

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF PLOVER**

and

**PLOVER VILLAGE EMPLOYEES' UNION LOCAL 309,  
AFSCME, AFL-CIO**

Case # 16  
No. 69264  
MA-14544

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Appearances:

**Ronald J. Rutlin**, Ruder Ware, 500 First Street, Suite 8000, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of the Village of Plover.

**Houston Parrish**, Staff Representative, AFSCME - Wisconsin Council 40, 1457 Somerset Drive, Stevens Point, WI 54481, appearing on behalf of Plover Village Employees' Union Local 309, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

The Village of Plover, hereinafter Village or Employer, and Plover Village Employees' Union Local 309, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear and decide a grievance involving pay for carrying a cell phone. A hearing was held on June 29, 2010, in Plover, Wisconsin. The hearing was transcribed, with the transcript having been filed on July 12, 2010. The record was closed on August 20, 2010, upon receipt of all written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

## ISSUES

The parties were unable to stipulate to the substantive issues and agreed to allow the arbitrator to frame the issues based upon the parties' proposed issues and the evidence presented. The Union would frame the issue as:

Did the Village of Plover violate the collective bargaining agreement by requiring the wastewater department employees to carry the Employer cell phone and remain in the geographic area on stand-by for an entire week at a time without compensation? If so, what is the remedy?

The Employer frames the issues as:

Was the grievance filed timely?

Did the Village violate the collective bargaining agreement when it modified the requirement that the employees in the wastewater department carry a Village-provided cell phone for an entire week after the weekend stand-by assignment?

Based on the evidence and arguments presented by the parties, the undersigned adopts the following statement of the issues:

1. Was the Grievance timely?
2. Did the Employer violate the collective bargaining agreement when it modified SOP 16 and required employees in the wastewater department to carry a Village-provided cell phone for the week after the weekend assignment? If so, what is the remedy?

## FACTS

The Union represents all regular full-time and regular part-time employees of the Village of Plover, excluding supervisory, managerial and confidential employees, fire fighters, law enforcement employees with the power of arrest, and elected officials. In particular, the Union represents employees in both the Water and Wastewater Departments of the Village of Plover. This is a relatively new bargaining relationship, with the initial contract between the parties having been negotiated approximately ten years ago.

At the time of the initial contract, the four employees of the Wastewater Department were required, on a rotating basis, to carry a pager or cell phone<sup>1</sup> on weekends and holidays to respond to emergency calls at the Wastewater facility. The parameters put into place initially are still applicable today: The individual carrying the cell phone has to be in the geographic vicinity that would allow him or her to respond to a call. Additionally, the person whose week it is to carry the phone is required to perform some duties on Saturday, Sunday and holidays. Although there is no additional pay for being “on-call” and carrying the cell phone, the employees are paid time and one-half for those hours worked to perform the regular Saturday, Sunday and holiday duties. In addition, in the event there is an emergency call to which the employee responds, the individual is paid two hours for the call plus the time that is actually worked.

The Village utilizes an automatic dialing system. In the event of an emergency, it dials phone numbers in a pre-determined order until it receives a response to one of its calls. The person who responds to the call, usually the person assigned the cell phone at the time, is required to respond to the situation or find another person to do so. In the event that the dialer goes through all its numbers without getting an answer, it calls the Portage County Sheriff’s Department.

During negotiations for a successor agreement to the 2005 – 2006 collective bargaining agreement between the Village and the Union, the Union made the following proposal:

Compensate employees at a rate of \$2 per hour for being on call or stand-by when an employee has to carry a cell phone for the employer.

At that time, bargaining unit members in the Wastewater Department were required to carry the cell phone on Saturdays, Sundays, and holidays and bargaining unit members in the Water Department were required to carry the cell phone for the entire week, until the Friday following their phone carrying weekend. Although in bargaining the Union presented information showing that comparable bargaining units<sup>2</sup> received pay for carrying a pager or cell phone while on standby, the Employer rejected the proposal. It was the position of the Employer that the bargaining unit members were more highly compensated than employees of other jurisdictions who received “pager pay”<sup>3</sup> and that this higher compensation more than made up for the lack of “pager pay” in this unit. The parties settled the successor contract without the inclusion of any compensation for “pager pay”.

