

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF MONROE**

and

**LOCAL 3760, AFSCME, AFL-CIO**

Case # 45  
No. 70009  
MA-14836

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Appearances:

**Daniel D. Barker**, Melli Law, S.C., Ten East Doty Street, Suite 900, P.O. Box 1664, Madison, WI 53701-1664, appearing on behalf of City of Monroe.

**Kathleen M. Lounsbury**, Ehlke, Gartzke, Bero-Lehman & Lounsbury, S.C. 6502 Grand Teton Plaza, Suite 202, Madison, WI 53719, appearing on behalf of Local 3760, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

The City of Monroe, hereinafter City or Employer, and Local 3760, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The parties jointly requested that the undersigned be appointed to serve as the arbitrator in this grievance regarding proper payment to employees for work performed on February 18, 2009. The undersigned was so appointed. A hearing was held on September 23, 2010, in Monroe, Wisconsin. The hearing was transcribed, and the transcript was filed on October 14, 2010. The record was closed on November 17, 2010, after receipt of all post-hearing 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.

ISSUE

There are no procedural issues in this case. The parties were unable to agree to a statement of the substantive issue, but agreed that the undersigned may formulate the issue based upon the evidence and arguments presented by the parties. The Union proposes the following issues for resolution:

1. Can the City refuse to pay wages at time and one-half, as required by article 9.08, when a Street Department employee is required to work hours outside of his normal shift schedule?
2. Can the City deny Street Department employees the work of their contractually defined schedule by regularly scheduling work outside of the normal shift schedule during the winter months?

At hearing, the City stated the issue as:

Did the City violate the labor agreement on February 18, 2009 when it sent the grievants, Mr. Einbeck, Mr. Kundert, Mr. Leistiko and Mr. Wild, home after they worked eight hours?

In its written argument, the City modified the issue to be:

Did the City violate the labor agreement on February 18, 2009 when it sent grievants home after they worked 8 hours and did not pay them overtime?

The undersigned has determined the issue to be:

Did the Employer violate the collective bargaining agreement on February 18, 2009 when it sent the Grievants home after they had worked 8 hours?

Did the Employer violate the collective bargaining agreement on February 18, 2009 when it did not pay the Grievants overtime for the time worked prior to 7:00 a.m.?

If so, what is the remedy?

### FACTS

The essential facts giving rise to the instant grievance are not in dispute. The Employer is a city which provides the full panoply of services to the residents of Monroe. The Union represents all regular full-time and part-time employees of the city who are not professional, craft, supervisory, managerial, confidential or casual, are not law enforcement personnel with the power of arrest or elected officials. In particular, the Union represents the employees of the Street Department who perform such tasks as plowing snow, repairing streets, collecting garbage, paving, cutting tree limbs, mowing grass and the like. The regular work schedule for these employees is 7:00 a.m. to 3:30 p.m. with a half hour unpaid duty-free lunch, usually between 12:00 and 12:30 p.m. each day. From time to time, conditions in the City require these employees to be called into work outside of their regular schedule. February 18, 2009 was one such day. The employees were called in early and were sent home early. They were not paid overtime for hours worked prior to their normal start time. A grievance was filed by the Union President, Dan Perdue, on March 10, 2009 which stated as follows:

Four (4) Street Department employees (Einbeck, Kundert, Leistiko, and Wild) were called in to work at 6:15 a.m. on Wednesday, February 18, 2009. At 12:30 p.m., Tom Boll ordered these same four (4) employees to stop work at 2:45 p.m. and to leave for the day. The employees filled out time cards including overtime slips for  $\frac{3}{4}$  hour at time and one-half ( $1 \frac{1}{2}$ ) for the 45 minutes worked from 6:15 a.m. – 7:00 a.m. The normal shift schedule for Street Department employees is 7:00 a.m. – 3:30 p.m. (which includes a  $\frac{1}{2}$  hour duty free lunch period). When paychecks were distributed on February 26, 2009, the 45 minutes submitted for was **not** included in the payroll. The employees asked Boll about the overtime and he told them it was not overtime. By doing so, Boll and the City have essentially “flexed” the employees’ shifts in order to avoid the payment of overtime, contrary to the relevant articles/sections referenced below regarding shifts, overtime, and call-outs. Such action is also an *unreasonable* application of any Management Rights that Boll and the City may attempt to assert.

