BEFORE THE ARBITRATOR

In the matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, LOCAL 1963

and

CITY OF GREENFIELD (FIRE DEPARTMENT)

Case #140
No. 69771
MA-14734

(FLSA Grievance)

Appearances:

Hawks Quindel, S.C., Post Office Box 442, Milwaukee, WI 53201-0442, by **Mr. Timothy Hawks**, Attorney at Law, appearing on behalf of the Union.

von Briesen & Roper, S.C., Attorneys at Law, Suite 700, 411 East Wisconsin Avenue, Milwaukee, WI 53202 by **Mr. James Korom**, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, Local 1963 of International Association of Fire Fighters (hereinafter referred to as the Union) and the City of Greenfield (hereinafter referred to as the Employer or the City) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as arbitrator to hear and decide a dispute concerning the administration of overtime provisions. The undersigned was so designated. A hearing was held on August 12, 2010 at the City's offices in Greenfield, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted briefs which were exchanged through the arbitrator on September 14, 2010, whereupon the record was closed. The arbitrator sought a clarification of a point in the record on December 19, and the clarification was supplied on December 21, 2010.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the arbitrator makes the following Award.

I. ISSUE

The parties stipulated that the issue to be determined herein is:

> Did the City violate the agreement as alleged in the grievance? If so, what is the appropriate remedy?

The grievance identified the violation as "… The City has deemed paid time off as an 'hour worked' when applying the provisions of 4.01 of the CBA since at least 1980. This is a benefit and condition of employment enjoyed by all unit employees. Effective February 15 the City unilaterally changed the benefit and condition of employment. Therefore, it violated, and continues to violate Section 31.01."

II. RELEVANT CONTRACT LANGUAGE

ARTICLE 4 – HOURS OF WORK

Section 4.01 HOURS OF WORK

> Regular hours of employment for employees of the Fire Department shall be twenty-four (24) hours on duty and twenty-four (24) hours off duty for a three day cycle with a ninety-six (96) hour period off duty after every third working day. For purposes of the Fair Labor Standards Act, the schedule shall be considered a twenty-seven (27) day cycle. Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City.

Section 4.02 NORMAL WORK WEEK

> A normal work week shall consist of an average of fifty-six (56) hours of duty per week.

. . .

Section 4.04 WORKDAY DUTY WEEK

> The regular weekday duty week Monday through Friday shall commence at 0800 hours and shall terminate for purposes of cleanup, training procedures, and routine inspection duties on or before 1700 hours. (The regular Saturday and Sunday duty day shall commence at 0800 hours and shall terminate for purpose of cleanup, training procedures, and routine inspection duties on or before 1200 hours.) The balance of the twenty-four (24) hour duty period shall be spent on standby status, emergency duty, public relations, fire prevention duties and maintenance of equipment necessary to the efficient operation of the Fire Department apparatus, and the station shall be restored to its original condition after all emergencies.

Section 4.05 OVERTIME PAYMENT

All employees shall receive overtime pay for time worked in excess of their regular work week of one and one (1-1/2) half times the employee's base hourly rate based upon a fifty-six (56) hour work week. No overtime shall be paid unless the employee is directed to work by the Chief or his authorized representative and entered into the Fire Department Journal and signed by the Chief or his authorized representative. All overtime shall be paid in one-half (1/2) hour increments.

(a) EMERGENCY ALARM RESPONSE: Employees called in for an emergency alarm response shall receive call-back pay at one and one half (1-1/2) times their hourly rate of pay for a minimum of two (2) hours based on a fifty-six (56) hour workweek. Call back pay shall commence at sign-in, with the understanding that Worker's Compensation shall be in effect from the time of the call, provided the employee responds directly to the station. Any portion of one-half (1/2) hour worked constitutes one-half (1/2) hour's pay, however, shift carryover shall remain at a one (1) hour minimum for the first hour and shall then be in one-half (1/2) hour increments after that.

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ARTICLE 31 – EMPLOYEE RIGHTS

. . .

Section 26.05 DECISION OF THE ARBITRATOR

The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 31 – EMPLOYEE RIGHTS

Section 31.01

The City will not unilaterally change any benefit or condition of employment which is mandatorily bargainable and heretofore enjoyed by the majority of unit employees during the life of this Agreement.