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<sup>1</sup> Initially the employees utilized a pager. It is unclear when the cell phone replaced the pager.

<sup>2</sup> The Union describes these comparisons as comparable bargaining units. The undersigned makes no finding as to whether they are appropriate comparisons for the purpose of interest arbitration.

<sup>3</sup> The testimony at hearing used the terms standby, on-call and call-in in various and inconsistent ways. To avoid confusion, the undersigned is utilizing the term “pager pay” to represent the contested issue: pay while carrying the cell phone.

Sometime in March 2008 a sewer back up occurred at a residence in the Village. The resident tried to call and contact someone from the Wastewater Department but was unsuccessful in doing so. Shortly after that event, Rich Boden, the Wastewater System manager, decided to utilize the cell phone number for the public to contact the department in the event of an emergency. The number was published on the Village's website and was included in the Village information guide published in July 2008. The guide also included Boden's Village-provided cell phone number and his home phone number. In addition, after the March event, Boden informed the staff of the Wastewater Department at the next weekly staff meeting, that they were to carry the cell phone during the week following their weekend assignment and that the number was to be published as an emergency response number.

Although employees in the Wastewater Department were now obligated to carry the cell phone throughout the week, the standard operating procedure (SOP 16, Dialer Call list) for the dialer call list for weekdays did not change at this time. As had been the case prior to the March 2008 incident, the first automatic dialer call went to Rich Boden. Only if he did not respond did the dialer make another call to the designated operator. The Union did not grieve the fact that they were required to carry the phone for the Monday through Friday period after their weekend stint with the cell phone because calls went to Boden first and they were usually not affected.

Boden made another change in the procedure in June 2009. Because Boden's workload was getting to be more substantial, he revised SOP 16, Dialer Call list, on June 15, 2009. The revised SOP 16 lists the rotating operator cell phone number as the first number to be called, followed by that individual's home number, then the cell phone number, Boden's cell phone, and then the assistant manager's cell phone number before the home numbers of all the employees, ending as before with the Portage County Sheriff's Department. That is, the employee whose turn it is to carry the cell phone became the first responder, rather than Boden being the first responder. In addition, Boden added the following language to SOP 16:

The designated operator will be on call from Friday preceding their weekend duty through the following Friday. It is the designated operator's responsibility to have a replacement cover their assigned on call times in event of vacation, illness, or other reason they cannot respond to calls.

The modified SOP 16 was presented to the employees on June 19, 2009. Mark Regnitz, a 20 year employee with the Village and the Union steward, orally grieved the change in SOP 16 on June 30, 2009. The grievance was denied by the Employer the following day. The grievance was filed at Step 2 on July 8, denied by the Employer, and filed at Step 3 on August 6, 2009. The parties were unable to resolve the grievance and the matter proceeded to arbitration.

Additional facts are included in the Discussion, below.

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE 2 – MANAGEMENT RIGHTS**

A. The Village possesses the sole right to perform all Village operations and all management rights reposed in it, subject only to the provisions of this contract and only as allowed by law. These rights by way of illustration include, but are not limited to, the following:

1. To direct and manage all operations and enterprises of the Village and to direct all operations of the Village workforce;
2. To hire, promote, transfer, schedule and assign employees;

. . .

3. To take whatever action is necessary to comply with local, state or federal law;
4. To introduce new or improved methods or facilities;
5. To maintain efficiency of Village operations;
6. To determine the methods, means and personnel by which such operations are to be conducted;
7. To change existing methods or facilities;
8. To determine the kinds and amounts of services to be performed as pertains to Village operations and the number and kinds of classifications, if any, to perform such services;

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10. To take whatever action is necessary to carry out the functions of the Village in emergency situations; and
11. To establish reasonable work rules, policies and schedules.