The contractual provisions cited by Perdue were Article 2 (Management Rights), Section 2.01 and Article 9 (Workday and Workweek), Sections 9.02, 9.06 and 9.08. Perdue also indicated that the violations included, but were not limited to, these sections. The remedy sought by the grievance was:

Make Einbeck, Kundert, Leistiko, and Wild whole with respect to wages and all other benefits by recalculating their pay for February 18, 2009, to include  $\frac{3}{4}$  hour (0.75) compensation paid at the rate of time and one-half ( $1 \frac{1}{2}$ ) their normal hourly rate.

The Employer acknowledges that these four employees were called in to clear the streets of snow, starting at 6:15 a.m. Streets Supervisor Boll also acknowledges that he told the employees to leave work at 2:45 p.m. His explanation for doing so was that the job duties they were performing at that time “weren’t really urgent”. Boll’s description of the work day was that

. . . we had been having snow squalls through the early morning, and that was about the time when it got the slipperiest for school traffic and such, so I had to get people out.

It would snow a little bit and then it quit, and then it would snow a little bit and quit, and the temperature we had was where it was melting fairly well, so we just had to get it moving in the morning with the colder temperatures, and then we didn’t do anything after that.

Boll also testified that when there is work that needs to be done, he will keep employees working to the end of their shift, even if they had been called in early. The Grievants testified that they had been told previously that when they were called in early, they could not leave early without filling the rest of the “normal” eight hour shift with benefit time. Boll testified that the current practice, as he understood it, was that employees cannot use sick time, vacation time, or comp time to go over eight hours in order to get overtime if they work outside their normal schedule. Boll was of the opinion that this was a policy developed by the Salary and Personnel Committee, and he was unaware of how, or if, it had been disseminated to bargaining unit members.

Boll also testified that it was a relatively infrequent occurrence for employees to be sent home early, before the end of their shift, when they had been called in to work before their shift. He indicated that it happened three or four times prior to February 2009 and once after that.

Additional facts are included in the Discussion, below.

## **RELEVANT CONTRACT PROVISIONS**

### **Article 2 – Management Rights**

2.01 Statement of Principle: The Employer retains the sole right to plan, direct and control the working force, to schedule and assign work to employees including overtime work, to determine the size of the work force and the means, methods and schedules of operation, to establish reasonable standards, work rules and regulations, and to promote

methods to maintain or improve the efficiency of its employees. The Employer also has the sole right to require employees to observe its reasonable rules and regulations, to hire, promote, lay off or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause; however, the Employer shall not take any action which would be in violation of state or federal laws. The above itemization is not deemed to be any kind of limitation on the general powers that the Employer has to regulate its employees and it is agreed and understood that the Employer has retained all rights relating to the planning, direction and control of the employees in this bargaining unit to the extent that such rights are not expressly amended or altered pursuant to the terms of this Agreement. If bargaining work is subcontracted, it shall not result in the layoff or reduction of regular hours of regular employees. No employee shall suffer a reduction in his or her wage rate as the consequence of any subcontracting. Any employee displaced as the result of subcontracting shall be entitled to exercise bumping rights, pursuant to Section 11.10 – Layoff, without a reduction in pay. If an employee(s) so displaced is unable to bump, the City shall reassign said employee(s) to other duties, without a reduction in pay.

### **Article 9 – Workday and Workweek**

9.01 Defined: The normal workday for full-time employees shall be eight (8) hours. The normal workweek for full-time employees shall be forty (40) hours, Monday through Friday.

9.02 Shifts: The normal shift schedules are: (lunch period are non-paid.)

. . .

**Street Department**: 7:00 a.m. to 3:30 p.m. (1/2 hour duty free lunch period).

. . .

9.06 Overtime: Employees will be compensated at the rate of time and one-half (1-1/2) their normal hourly rate for all hours worked in excess of eight (8) per day or forty (40) per week. All time paid shall be considered time worked for overtime purposes. . . .

. . .

