BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF SUAMICO**

and

**TEAMSTERS GENERAL UNION, LOCAL 662**

Case 6
No. 69656
MA-14694

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**Appearances:**

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Scott D. Soldon**, 1555 River Center Drive, Milwaukee, Wisconsin, appeared on behalf of the Union

Davis & Kuelthau, Attorneys at Law, by **Robert W. Burns**, 318 South Washington Street, Green Bay, Wisconsin, appeared on behalf of the Employer.

## ARBITRATION AWARD

Teamster General Union, Local 662, herein referred to as the "Union,"[1] and Village of Suamico, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Suamico, Wisconsin, on June 24, 2010. The parties agreed to file post-hearing briefs, the last of which was received August 4, 2010.

## ISSUES

The parties did not agree to a statement of the issues, but agreed that I might state them. I state them as follows:[2]

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[1] Teamsters Local 75 was later merged with Local 662.

[2] There was no substantive difference between the parties' own statements of the issues. The phrasing I have chosen is more neutral.

1. Did the Employer violate the collective bargaining agreement in the manner by which it called in employees to perform snow removal overtime on December 13, 2009?

2. If so, what is the appropriate remedy?

## FACTS

The Employer is a Wisconsin Village, having been incorporated from a Town to a Village in 2005. The Village has a Department of Public Works. The Union has been the representative of the non-supervisory employees of that Department at all material times. Prior to the incorporation of the Village, there was a separate Sanitary District providing water and sewer services to the same area. The Union also represented the non-supervisory employees of the Sanitary District. When the Village was incorporated, the Sanitary District was abolished and the employees and functions of the Sanitary District were transferred to the Department of Public Works.

Until March, 2009, the chief managerial officer of the Department of Public Works was Tim Krause. He reported directly to the Village Board. In 2005, the Village hired Randolph Loeberger as its Village Engineer. In about March, 2009, Director Krause retired. The Employer consolidated the position of Village Engineer and Director of Public Works. Mr. Loeberger then assumed the duties of the Director of Public Works.

The Union and the Employer met prior to that consolidation to bargain with respect to the impact of consolidation upon the employees represented by the Union in both affected bargaining units.

In late December, 2004, the Employer and the Union entered into a Memorandum of Understanding which addressed some of those issues. It provided in relevant part:

> The Village of Suamico ("Village") and the employees voluntarily recognized as described below and represented by Teamsters Union Local 75 ("Union") agree to the following:
>
> 1. On January 1, 2005, the former Sanitary District bargaining unit employees (hereinafter "utility employees") will fall under the DPW Contract. When issues of seniority arise the utility employees will be separated from the DPW employees as follows:

a. Job assignments will be given to the utility employees consistent with their normal duties and the same will apply to DPW employees. Should there be a cross over of assignments employees will go to the bottom of the other department's seniority list.

b. Vacations will be selected by department seniority (i.e., utility vs. DPW). The same with job postings and layoffs.

The parties agree to mutually approach these issues in good faith during the 2005 contract year with the DPW Steward involved whenever perceived conflicts may arise with the current DPW contract. The Union agrees that it will present the Village with a comprehensive proposal on such assimilation issues prior to the commencement of bargaining for the 2006 DPW contract.

Thereafter, the parties negotiated a successor to the DPW collective bargaining agreement, executed in April, 2006, effective from January 1, 2006, to December 31, 2008. Neither the Union, nor the Employer ever presented a proposal concerning the selection of employees for overtime work. The parties did incorporate all of the employees under the terms of the collective bargaining agreement. They did address other issues concerning those employees, including issues concerning wage rates. They made changes to Article 6 the substance of which provisions remain in the current Article 6.

At all material times prior to the consolidation described above, DPW unit employees and not employees in the utility unit performed snow plowing as needed for Suamico. The overtime pay for performing snow plowing makes the snow plowing work very desirable.

Prior to the consolidation, utility unit employees performed emergency repairs to water and sewer equipment. This is desirable overtime work but occurs far less often and in smaller amounts than snow plowing operations. Former DPW employees have never become qualified to do this work.