III. BACKGROUND FACTS

The City provides general municipal services, including fire suppression and rescues. The Union is the exclusive bargaining representative of the City's sworn firefighters. Greenfield firefighters work a twenty four hour duty schedule, with three of every nine days scheduled on duty. The cycle of duty days is one on, one off, one on, one off, one on, four off. This schedule, known as a California schedule, averages 56 hours per week, although in a given week a firefighter will actually work either a 72 hour or 48 hour schedule.

Since the 1970's, Greenfield's firefighters have been paid overtime for time outside their normal work week, typically callbacks to cover minimum manning levels when another firefighter is absent. This benefit was pursuant to a contract provision (Section 4.05 in the current collective bargaining agreement) stating: "All employees shall receive overtime pay for time worked in excess of their regular work week of one and one (1-1/2) half times the employee's base hourly rate based upon a fifty-six (56) hour work week." Until 1985, however, they did not receive overtime for any hours within the regular work week.

In 1985, the U.S. Supreme Court decided Garcia v. SAMTA, 469 U.S. 528, which applied the Fair Labor Standards Act to public employees, including firefighters. The work schedules of protective service employees are different than the normal 40 hour week, so special provisions were made for how to calculate overtime for police and firefighters. Employers and firefighters with collective bargaining relationships had the ability to select from among different options for the period over which overtime would be calculated. The parties in Greenfield elected to use a 27 day cycle, and they memorialized this in the language they negotiated to acknowledge the newly imposed FLSA coverage, by adding two sentences to Section 4.01 of the contract: "For purposes of the Fair Labor Standards Act, the schedule shall be considered a twenty-seven (27) day cycle. Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City." Because of the 27 day measurement period selected for use in Greenfield, and the statutory maximum of 204 hours for work within that period, firefighters working a California schedule have 12 hours of overtime built into each cycle.

The FLSA uses an hours worked standard for determining overtime obligations. Paid leave time is not counted as hours worked for overtime purposes. In practical terms, because of vacations, sick leave and other paid time off, this means that quite often firefighters do not cross the 204 compensable hours threshold for overtime under the statute. In the wake of Garcia, and the inclusion of the new language in the contract, firefighters were paid their regular salaries for the regular schedule, and received overtime if the hours actually exceeded 204. If a firefighter used paid leave for a portion of the regular schedule, those hours were not treated as compensable for overtime purposes.

Notwithstanding the treatment of compensable hours under FLSA, both before and after the Garcia decision firefighters have been paid overtime for all hours worked outside of their normal schedules, without regard to whether any paid leave time was used during the pay period.

In February 2010, Fire Chief Russell Spahn sent out a memo, announcing to the firefighters that henceforth the City would pay overtime only according to the Fair Labor Standards Act. The effect of the memo was to change the treatment of time outside of the regular schedule, making it subject to the same "hours worked" standard used for determining compensable hours under the FLSA. The instant grievance was thereafter filed, alleging that this change violated the collective bargaining agreement and the long standing past practice. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

Additional facts, as necessary, are set forth below.

IV. POSITIONS OF THE PARTIES

A. The Position of the Union

The Union takes the position that City has engaged in a clear violation of the collective bargaining agreement. For 24 years, the contract has contained a sentence that says "Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City." It has never, until now, been interpreted as limiting overtime payments to only those demanded by the FLSA. It has never, until now, been interpreted as excluding paid leave time from the calculation of overtime for hours outside the normal work week.

The language relied upon by the City was negotiated in response to the Garcia decision. "For purposes of the Fair Labor Standards Act, the schedule shall be considered a twenty-seven (27) day cycle. Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City." The parties were required to elect a cycle for overtime calculations, which they did in the first sentence of the provision. The second sentence was an acknowledgement of the new legal development, requiring overtime payments for 12 hours that had previously been straight time. It also recognized the possibility that the decision might at some point be reversed. Thus the phrase "so long as applicable to the City."

The error of the City's interpretation is shown by the other premium time provisions of the contract. If Section 4.01 actually governs all overtime payments, as claimed by the City, then the shift carryover minimum of one hour and the emergency alarm response minimum of two hours make no sense. The Fair Labor Standards Act

would not provide overtime for these instances. Further, the parties agree that Emergency Alarm Response time is paid at time and half, without regard to the use of leave time, even though there is little to distinguish that clause from the remainder of Section 4.05. The parties clearly understood that the obligation to pay overtime was not limited to FLSA overtime, and expressed that understanding in negotiating these minimums. Likewise, the general overtime provision for time and a half for hours worked outside the normal shift, as applied over the past two and a half decades, reflects that same understanding.