9.08 Call-out: Any employee called into work at a time other than his/her regular schedule of hours, except where such hours are consecutively prior to or subsequent to the employee's regular schedule of hours, shall receive a minimum of two (2) hours' pay at time and one-half the regular rate of pay, except where an employee has previously agreed to work an assignment which will last less than two hours, then the employee shall be compensated as mutually agreed at time and one-half their regular rate. Employees who are called out pursuant to this Section on a holiday listed in Section 14.01 shall receive double-time (2X) the regular rate of pay in addition to holiday pay. . . .

. . .

9.10 Changes in Schedule: Changes in work schedules may be made by mutual agreement of the parties. Such change in schedule will not result in an employee earning overtime premium for hours in excess of eight (8) per day.

## DISCUSSION

### The Issue

The Union poses two questions for the arbitrator:

1. Can the City refuse to pay wages at time and one-half, as required by article 9.08, when a Street Department employee is required to work hours outside of his normal shift schedule?
2. Can the City deny Street Department employees the work of their contractually defined schedule by regularly scheduling work outside of the normal shift schedule during the winter months?

The City posed one question at hearing:

Did the City violate the labor agreement on February 18, 2009 when it sent the grievants, Mr. Einbeck, Mr. Kundert, Mr. Leistiko and Mr. Wild, home after they worked eight hours?

However, in its written argument, the City recognized that this statement of the issue failed to recognize that there are two intertwined questions. Accordingly the City presented a revised statement of the issue:

Did the City violate the labor agreement on February 18, 2009 when it sent grievants home after they worked 8 hours and did not pay them overtime?

In its first question, the Union presupposes the outcome of the decision by contending that Section 9.08 of the collective bargaining agreement requires payment at the rate of time and on-half for all hours worked outside of the normal shift schedule. Accordingly, the undersigned has rejected that statement of the issue. The second question posed by the union presupposes that the City regularly schedules work outside of the shift schedule during winter months and denies employees the ability to work their entire regular shift as well. The testimony at hearing was that employees who were called in to work before the regular shift were sent home before the end of the regular shift, 3:30 p.m., perhaps three or four times prior to the events giving rise to the instant grievance and once thereafter. Since the City does not regularly engage in this activity, the question posed is not properly before the undersigned. Accordingly, I have also rejected this statement of the issue.

The manner in which the City initially posed the issue to be decided failed to recognize that there are really two contentions presented in this case: the failure on the part of the City to pay time and one-half for the hours worked by the employees prior to the start of the regular work day, and the fact that the City sent the employees home before the end of the regular work day. In its restatement of the issue, the City has recognized that there are two prongs to the Union's attack on the City's actions of February 18, 2009. The Union contends that the City violated the collective bargaining agreement by sending the employees home after eight (8) hours of work but earlier than the regularly scheduled end of the shift, 3:30 p.m. The Union also contends that the Employer violated the collective bargaining agreement by failing to pay the Grievants time and one-half for the time worked prior to the regularly scheduled start of the shift, 7:00 a.m. I have stated the issues to be decided in such a manner as to clearly articulate the two matters at issue:

Did the Employer violate the collective bargaining agreement on February 18, 2009 when it sent the Grievants home after they had worked 8 hours?

Did the Employer violate the collective bargaining agreement on February 18, 2009 when it did not pay the Grievants overtime for the time worked prior to 7:00 a.m.?

If so, what is the remedy?

### **Deviation from the "regular" workday, alleged violation of Section 9.02**

The undersigned has had the opportunity to examine the meaning of Section 9.02 of the collective bargaining agreement between these same parties on a prior occasion. In CITY OF MONROE, MA-13555 (7/07), the undersigned was asked to determine whether there was a contractual violation when an employee was directed to leave work after his completion of eight hours of work which occurred at 3:00 p.m. on a day during which the employee did not take his allotted 30 minute duty free lunch.

Contrary to the contention of the Union, the prior decision is applicable to the instant situation. In denying the grievance, the undersigned stated at p. 9:

. . . the undersigned finds the language to be clear and unambiguous and permits the Employer, on a limited basis, to vary the normal work schedule and send employees home after they have completed eight (8) hours of work.