Shortly after the two units were merged the Union's steward developed a diagram apparently in consultation with then DPW Director Krause which essentially became a seniority call list by which employees of the former DPW were called for snow plowing overtime and other work normally performed by the DPW in order of their seniority first. If more employees were needed then, qualified employees of the former Water Department were called in order of their seniority. The list detailed that employees of the former Water Department were called in order of their seniority for overtime work which had normally been performed by employees of the Water Department. The Employer routinely followed the overtime procedure which the Union created at all relevant times thereafter. The list was posted on the Union bulletin board in the DPW garage were everyone in the DPW would have seen it in the normal course of their work. It should be noted that after the two units were

consolidated all unit employees performed snow plowing during snow emergencies to the extent that each employee had a CDL license allowing him or her to operate a plow.

The parties negotiated a successor to the collective bargaining agreement expiring or agreements to the one expiring December 31, 2008, effective from January 1, 2009, to December 31, 2011. The agreement was executed March 12, 2009. No relevant substantive changes were made to the predecessor agreement.

The Employer has implemented a voluntary cross-training program for the purpose encouraging employees to learn the duties which they did not perform prior to the merger. In this regard, all but two of the former utility employees have obtained CDL licenses and have performed snow plowing. Larry Robenhorst and Troy Noe, employees of the former DPW, have become qualified to perform utility work. They are the only employees of the former DPW to become so qualified. They do not regularly do utility work, but are on-call to fill-in as needed. It is the goal of the Employer to eventually have all bargaining unit employees qualified to perform all bargaining unit functions.

On October 22, 2009, during the term of the existing agreement, the Employer and Union met to discuss difficulties with respect to seniority issues. The Union presented the seniority posting referenced above at that meeting and discussed its potential relevance. The Employer proposed, and the Union tentatively agreed subject to ratification, that the seniority lists of the two departments be merged by placing employees on one seniority list in order of their date of hire without any regard to whether they were hired at the DPW or utility. The Employees failed to ratify the agreement and the Union took position that things would remain the way they were. The Employer remained dissatisfied with that position.

On about November 17, 2009, the Employer proposed that the parties enter into a Memorandum of Understanding as to a call out procedure when Sheriff’s Deputies request assistance for emergency road maintenance. It is unclear whether the parties agreed to that memorandum, but it specifically provided:

> This call in procedure is not intended to cover or revise the call in policy for snow removal and winter roadway maintenance operations.

As of December 13, 2010, the following relevant employees had the following seniority dates and departmental origins:

| EMPLOYEE | START DATE | DEPARTMENT OF ORIGIN |
|---|---|---|
| Nick Brown | 6/27/1983 | Water |
| Denis VandenHuevel | 4/14/1987 | Water |
| Tom LaCount | 3/23/1988 | DPW |
| Larry Robenhourst | 7/11/1996 | DPW |
| Brad Houle | 9/27/1999 | Water |
| Troy Noe | 1/10/2000 | DPW |

On December 13, 2009, the Employer required snow removal on overtime which only required that two employees be called out. Director Loeberger decided to call qualified employees in order of seniority without regard to their department of origin. He did not call Nick Brown because he did not have a CDL required to operate the plow. He called Mr. Vandenheuvel and Mr. LaCount. They performed about 5.5 hours of overtime at double time. Had the Employer followed the posted procedure described above, Mr. Robenhorst would have been one of the two employees called. The Union filed a grievance alleging that Mr. Robenhorst should have been one of the employees called. The grievance was properly processed to arbitration.

## RELEVANT AGREEMENT PROVISIONS

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**ARTICLE 6. SENIORITY**

A. The first six (6) months' service of a newly appointed employee is a probationary period (unless extended an additional ninety (90) days by mutual agreement between the Village and Union) during which time he or she will be required to demonstrate his or her qualifications for the position prior to receiving a permanent appointment, and during which period there shall be no responsibility on the part of the Village for a permanent appointment.

1. Termination of employment during this probationary period shall not be subject to challenge by the employee.

2. When the probationary period is completed and a permanent appointment received the appropriate provisions of this agreement shall date back six (6) months from the completion of said probationary period.