Even if the arbitrator were to conclude that the contract does not clearly mandate time and a half for time outside the normal schedule, overtime is a benefit which is a mandatory topic of bargaining. Article 31 of the agreement expressly requires the City to maintain its practices with respect to such benefits. The City concedes that it has followed a practice of paying overtime for hours outside the normal schedule, without regard to the use of paid leave time during the pay period. The unilateral change in February 2010 was a clear violation of the contract, under both the overtime provision and the standards provision. The arbitrator should so conclude, and should order the City to reinstate the former practice and make the employees whole for their losses.

B. The Position of the City

The City takes the position that there has been no contract violation, and that the grievance should be dismissed. The arbitrator's role is to interpret and apply the contract as written. Admittedly the City has paid its firefighters overtime for hours outside the work week on the basis of hours paid, rather than hours worked, since the late 1970's. However, that method of payment is not what the contract calls for. The language of Section 4.05 has been unchanged since the late 1970's, and requires overtime "for time worked in excess of their regular work week.." (emphasis added). In this same vein, the hours of work and workweek provisions of Article 4 refer to hours "on duty", not hours in paid status. The payroll procedures in place since February 2010 pay firefighters based upon hours worked and time on duty, just as the contract requires. The Union's preferred reading would pay them for time not worked, and which is not "in excess" of the normal average of 56 hours of "on duty" time.

If the arbitrator confines himself to the language of the Agreement, as he is required to do, he cannot find a violation of Article 4 because nothing in Article 4 supports the Union's claim. Indeed, the language of the Article expressly contradicts the claim. In addition to defining the right to overtime in terms of hours worked and time on duty, Section 4.01 of the contract provides that overtime will paid "if required by the Fair Labor Standards Act..." This language was added after the Supreme Court's decision in Garcia, and has been unchanged since the 1986-88 Agreement. The Union admits that paid leave time is not compensable time under the Fair Labor Standards Act for purposes of computing overtime. The contract simply could not be clearer in limiting the City's obligation to pay overtime to hours actually worked.

The City points out that the parties have recognized the limitations on the calculation of overtime in other portions of the contract. In Section 4.05(a), overtime is required for all time spent on Emergency Alarm Response call backs. This provision would be meaningless if all hours worked outside of the normal schedule were automatically treated as overtime. The fact that the parties carefully negotiated language to achieve such a payment shows that they are capable of being clear when they wish to be, and that they did not assume these hours would be paid at a premium rate simply because they fall outside the normal schedule.

The arbitrator's reading of the contract should not be influenced by the practice of the past thirty years. Practices may be instructive where the contract is vague, but this is a case where the contract is clear, and past practice cannot trump clear language. "Time worked" has a specific meaning, and it cannot be transformed into "time paid" under the guise of interpretation. Nor can "if required by the Fair Labor Standards Act" be changed to "if permitted by the FLSA." There is no ambiguity here which may be informed by a past practice. Moreover, the arbitrator must weigh the fact that even a long-standing past practice may well reflect the considered judgment of management as to how best to exercise its management rights, not some mutual agreement intended to bind the City if it decides that changing circumstances require a different choice. The Management Rights provision in Section 21.01 makes it clear that "the sole right to operate the City Government" cannot be "abridged by any practice, understanding or otherwise unless expressly set forth in writing." The Union may well wish to have the former practice maintained, but the contract does not permit that result in the face of the City's decision to apply the contract terms the parties themselves have agreed to.

The Union purports that Article 31 freezes the former overtime payment practice in place, but the language used in that provision does not say that. Article 31 supposedly prevents changes in any mandatorily bargainable area, but it hopelessly conflicts with Article 21, which reserves to management the right to make changes in methods and facilities, and specifically prohibits the abridgement of those rights by any past practices. The arbitrator need not resolve this conflict, however, since on its face, Article 31 does not apply to this situation. Article 31 preserves only those benefits or conditions which are "mandatorily bargainable." The duty to bargain extends only until it is satisfied by an agreement on the topic. There is no duty to bargain over overtime here, because the parties have done that bargaining, reached agreement and reduced that agreement to writing in Article 4. Thus the subject of overtime payments is no longer a mandatory topic of bargaining, during the term of the agreement, and does not fall within the general scope of Article 31.

