline set forth in the Agreement. Further, other circumstances make dismissal on this technical basis inappropriate. Because of the discussions that were occurring between City and Union representatives, the City had notice that the Union objected, generally, to the implementation of the policy and, more specifically, to its application to the Grievants. Although Mersberger and Benzschawel both testified that they understood that the policy, once revised, was acceptable to the Union, there is also undisputed evidence on the record indicating that Musch and Kaboord told them, with regard to both the original and the revised policy, that there likely would be grievances filed. And Birschbach objected right away to his supervisors, to Tauschek, and to Meyer about the imposition of a discipline under the policy. Importantly, there is no evidence on the record indicating that any event occurred that caused the City to be prejudiced by the filing of

the grievance on June 9, rather than a couple days before. Moreover, a non-prejudicial failure to meet a technical requirement is particularly unconvincing in this situation, where the City's policy remains in place. If the merits of this case are not addressed here, they are bound to be resurrected, at additional expense to the parties, the very next time the policy is used to discipline a member of the bargaining unit.

### Merits

As to the merits, the City argues that it has the discretion to implement a policy mandating that employees must work a full two hours in call-in situations. It argues that the management rights clause in the Agreement reserves to the City the basic right to control staffing and, further, that the last sentence of Article X specifically gives management the right to require employees to work two full hours in call-in situations. That sentence states that employees "may be required" to work a two full hours when called in. If read in isolation, the sentence appears to give the City the discretion it argues it has. The problem with this interpretation, however, is that it nullifies other parts of Article X. In two distinct places, the first of the two sentences that make up Article X anticipates that there will be situations in which DPW employees will be able to earn two hours of pay for having performed less than two hours of work. The sentence states that employees will be entitled to two full hours of work "or pay therefore", and it states that time-and-one-half will be available to employees "regardless of the length of time less than two (2) hours which he may have worked". If the City's interpretation of Article X was adopted and the City was permitted to maintain its policy requiring DPW employees to work a minimum of two full hours in call-in situations, employees would never have the opportunity contemplated in the Agreement to receive two hours of pay for less than two hours of work. This result strips from the Agreement that premium pay benefit, which Article X indicates the parties intended to provide to DPW employees.<sup>2</sup> It also deprives the quoted phrases of any possible meaning or application. Thus, a decision in the City's favor would violate the basic tenet of contract construction that discourages any interpretation which renders language superfluous.

This conclusion is not intended to suggest that the City has no authority to require two full hours of work in call-in situations. As discussed, the last sentence of Article X clearly states that employees may be required to work two full hours in such situations. As the parties here have acknowledged, the sentence is not entirely clear due to its passive construction – that is, it does not identify the agent that may do the requiring. The Union's arguments suggest that the sentence should be read to provide that it is the circumstance of a call-in, as opposed to any City manager, that may place the two-hour requirement on employees. I find, on the contrary, that it is both – the requirement is driven both by the circumstances of a call-in and the discretion retained by management. The Union's more one-sided interpretation rests on the assumption that the proper breadth of a task – what is required to get a job done – can be objectively determined in every situation. That obviously has not been the case with these

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<sup>2</sup> The other premium pay benefit provided for in Article X is the ability to earn time-and-one-half pay for call-in hours. That benefit remains unaffected.



parties in the past. Indeed, the origin of this case can be traced back to disagreements between DPW supervisors and employees as to what constituted completion of tasks such as grave-covering in call-in circumstances. It is only consistent with the City's basic right to direct the workforce to interpret the last sentence of Article X to give City managers some discretion to determine what it takes to get a call-in job done and, in appropriate instances, to decide that a job is significant enough to require two full hours of attention. This is not to suggest that management may, on a whim and regardless of the work demands, require two hours from a called-in employee. Any discretion must be exercised in a non-capricious manner which, in this case, presumably would require a nexus between the time required from a called-in employee and the nature of the task that led to the call-in.

On the basis of the foregoing, I make the following

**AWARD**

The grievance is sustained. The disciplines shall be removed from the Grievants' personnel files.<sup>3</sup>

Dated at Madison, Wisconsin, this 20<sup>th</sup> day of October, 2010.

Danielle L. Carne /s/

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Danielle L. Carne, Arbitrator

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<sup>3</sup> Although the Union has asked that the Grievants be made whole, there is no evidence on the record indicating that they suffered any monetary loss.