B. The accepted rules of seniority shall apply as follows:

1. In the event a layoff becomes necessary the last employee hired shall be the first laid off and in rehiring shall be the first recalled. Should the layoff be in a classification involving a senior employee, qualifications will be considered prior to any layoff. Should a more senior employee become qualified while on layoff, he/she will be allowed to displace the junior employee that he/she is qualified to displace.

2. For purposes of recall to work after layoff, an employee's seniority will remain in effect up to five (5) years from most recent date of layoff, unless the employee earlier rejects an offer to return to work, at which time seniority and recall rights are terminated.

3. In no event shall any new help be hired into a classification in which layoff(s) have occurred until all regular employees are working, or have been given the opportunity to return to work.

4. If two or more employees are hired on the same day, seniority shall be determined by lot.

5. Seniority principles shall apply in daily job assignments within the Department of Public Works provided that such principles do not interfere with the regular operational assignments that were in place prior to the incorporation of the Utility into the DPW or the efficient operation of the Department as determined by the Director of Public Works or his designated representative.

C. No employee shall suffer a reduction in pay if he/she is required to take a temporary job carrying a lesser rate of pay. Any employee who is required to temporarily fill a bargaining unit job that has a higher rate of pay for more than four (4) days shall receive the higher rate during the temporary assignment.

D. Probationary Period

1. Purpose. The probationary period is an integral part of the examination process. It shall be utilized to closely observe the employee's work, to ensure effective adjustment of a new employee to his/her position and to remove any employee whose performance does not meet required work standards. No probationary employee is guaranteed regular status and the Village need not show cause when dismissing a probationary employee.

2. Duration. A new employee when first employed in any regular job assignment shall, beginning with the date of employment, serve a probationary period of six (6) months.

3. Dismissal. If the department head decides not to make the employee regular then, with the approval of the Village Administrator, the employee shall be notified in writing of the termination.

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**Article 25. Hours of Work**

A The regular workweek shall be Monday through Friday, eight (8) hours per day and forty (40) hours per week.

B. Time and one-half (1 ¼) shall be paid for all hours worked in excess of eight (8) hours per day and/or forty (40) hours per week, whichever is the greater, but not both

C. Normal workday shall begin at 7 00 AM and end at 3 00 PM with a paid 10 minute break in the morning and a 20 minute paid break at noon

D. The regular pay period for all full time employees shall be 12 01 AM Sunday to Midnight Saturday

E. Overtime Priority.

1. Overtime required as an extension of the regular workday will first be offered to the employee performing the task during the regular workday.

2. Overtime requirements not met in paragraph 1, above, shall be filled on the basis of seniority within the departments, the most senior qualified employee being the first person contacted.

3. Overtime requirements not met above shall be filled utilizing a master overtime list of all unit employees. The most senior qualified employee being the first employee contacted.

4. Overtime requirements not met by all the above shall met by directing the junior qualified employee to perform the work.

5. For overtime purposes, it is recognized that an employee who is off work on vacation, sick leave, etc. will not be called or expected to work overtime which is scheduled or assigned prior to 7 a.m. of the last scheduled work day off, unless all other eligible department employees have been given the opportunity to

work the overtime and additional help is still needed. Employees who are available for such overtime while off on vacation, sick leave, etc., will be required to notify their Employer of their availability.

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**Appendix A**

Hourly Rates

| TITLE | 1-1-2009 | 1-1-2010 | 1-1-2011 |
|---|---|---|---|
| DPW III | $22.89 | $23.46<br>Wastewater Operator<br>Chief Water Operator<br>Foreman | $24.05 |
| DPW II | $19.67 | $20.16 | $20.66 |
| DPW I | $18.94 | $19.41 | $19.90 |
| FACILITIES MAINTENANCE SPECIALIST | $18.94 | $19.41 | $19.90 |

Lead Worker $.50 cents May through October

Newly hired employees will start at:

80% of the regular rate of pay, 1st 6 months
90% of the regular rate of pay, 2nd 6 months
100% after 1 year service