- B. These rights shall be exercised consistent with Chapter 111 of the Wisconsin Statutes and the express terms of this Agreement. Any unreasonable exercise or application of these rights by the Village shall be appealable pursuant to Article 8 [sic] – Grievance and Arbitration Procedure. The Union, in recognizing the above listed Management Rights, does not waive any of its rights to negotiate on subjects which are held out to be mandatory subjects of bargaining.
- C. When not occupied with their supervisory duties, supervisors shall not be restricted from performing bargaining unit work. Such use by supervisors shall not result in the lay off or reduction of regularly scheduled hours of present employees in the bargaining unit.

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#### **ARTICLE 5 – GRIEVANCE AND ARBITRATION PROCEDURE**

- A. Definition. A grievance shall mean a dispute that occurs concerning the interpretation, application or violation of this Agreement.
- B. Subject Matter. Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant(s), a clear and concise statement of the grievance, the issue(s) involved, the occurrence date(s) of the subject matter of the grievance, the relief sought, the specific section(s) of this Agreement alleged to have been violated, the signature of the grievant(s) and the date.
- C. Time Limitations. The time limitations specified in the procedure are intended to be followed. They may only be extended by mutual written consent of all of the parties.

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- E. Steps in Procedure.
  - 1. Step 1. The employee, with or without a Union representative, shall orally explain the grievance with his or her department head or designee as soon as possible, but in no event later than fourteen (14) calendar days after he or she knew or should have known of the event giving rise to the grievance.

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F. Arbitration Step.

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4. Arbitrator Authority. The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

**ARTICLE 18 – HOURS OF WORK AND OVERTIME**

- A. Normal Work Week. Work schedules shall be established by the department head, except as follows. The normal work week for regular full-time employees in the Village Offices shall be eight (8) hours a day scheduled between 7:30 a.m. and 4:30 p.m., Monday – Friday. The normal work week for regular full-time employees in the Public Works and Water and Wastewater Departments shall be eight (8) hours a day, scheduled between 6:00 a.m. and 4:30 p.m., or four (4) consecutive ten (10) hours days, forth (40) hours a week, Monday – Friday. This does not affect the Wastewater and Water Departments’ partial shifts on Saturdays, Sundays, and holidays. The normal work week for regular part-time employees in the Village Offices (excluding Building Maintenance Worker), Public Works, and Water and Wastewater Departments shall be Monday – Friday. In addition to the hours identified above, employees may be required to work outside of the normal work week or normal work day. If a second shift is established in the Wastewater Department, it shall normally begin at or after 12:30 p.m. and end at or before 11:00 p.m. on the same day.

A schedule of each employee’s normal work hours shall be provided at least two (2) weeks prior to the beginning of the schedule. In addition to the scheduled work hours, overtime may be assigned based on the needs of the Village. All paid time shall be considered as time worked, except that sick leave shall not be used for calculating overtime.

- B. Overtime. Overtime shall be paid to employees pursuant to applicable state and federal law. Overtime will not be authorized unless the department head or his or her designee determined it is necessary and directs or approves the overtime. Overtime that is not regularly scheduled shall be offered to all qualified employees before part-time employees, casual employees and temporary

employees, using the call list in the Public Works Department and in other departments by job classification in such a way as to equalize the opportunity for overtime among qualified employees. Employees who work more than forty (40) hours in a workweek and eight (8) hours in a workday shall receive one and one-half (1 ½) the employee's regular pay for all overtime worked. Employees regularly scheduled to work ten (10) hour days, four (4) days a week shall receive overtime pay after ten (10) hours in a workday and after forty (40) hours in a workweek. Overtime pay shall not pyramid.

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### **ARTICLE 19 – COMPENSATION**

- A. Payroll. Village employees shall be paid on a biweekly payroll system. Each period covers fourteen (14) calendar days beginning on a Sunday and ending the Saturday of the following week. Paychecks shall be distributed in sealed envelopes to each employee on the Thursday following the end of the pay period.

If direct deposit of compensation is implemented by the Village, employees shall be allowed to choose whether their compensation is deposited directly in the financial institution of the employee's choice, if a financial institution accepts electronic transfer of wages.