The sole basis on which the arbitrator can make a decision is the clear language of Article 4. That language does not require time and one half if fewer than 204 hours are actually worked in the course of a 27 day cycle. There is no contractual provision which has been violated and the grievance should be denied in its entirety.

V. DISCUSSION

For roughly thirty years, the firefighters working for the City of Greenfield have been paid overtime for any hours worked outside of their normal schedules. They are also paid overtime for hours built into their schedules, in excess of 204 in a 27 day cycle. The overtime outside of the regular schedule has been paid on the basis of hours in paid status, so the use of leave time does not affect the right to overtime. This is different than the payment that would result purely from the application of the Fair Labor Standards Act, which counts as compensable for overtime purposes only those hours actually worked, and is the standard that has been used for calculating overtime hours within the regular schedule.

The practice of paying overtime for time outside the regular schedule on the basis of hours paid preceded the Supreme Court's 1984 Garcia decision extending the FLSA to public employees, and was unchanged in the wake of that decision. In response to the decision, the parties negotiated new language in their Hours of Work provision, adding two sentences to that section: "For purposes of the Fair Labor Standards Act, the schedule shall be considered a twenty-seven (27) day cycle. Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City." The separate provision on the payment of overtime for time outside the work week in a separate paragraph remained unchanged:

> All employees shall receive overtime pay for time worked in excess of their regular work week of one and one (1-1/2) half times the employee's base hourly rate based upon a fifty-six (56) hour work week. No overtime shall be paid unless the employee is directed to work by the Chief or his authorized representative and entered into the Fire Department Journal and signed by the Chief or his authorized representative. All overtime shall be paid in one-half (1/2) hour increments.

The City changed its policy in February 2010, going to a strict application of the FLSA in its treatment of compensable hours for overtime within and outside the regular work week. In doing so, the City argues that it is merely applying the contract language as written. Specifically, the City argues that the sentence stating that "Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City" controls over any contrary practice, and that the general overtime provision providing "overtime pay for time worked in excess of their regular work week" only mandates payment for hours actually worked, not hours paid.

A. Section 4.05 and Time in Excess of the Regular Work Week

The right to overtime pay for hours outside the regular work week flows from what was originally Section 4.06, and is now Section 4.05, which has been substantively unchanged since at least the 1978 collective bargaining agreement. As previously noted, that Section provides, inter alia, that "Employees shall receive overtime pay for time worked in excess of their regular work week at one and one half (1 1/2) times the employee's base hourly rate based upon a fifty-six (56) hour work week."[1] I cannot agree with the City that the phrase "time worked in excess of their regular work week" clearly and unambiguously eliminates hours paid but not worked from the calculation of overtime. Prior to the Garcia ruling, the parties had an understanding of what was meant by the phrase "time worked in excess of their regular work week." They treated it as meaning the hours outside the employee's normal schedule. After the Garcia ruling, they made no changes to this language, and they continued to understand the phrase in that way. There is nothing in the language which is inconsistent with the practice. In the case of a call-in for an extra shift or the like, the hours outside the normal schedule are, by definition, hours actually worked. The City's reading of the language would extend the term "time worked" to define the characteristics not of the hours outside the normal schedule, which is the subject of the sentence, but of the hours within the normal schedule. The City's rationale for this is that the words "in excess" suggest that the two sets of hours – those within the normal schedule and those outside – share the same traits. They buttress this by noting that the parties use the terms "hours on duty" and "hours of duty" to define the regular work day and work week. These are not unreasonable inferences, and the City's interpretation is an entirely possible reading of the language. It is equally possible, however, to read the phrase "in excess" as referring to the fact that the hours are *in addition to* the normal schedule. As noted, that is the subject of the provision and those are the hours to which the descriptive phrase "time worked" is directed.