Reclassifications: Employees seeking to be reclassified from Level I to Level II must request testing no later than August 1 of each year, and such testing must be completed by November 1 of that year in order for the reclassification to be effective the following January 1. No more than three (3) re-tests per category will be permitted in the same year, subject to third-party availability. Tests which are passed for a category will remain valid for two (2) years.

| On-Call Pager Pay: | | |
|---|---|---|
| | 2009 | $110 |
| | 2010 | $115 |
| | 2011 | $120 |

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## POSITIONS OF THE PARTIES

### Union

When the two units were combined the then Director and the Union negotiated a memorandum of understanding with respect to overtime assignments. Under the agreement one of the "normal" duties of the DPW was snow plowing. The Employer called former DPW employees for snow plowing before calling former sanitary district employees pursuant to that agreement at all times in the past prior to the occurrences in dispute. The written agreement remains unchanged. In 2009, the Union and the Employer met to discuss the application of seniority. The Union voted down a proposal by the Employer to dovetail the seniority lists. The parties discussed it and the Union proposed keeping things the way they were. Director Loberger's succession to the Director's job is not a reason to change the practice of the parties. The Union asks that the grievance be sustained, that the Arbitrator order the Employer to cease and desist from violating the agreement, and that he retain jurisdiction for sixty days should the parties have a dispute over the remedy.

### Employer

The Employer did not violate the collective bargaining agreement by calling in Mr. Vandenheuvel to plow snow on December 13, 2009, instead of Grievant Robenhorst. Article 25, Section E3 provides that overtime not filled by the procedures above ". . . shall be filed utilizing a master overtime list of all unit employees." The Employer followed this language. The language is clear and unambiguous and, therefore, the arbitrator should look no further. The Union is likely to argue that this grievance is controlled by Article 25, Section E2 because the parties intended to maintain a distinction between public works department jobs and former utility department jobs. However, there is no basis for this because Appendix A to the agreement lists classifications within the bargaining unit and omits any distinction between former DPW employees and former Utility Department workers. The agreement lists the classifications and does not distinguish between the two former departments. Director Loberger confirmed that there were no "departments within departments." He later discussed the cross-training opportunities so that all employees are qualified to do all of the work. Article 25, Section E2's department language existed before the sanitation district and DPW were combined. It could not refer to what the Union is seeking herein.

The Union's reliance on the 2004 memorandum of understanding as controlling in this case is misplaced as it expired with the parties' 2003-05 agreement. There is no evidence that the agreement was incorporated into the successor agreement. The Union testified that the diagram was agreed to be former DPW Director Tim Krause and posted in the DPW garage. It was not signed by anyone on behalf of the Village. Even if the arbitrator concluded that the list was binding, it also expired at the end of the 2003-4 agreement. The parties have negotiated two successor agreements without changing the operative language. Other arbitrators have held that memoranda of understanding expired under similar circumstances.

The Employer has the right to renounce the alleged past practice during the term of the agreement because it was inconsistent with the terms of the agreement. Director Loberger testified that snow plowing has not been reserved for any category of employee and Mr. Vandenheuvel had regularly done snow plowing before. The memorandum of understanding contains the following language: "this call in procedure is not intended to cover or revise the call in policy for snow removal and winter roadway maintenance operations. Under the doctrine expressed by the Circuit Court in SUN PRAIRIE AREA SCHOOL DISTRICT, DEC. NO. 31190-D (Dane Co. Cir. Ct, 2007), the Employer has the right to rescind a past practice which is inconsistent with the terms of an agreement during the term of that agreement. The Employer asks that the grievance be denied.

**DISCUSSION**

It is the responsibility of the arbitrator to apply the agreement of the parties as it is written. If the agreement is ambiguous it is the responsibility of the arbitrator to determine the correct interpretation and apply it. A provision in a collective bargaining agreement is ambiguous if it is fairly susceptible to more than one interpretation. The arbitrator also applies time honored principles of contract interpretation in order to make that determination. As is relevant here, the arbitrator looks to the context of the specific provision, the scheme of regulation of the agreement as a whole, the history of the provision, any agreement of the parties, and their "past practice."