- B. Wages. Employees shall be paid wages as set forth in Appendices A and B attached and incorporated in this Agreement.
- D. Call-In Pay. An employee who is called in to work outside the employee's normal schedule of hours shall receive call-in pay of two (2) hours straight time wages in addition to pay for the hours actually worked. . . .

### **POSITIONS OF THE PARTIES**

The Union has grieved a change in the requirements to carry, on a rotating basis, a Village-provided cell phone by bargaining unit employees in the Village's Wastewater Department. The Union contends that this action constitutes a change in working conditions and is a violation of Article 18 – Hours of Work and Overtime, Appendix A – Wage Rate, past practice of carrying the cell phone, and “any other



contract provisions that may apply and all relevant parts of collective bargaining” agreement.<sup>4</sup> As a remedy for this alleged breach, the Union seeks an Order that the Employer cease and desist this “forced weekday standby work” and that the employees be made whole – either at the rate of \$2.00 per hour in line with comparable bargaining units or per the wage rate table as “there is no question: that standby work is a service to the employer.”<sup>5</sup>

For its part, the Village first contends that the grievance must be dismissed because it was not filed on a timely basis. It is the Employer’s contention that the requirement to carry the cell phone during the week occurred in March 2008 and the grievance had to be filed within the contractual number of days of that event in order to be timely. With respect to the merits, the Village argues that the Union is attempting to obtain through the grievance process a benefit that it failed to obtain at the bargaining table. The Village further argues that the Union’s position lacks merit since the standby/on call responsibilities at issue are not compensable under the Fair Labor Standards Act (FLSA).

## DISCUSSION

### Timeliness

The Employer made two modifications in the requirements for employees, on a rotating basis, to carry the Village cell phone in order to respond to emergencies. In March 2008, the Village extended the requirement to carry the phone from the weekend and holidays to weekends and holidays and all weekdays until the following Friday. At that time, there was no change to the order in which any emergency calls were to be answered during the week: the first call went to Wastewater System manager Rich Boden. The Union did not grieve this event. The second change occurred in June 2009 when SOP 16 was revised to reflect that the carrier of the cell phone would be the first call made by the automatic dialer and the requirement that the designated operator had the responsibility to have a replacement cover their assigned on call times in the event of a vacation, illness, or other reason they could not respond to a call. The Union grieved this change, and the parties have stipulated that the grievance was timely if the triggering event was the June 2009 modification.

I find that the grievance was timely and is properly before me. Although there is no doubt that there was a change in working conditions and that the Union could

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<sup>4</sup> Step 2 grievance, dated July 9, 2009.

<sup>5</sup> Union Brief, at 11.

have filed a grievance in March 2008, it decided not to do so.<sup>6</sup> Additional changes were made in June 2009: the carrier of the cell phone became the first responder and the designated operator is now required to identify a replacement to cover the assigned on call time in the event of certain types of absences. The Union decided to grieve these changes.

### Merits

It is a basic tenet of labor arbitration that

an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

UNITED STEELWORKERS OF AM. V. ENTER. WHEEL & CAR CORP., 363 U.S. 593, 597 [46 LRRM 2423] (1960). This quotation from the Steelworkers Trilogy is cited in a recent case from the 10<sup>th</sup> Circuit Court of Appeals, CP KELKO US INC. V. OPERATING ENGINEERS LOCAL 627, 188 LRRM 2850 (2010) in which the Court found that an arbitrator had exceeded his authority in issuing an award quite similar to that which the Union seeks in this case. Although the actions of the Employer herein clearly modify the terms and conditions of the employees, I find that there is no violation of the terms of the collective bargaining agreement between the parties.

The Union bases its grievance on Article 18 regarding hours of work and overtime, Appendix A regarding wage rates, past practice of carrying the cell phone, and any other contract provisions that might apply.