The Union's interpretation of this language is consistent with the actual practice of the parties for over thirty years. The City argues that practices should not be given a life of their own, and that contractual rights should be limited to those actually guaranteed by the language of the contract. Here, however, the language is susceptible to both interpretations, and for the purposes of understanding Section 4.05, the practice is relevant to resolving the ambiguity in the rights the contract as written confers, not as a free standing right. Given two equally plausible interpretations of ambiguous language, an arbitrator will in most cases defer to the parties, and will adopt the meaning that the parties themselves have given the language in their day to day dealings over time. In the case of Section 4.05, deferring to that meaning favors the position of the Union.

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[1] Between the 1978 and 1983 agreements, the parties corrected the term "base hour rate" to "base hourly rate."

B. Section 4.01 and Time in Excess of the Regular Work Week

The City asserts that Section 4.05 is not the controlling language for this case, and that the parties effectively superseded that provision when they negotiated the last half of Section 4.01 following the Garcia decision: "For purposes of the Fair Labor Standards Act, the schedule shall be considered a twenty-seven (27) day cycle. Overtime payments shall be made if required by the Fair Labor Standards Act so long as applicable to the City." In the City's view, this addition, and particularly the last sentence, serves to strictly limit the liability for all overtime payment to those instances required under the Fair Labor Standards Act, and to eliminate other general overtime obligations. This is not a persuasive reading of the contract as a whole. As was the case with Section 4.05, the City's interpretation of Section 4.01 is at odds with the parties' own reading of the contract over time. Moreover, if this portion of Article 4 was intended to comprehensively define the circumstances in which overtime pay would be provided to employees, the parties would presumably have just eliminated the first sentence of Section 4.05 when they amended Section 4.01. Under the City's interpretation, that sentence serves no purpose whatsoever.

While the City's interpretation renders the substance of Section 4.05 meaningless, the Union's interpretation gives meaning to both Section 4.01 and Section 4.05. Prior to the Garcia decision, firefighters did not receive overtime for the twelve scheduled hours beyond 204 in each 27 day cycle. Following that decision, and the addition of the final two sentences of Section 4.01, additional pay was received for those hours if required by the FLSA – that is, if hours actually worked exceeded 204 in the 27 day cycle. That overtime would not have been paid under the terms of Section 4.05, since that provision only speaks to time outside of the regular work week. Thus each provision serves a distinct function, and has a distinct meaning. Given an interpretation which gives meaning to two clauses, and another which gives meaning to one clause at the cost of rendering the other meaningless, an arbitrator will generally favor the former interpretation. Parties are not presumed to have negotiated language without intending it to be effective and meaningful.[2]

The City is correct that the language of Section 4.01, standing alone, would not support the Union's claim for overtime for time worked in excess of the normal work week if the 204 hour threshold is not first met by the hours actually worked. Section 4.01 does not, however, stand alone. It is but one of several provisions addressing overtime. The continued existence of Section 4.05, and the interpretation given to that provision over the years, creates a separate contractual entitlement to

[2] The City cites this principle in arguing that the Emergency Alarm Response provision (Section 4.05(a)) is meaningless if all hours outside the normal schedule are already paid at time and a half under Section 4.05. On the contrary, the thrust of Section 4.05(a) is to provide for minimum hours of pay when employees are called back or are carried over from their shift, and to define when a worker responding to an emergency becomes covered by Workers Compensation. While the rate is specified at time and one half, and this *is* redundant, that is not the focal point of the provision.

overtime for the hours outside the normal schedule. Contrary to the City's argument, I conclude that Section 4.05, and not Section 4.01, controls overtime payments for time worked in excess of the normal work week, and that it does not distinguish between hours paid and hours worked.[3] It follows that the City violated the collective bargaining agreement when it implemented the Chief's memo in February 2010 with respect to hours outside the normal schedule.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The City violated the collective bargaining agreement as alleged in the grievance. The appropriate remedy is to reinstate the former practice of using time paid as the basis for the calculation of overtime for time worked outside the normal work week, and to make whole all of the affected employees.

The Arbitrator will retain jurisdiction for a period of sixty days following the date of this Award for the sole purpose of resolving disputes over remedy if requested by either party.

Signed this 3rd day of January, 2011 at Racine, Wisconsin.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

[3] Given the conclusion as to the meaning of Section 4.05, I find it unnecessary to offer any opinion as to the impact of Article 31 on the City's obligation to pay overtime.

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