The concept of "past practice" is defined and its application discussed in NAA, *The Common Law of the Workplace: The Views of the Arbitrators* Sec. 2.20 (BNA, 2d. Ed); see, also, Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" 1961 Proceedings of the National Academy of Arbitrators, page 31 (BNA, 1961). In essence, a "past practice" is a pattern consistently undertaken in recurring situations so as to evolve into an understanding of the parties.

The determinative issue in this matter is whether Article 25, Section E2 should be applied to this circumstance. Because the DPW and the utility were separate units before they were consolidated, it is conceivable that they would remain separate departments for some or all purposes within the DPW. Thus, it is possible that E 2 would award the overtime in question as the Union as specified. The language is, therefore, ambiguous under the disputed circumstances.

Prior to the consolidation it appears that Section E 2 had no applicability and was "historical" language in the parties' collective bargaining agreement. There is no evidence there were separate departments during the agreement then in effect and there was only one wage classification for all unit employees.

When bargaining units are consolidated in the manner which occurred herein, the collective bargaining agreement does not automatically apply to the added employees.[3] Historically, both units had a rather broad application of "seniority" principles. Article 6 of the existing agreement contained the provision which remains in the current agreement: "Seniority principles shall apply in daily job assignments within the Department . . . ." The Sanitary District contract had a similar provision. The parties specifically negotiated a transition agreement as referenced above recognizing their separate duties. The better view of the available evidence is that in furtherance of that endeavor parties mutually agreed to the posted call-in procedure. The available evidence indicates that the Employer routinely followed that posted procedure until the facts in this case. Accordingly, it is strong evidence of mutual agreement by past practice.

The parties essentially disagree as to whether the call-in procedure was an independent agreement or was a mutual agreement to create a specialized way to apply subsection E 2. The better view is that it was a specialized way to apply subsection E 2 to this new situation. The terms of the memorandum of understanding are interrelated to the terms of the collective bargaining agreement. It states that it is an agreement for the utility employees to "fall under the DPW contract." For example, it contains the sentence:

> "When issues of seniority arise the utility employees will be separated from the DPW employees as follows:"

The definition of seniority used in that sentence is contained the in the collective bargaining agreement. Many of the other aspects of the memorandum of understanding refer to or rely upon other aspects specified in the collective bargaining agreement with respect to the administration of seniority. Accordingly, I conclude that it is an agreement to create a specialized application of subsection E 2.

The Union never presented a proposal as to overtime in the negotiations for the 2006 agreement. However, it is also true that the Employer never made a proposal to remove subsection E 2 from the agreement. Under the Employer's theory, the provision would have had no meaning after the expiration of the memorandum of understanding. The core of this dispute is what effect the failure has on the applicability of E 2 versus E 3. Although neither party addressed the issue in bargaining, they continued to follow the posted overtime procedure. In this case, the past practice evidence is strong evidence of a mutual agreement to continue the specialized interpretation of E 2. It certainly is the only evidence of mutual agreement.

One of the time-honored rules of contract construction is that arbitrators will prefer an interpretation of a provision which leaves it with meaning over one which leaves a provision as without meaning. Under the circumstances, the better view is that E 2 continues to be

[3] See, N.L.R.B. v. INTERNATIONAL SECURITY SERVICES, 406 U.S. 272, 80 LRRM 2225 (1972).

applicable except to the extent the parties have mutually agreed to change it. Accordingly, the Employer violated Section E.2 when it failed to call Mr. Robenhorst for the disputed overtime.

The next question is the appropriate remedy. The ordinary remedy for a failure to call the appropriate person for overtime is to pay him or her for the lost time. Some arbitrators might not grant that remedy were the error in administering the agreement is the result of a good faith error. This case was a test case. The Employer has not argued for that exception from this remedy. The parties have opted for a system which includes a high risk of honest error. No determination is expressed or implied as to the appropriate remedy when the violation occurs from a good faith error.

## AWARD

The grievance is sustained. The Employer shall henceforth follow the agreed-upon snow removal call out procedure. It shall make the Grievant whole for all lost wages for the December 13, 2009, snow removal. I reserve jurisdiction over the calculation of remedy if either party requests in writing, copy to opposing party, that I do so within sixty (60) calendar days of the date of this award.

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

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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