While the current situation differs from that of the prior grievance in that some of the eight hours worked are outside the normal workday, this fact does not modify the conclusion reached in the prior award. This interpretation cannot, however, be construed to permit the Employer to vary the normal work day by sending employees home after eight (8) hours of work every time they have been called in to work prior to the normal start time. Such a practice would undermine the concept of a “normal” workday or workweek. Rather, the Employer is obligated to allow employees to work the entire regular shift, until 3:30 p.m., unless it has a rational basis to send the employees home prior to 3:30 p.m. Such a rational basis could be lack of work or knowledge of an impending storm that might require employees to be called in early again and safety reasons warrant sending the employees home to rest. Although sending employees home once for the same number of minutes as they worked prior to the normal start time due to a lack of work, as occurred on February 18, 2009, might have a rational basis, an on-going pattern of sending employees home after they completed exactly eight (8) hours of work due to a lack of work would raise significant questions. It would, in fact, violate the concept of a regular workday and be violative of the collective bargaining agreement between the parties. Inasmuch as the Union failed to demonstrate that employees are regularly sent home early when they start work prior to the regular shift, the events of February 18 do not constitute a violation of Section 9.02.

**Payment of time and one-half for time worked outside, but contiguous to, the normal workday, alleged violation of Section 9.08**

It is the position of the Employer that employees can earn overtime in four ways, none of which are applicable to the instant matter: work over eight hours in a day; work over 40 hours in a week; work on a holiday; and work a call-out assignment when the hours worked are not consecutive prior to or subsequent to the regular schedule of hours. Inasmuch as none of these situations is applicable to February 18, 2009, the City contends no overtime is owed for the three-fourths of an hour that these employees worked before the regular shift began. The Employer also argues that the Union’s argument of paying overtime for these hours must fail because the Union has not demonstrated any payments of overtime for hours worked before 7 a.m. except when the employee worked the full normal workday, until 3:30 p.m., which resulted in work in excess of 8 hours in a day, triggering the time and one-half wages provision of Section 9.06.



The Union, on the other hand, contends that Section 9.08, read in concert with Sections 9.01, 9.02 and 9.10<sup>1</sup> require the Employer to pay employees at time and one-half for call-out work that is consecutive to the regular workday. The Union also argues that the past practice of the City is consistent with the Union's interpretation of the collective bargaining agreement and, further, that the City is attempting to change the terms of the collective bargaining agreement without bargaining those changes with the Union.

It is clear to the undersigned that the terms of the collective bargaining agreement require the employees to work at least eight hours, Monday through Friday. As indicated above, and in the prior award, those hours are to be between the hours of 7:00 a.m. and 3:30 p.m. (with a one-half hour duty free lunch) except under limited circumstances and emergencies.

To ascertain whether the employees are entitled to time and one-half for the time worked prior to 7 a.m., regardless of the total number of hours that they work in the day, a careful analysis of Section 9.08 is required. The Employer argues that call-out time contiguous to the normal workday is not to be paid at time and one-half unless another provision of the collective bargaining agreement requires such payment. The Union argues that in so arguing, the Employer has cut off its analysis of Section 9.08 without regard to the remainder of that provision.

Section 9.08 reads as follows:

Call-out: Any employee called into work at a time other than his/her regular schedule of hours, except where such hours are consecutively prior to or subsequent to the employee's regular schedule of hours, shall receive a minimum of two (2) hours' pay at time and one-half the regular rate of pay, except where an employee has previously agreed to work an assignment which will last less than two hours, then the employee shall be compensated as mutually agreed at time and one-half their regular rate. Employees who are called out pursuant to this Section on a holiday listed in Section 14.01 shall receive double-time (2X) the regular rate of pay in addition to holiday pay. . . .

Call-out pay is common in collective bargaining agreements between municipal employers and their employees. It is designed to provide a premium to employees for the inconvenience of working outside of, and often in addition to, their normally

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<sup>1</sup> In the prior award, I found that Section 9.10 is intended to allow the parties to the contract, the Union and the Employer, to bargain a modified work schedule, presumably one wherein employees are working 10 hours a day, four days a week. This Section is not applicable to a change of schedule that an employee, or group of employees, agrees to with the City. Section 9.10 is inapplicable to the circumstances at issue herein.

scheduled work hours. Call-out pay often provides that employees are to be paid for a minimum number of hours of work, regardless of the actual time worked, and that such time is to be paid at one and one-half the regular wage. Call-out pay is an example of a premium pay – extra pay for work that is not part of the regular work schedule.