A careful review of the collective bargaining agreement between the Union and the Village reveals no language regarding the on-call procedures that are at issue herein. Neither Article 18 nor Appendix A address this matter. The only oblique reference to the additional hours worked by employees of the Wastewater and Water Departments is found in the definition of normal work week that includes the statement: "This does not affect the Wastewater and Water Departments' partial shifts on Saturdays, Sundays, and holidays." Thus, there is no ambiguous language that may be interpreted through the use of extrinsic evidence such as past practice.

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<sup>6</sup> The failure to grieve the 2008 change could have an affect on any possible remedy.

Employees of the Water Department work under the same working conditions that are at issue in this case. They are members of the same collective bargaining unit and covered under the terms of the same collective bargaining agreement. The Union has not explained how there can be a violation of the collective bargaining agreement with respect to one group of employees and not to the other. The Union appears to argue that it is the change from the prior working conditions (carrying the cell phone on weekends and Saturdays) to the new conditions (carrying the cell phone on weekdays following the weekend and being responsible for finding a replacement) that generates a grievance which, under the terms of the collective bargaining agreement: “means a dispute that occurs concerning the interpretation, application or violation of this Agreement.” Perhaps the Union is arguing that the change in cell phone carrying is a new work rule that the Village has adopted pursuant to its rights under the management rights clause of the collective bargaining agreement. If that is the case, the Union has not shown that it is an unreasonable work rule, given that the same work rule has applied and continues to apply to employees of the Water Department.

The Union argues that its members should be compensated for the standby hours “worked”. In its request for remedy, the Union suggests the \$2.00 per hour rate of pay that it demanded in bargaining for the 2007-2008 collective bargaining agreement. The demand does not distinguish between the weekend and holiday hours that the employees have traditionally carried the cell phones and the “new” hours that they now carry the phone. The Union also disregards the fact that this compensation was not achieved in the bargaining process and asks the undersigned to amend the contract to provide a benefit that the Union failed to obtain in bargaining. That is beyond the authority of an arbitrator, and I decline to do that. Alternatively, the Union asks that the employees be compensated at their regular wage rates for the hours they carry the cell phone. Again, traditionally, employees have not been compensated for carrying the cell phone, only for hours actually worked at the Wastewater department or when called in. It is not possible for the undersigned to award hourly rates of pay for carrying the cell phone when it is clear that the employees have carried it on weekends and holidays without additional pay since prior to the initial bargaining agreement between the parties.

It is clear that the Union is objecting to the Employer’s unilateral change in SOP 16.<sup>7</sup> That is understandable – the employees are now required to be available to respond to calls for more hours than before and they have a specific requirement to ensure that someone is available to respond to calls in the event that they have to leave

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<sup>7</sup> While the Union has a right to bargain over changes that affect mandatory subjects of bargaining, the Union specifically noted that it was not asking to “open the contract for mid-term bargaining” when it sought to resolve the grievance by the payment of \$2 per hour as “pager pay”. A unilateral change in terms and conditions of employment often does not equate to a contractual violation.

the area.<sup>8</sup> Inasmuch as there is nothing in the collective bargaining agreement that addresses this matter, as the water department employees who are covered by the same collective bargaining agreement have been required to perform this “work” without additional pay since prior to the first collective bargaining agreement between the parties, as the management rights clause reserves to management rights that it had prior to the existence of a collective bargaining agreement except as modified by that agreement, management did not violate the contract when it modified SOP 16 in June 2009.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

**AWARD**

1. Yes, the grievance is timely.
2. No, the Employer did not violate the collective bargaining agreement when it modified SOP 16.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 8th day of November, 2010.

Susan J.M. Bauman /s/

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Susan J.M. Bauman, Arbitrator

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<sup>8</sup> The Union’s argument that the employees are required to perform additional “work” without additional pay is not properly in front of this arbitrator. The Employer argues that such “work” is not compensable under the Fair Labor Standards Act. While that may be the case, it is the role of the arbitrator to interpret the collective bargaining agreement which provides no rate of pay for “work of this nature.” The Union could pursue its claim that this is compensable work before the Wage and Hour Division of the Department of Workforce Development or the U.S. Department of Labor. I offer no opinion as to the likelihood of success in either forum.