The first sentence of this Section 9.08 presents a challenge to the casual reader. It is a very long, complex sentence that provides for certain benefits and contains at least two exceptions. The meaning of this clause is central to the dispute between the Union and the City. It is clear to the undersigned that the provision provides that when an employee is called into work at a time that is not consecutive to his or her regular schedule of work, that employee is entitled to pay of at least two hours, paid at time and one-half of his or her wage. It is also clear that the contractual language provides that where an employee has previously agreed to work an assignment which will last less than two hours, without reference to whether that time is consecutively prior to or subsequent to the regularly scheduled hours, the employee will be paid at time and one-half the regular wage rate. The Employer reads the clause “except where such hours are consecutively prior to or subsequent to the employee’s regular schedule of hours” to be an exception to both the two hour minimum pay and the payment at time and one-half for the time period in question. The Employer does not address the second exception in the provision.

In its brief in chief, at p. 11, the City contends that

To grant the 45 minutes of overtime demanded by the Union without completely writing the consecutive hours exception out of the contract, the Arbitrator would have to modify the consecutive hours exception by impermissibly adding language to it. In fact, she would have to completely rewrite Section 9.08 to read in relevant part as follows:

9.08 Call-Out: Any employee called into work at a time other than his/her regular schedule of hours, shall pay [sic] at time and one-half the regular rate of pay, except where such hours are consecutively prior to or subsequent to the employee working their’s full regular schedule of hours.

The undersigned finds that the Employer has distorted the language of Section 9.08. The language at issue here provides for two hours of pay when the call-out is not contiguous to the regular work schedule. That much of Section 9.08 is very clear, and is quite standard. The Union argues that the Employer has chosen to ignore the second exception contained in Article 9.08, the very provision, according to the Union that provides that when an employee has previously agreed to work an assignment that will last less than two hours, the employee will be paid at one and one-half the regular rate of pay.

Arguably the contract clause is ambiguous. The rules of contract interpretation require the arbitrator to look at extrinsic evidence only when the contract language is ambiguous. Extrinsic evidence, generally, consists of bargaining history and the practices of the parties. In this case, the parties failed to provide any extrinsic evidence that supports their arguments.

Neither party introduced any bargaining history relating to Section 9.08, although the Employer did introduce a bargaining proposal made by the Union subsequent to the issuance of the prior award, wherein the Union attempted to delete the word “normal” from Sections 9.01 and 9.02. That bargaining proposal bears no relationship to the question of whether the employees are entitled to receive overtime pay for the period in question. With regard to past practice, the Union presented testimony to the effect that the employees had always been paid one and one-half times their hourly rate for hours worked prior to their normal start time but failed to show that the employees received such payment when they only worked for eight (8) hours that day. The Union did demonstrate that it was a past practice of the parties to require employees who wanted to leave before 3:30 p.m. on days they came in before 7:00 a.m. to take benefit time to “complete” the eight hour work day. Supervisor Boll concurred that this had been the practice.<sup>2</sup> This fact could be construed as an admission against interest by the Employer. The memorandum that the Department of Safety and Human Resources sent to Department Heads on January 30, 2006 asks that employees be notified of the following:

According to clearly written contract stipulations when employees are asked to report early supervisors will be sending them home after 8 hours unless there is additional work that the supervisor deems needs to be done – employees are not entitled to more than 8 hours.

Employees who are hurt on the job or who are absent during the work shift because of illness or other medical reasons will only be allowed to put in for sick leave up to the maximum number of hours that remain on their 8 hour shift.

The above clarifications may be contrary to past practice in some departments but they are in accordance with the provisions of the labor agreement.

This document comes as close to a “smoking gun” in terms of changing practices during the term of a collective bargaining agreement that this writer has seen. It also supports the Union’s position that there is a clear past practice that employees who are called into work earlier than the regular start time will work a full shift in

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<sup>2</sup> Although the Employer presented a memorandum that indicated the City was changing that practice, no witnesses testified that it had been disseminated to the employees.

addition to the pre-regular schedule hours that are to be paid at time and one-half. If, as the Union contends and the Supervisor appears to agree, the employees were always allowed to remain at work for the entire 8 hours of their shift, regardless of how early they came to work, the Employer is not free to modify this practice.

Further, contrary to the assertions of the memorandum, the “clearly written contract stipulations” do not provide that employees are not entitled to more than 8 hours of work under certain circumstances. It appears that the City is relying, in part, on this memorandum to change the long-time practice of calling employees into work before their shift, having them work the full shift, and paying overtime for the hours in excess of eight that were worked that day. An alternative view is that the employees worked 8 hours in the day and worked “call-out” time prior to the shift, entitling them to overtime for time worked before the normal shift. This brings us, full-circle, back to Section 9.08 and its meaning.

Section 9.08 relates to call-out pay. If the exceptions are both removed from the clause, the language reads:

Any employee called into work at a time other than his/her regular schedule of hours, shall receive a minimum of two (2) hours' pay at time and one-half the regular rate of pay.

This is a fairly straight forward and easily understood provision: employees working other than their regular schedule of hours shall receive a minimum of two hours pay, and the hours worked will be paid at time and one-half. The parties hereto have modified this relatively simple and straightforward clause by the addition of two exceptions. The first exception deals with hours worked consecutively prior to or subsequent to the employee's regular schedule of hours.

Call-out: Any employee called into work at a time other than his/her regular schedule of hours, except where such hours are consecutively prior to or subsequent to the employee's regular schedule of hours, shall receive a minimum of two (2) hours' pay at time and one-half the regular rate of pay.

When the call-out time is consecutive to an employee's regular hours of work, the employee is not inconvenienced in the sense that he or she has to come to work only once to perform the call-out work as well as the regular hours of work. Accordingly, the two (2) hour minimum pay is inapplicable. The Union does not argue, nor could it, that the grievants herein are entitled to two hours' pay at time and one-half. They only seek to be paid for the  $\frac{3}{4}$  hour they worked prior to their regular shift at time and one-half.

If the first exception is omitted, but the second exception is present, the clause reads as follows:

Call-out: Any employee called into work at a time other than his/her regular schedule of hours shall receive a minimum of two (2) hours' pay at time and one-half the regular rate of pay, except where an employee has previously agreed to work an assignment which will last less than two hours, then the employee shall be compensated as mutually agreed at time and one-half their regular rate.

Here, if the employee had agreed to work an assignment that would last less than two hours, he or she would only be paid for time worked, but said payment would be at one and one-half times the regular rate of pay.

It can be argued that an employee that responds to a call from his or her supervisor at 6:00 a.m. to come to work early, by 6:15 a.m., has agreed to work call-out work for a period that would be less than two hours. That employee is entitled to be paid at time and one-half for those hours of work, regardless of the total number of hours that he or she works during the entire day. While it might be considered a stretch to say that an employee who is called at 6:00 a.m. to come to work at 6:15 a.m. has "agreed to work call-out for a period" less than two hours, it would be more of a stretch to deny that Section 9.08 provides that call-out pay is to be paid at time and one-half. The exceptions clearly apply to the two (2) hour minimum, not to time and one-half.

As stated above, Section 9.08 is hardly a clarion of clarity. However, the intent of the section is quite clear. Employees who work outside of their regular work day are entitled to be paid premium pay for that work. In this case, the four Grievants should have been paid overtime for the  $\frac{3}{4}$  hour they worked prior to their regular work day.

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

AWARD<sup>3</sup>

The grievance is denied in part and sustained in part.

The Employer did not violate the collective bargaining agreement on February 18, 2009 when it sent the Grievants home after they had worked 8 hours.

The Employer violated the collective bargaining agreement when it did not pay the Grievants overtime for the time worked prior to 7:00 a.m.

The remedy for this breach is to pay each Grievant half of his normal wage for  $\frac{3}{4}$  of an hour.

Dated at Madison, Wisconsin, this 31<sup>st</sup> day of January, 2011.

Susan J.M. Bauman /s/

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Susan J.M. Bauman, Arbitrator

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<sup>3</sup> The undersigned will retain jurisdiction for a period of 30 days from the date of this award to address any questions regarding the remedy ordered.