BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUKESHA PROFESSIONAL POLICE ASSOCIATION
WISCONSIN PROFESSIONAL POLICE ASSOCIATION (WPPA)
LAW ENFORCEMENT EMPLOYEE RELATIONS (LEER) DIVISION

and

CITY OF WAUKESHA

Case 186
No. 70158
MA-14884

(Jason Fink Overtime Grievance)

Appearances:

Roger Palek, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of the Association.

Donna Hylarides Whalen, Assistant City Attorney/Human Resources Manager, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin 53188**,** appearing on behalf of the City.

ARBITRATION AWARD

Waukesha Professional Police Association, WPPA, LEER Division, hereinafter referred to as the Association, and the City of Waukesha, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. The parties requested a list of five staff arbitrators from the Wisconsin Employment Relations Commission from which to select an arbitrator to hear and decide the instant dispute. The undersigned was selected to arbitrate the dispute. A hearing was held on December 14, 2010 in Waukesha, Wisconsin. Thereafter, the parties submitted briefs, and the Employer submitted a reply brief, whereupon the record was closed on February 24, 2011. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following issue:

Whether the Employer violated Article 5.01 of the labor agreement when it failed to compensate the grievant for time spent seeking medical treatment which occurred outside of his regularly scheduled shift for a duty related injury?

PERTINENT CONTRACT PROVISIONS

The parties' 2010-2012 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 5 - Overtime

5.01 Employees will be paid at the rate of time and one-half their normal rate of pay for all hours worked in excess of the scheduled workday or workweek. Employees may request compensatory time off in lieu of overtime pay. Unused compensatory time off shall be carried forward into the following calendar year. Compensatory time accrual may not accumulate in excess of an annual amount of up to one hundred sixty (160) hours. Compensatory time may be taken in not less than one (1) hour increments at the end of a work shift with supervisory approval. Usage in less than an eight (8) hour blocks is limited to the day the compensatory time is to be used only and may not be scheduled in advance.

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Article 10 – Previous Benefits

10.01 The City agreed to maintain in substantially the same manner such present benefits which are mandatory subjects of bargaining and not specifically referred to in this Agreement. Such benefits and written policies as may now exist that are mandatory subjects of bargaining are incorporated herein by reference as though fully set forth at length.

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PERTINENT WORK POLICY

The City's policy dealing with worker's compensation (known as Policy E-5) is incorporated by reference into the collective bargaining agreement. That policy provides in pertinent part:

F. Wages

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> An employee who, as a result of a job related injury or illness, is absent for three (3) or less days shall receive their regular base pay from the City for such absence. All compensation paid during such absence is fully taxable. The City's worker's compensation carrier recognizes lost time from the first three (3) days of absence and will reimburse the City for those days should such work absence go beyond six (6) days. All compensation payments received by the employee, or the City on behalf of the employee, will be endorsed to the City up to the expiration of the four (4) month supplement pay benefit.

BACKGROUND

The City has ten bargaining units. AFSCME represents five of those units. In 2001, a grievance arose in one of those units where an employee sought overtime for the time spent seeking medical treatment for a work-related injury which occurred on the job. That grievance was settled with an agreement by the parties "that the City is not liable for the payment of overtime for time spent in medical treatment due to an on the job injury." The record also establishes that employees in the five AFSCME bargaining units have never been compensated for time spent obtaining medical treatment for work related injuries which falls outside of their regular shift. OPEIU represents one of the City's bargaining units. The record establishes that the employees in that unit are not eligible for pay during time spent seeking medical treatment which falls outside of their scheduled work hours.

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WPPA represents one of the City's bargaining units, namely the law enforcement unit. That's the unit involved here. The remainder of this section deals with matters that have occurred in that unit.

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In 1998, Officer Eileen Micklitz injured her back while on duty. Afterwards, she returned to work on a modified duty status. While on this modified duty status, she attended a physical therapy session for her injury. The physical therapy session in question did not occur during her scheduled work hours. Instead, it occurred outside her scheduled work hours. She subsequently sought overtime for the time she was at the physical therapy session. Her request for overtime was denied, whereupon she grieved it. The Association subsequently appealed the grievance to arbitration. Prior to the hearing, the Association withdrew the grievance, stating: "The Association no longer desires to proceed to arbitration. . . Please consider this matter closed."

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In 2007, Officer Douglas Sander injured his knee in a training session while on duty. He received medical treatment for the injury. His medical treatment extended beyond the end

of his regular shift. Officer Sander did not seek overtime for the time spent beyond the end of his regular shift receiving medical treatment for the knee injury. The Association was unaware of Officer Sander's decision to not seek overtime/compensatory time for the matter.

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In January of 2009, Officers Thomas Witzel, James Rottscholl, Greg Kermendy and Russell Klemann were exposed to carbon monoxide during a suspicious death investigation at the citizen's home. After firefighters discovered a faulty furnace, all four officers were taken to the hospital and examined and treated for carbon monoxide poisoning. Each individual received overtime/compensatory time pay for the time spent at the hospital after their shifts concluded. (Witzel 4 hours and 15 minutes, Rottscholl and Kermendy 3 hours each, and Klemann 3 hours and 30 minutes).

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In February of 2009, Officer Michelle Trussoni was struck by another vehicle while driving her squad car. She was taken to the hospital to be examined for injuries. She received compensatory time pay for the time spent at the hospital after her shift was concluded (specifically, 45 minutes of compensatory time).

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In June of 2010, Officer David Daily was assaulted by a suspect while on bicycle patrol. He was taken to the hospital to be examined and was treated for a knee injury. He received compensatory time pay for time spent at the hospital after his shift was concluded (specifically, 4 hours and 40 minutes of compensatory time).

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When an officer in the Police Department requests overtime or compensatory time, they complete a form entitled "Paid Overtime Voucher" or "Comptime Voucher". These forms are identical except for the name at the top. The bottom half of each form lists about 30 possible reasons for the overtime/comptime, and employees check the category they consider applicable. When Officers Rottscholl, Kermendy and Klemann completed their overtime voucher forms for the January, 2009 carbon monoxide incident referenced above, each included a reference therein to an injury or time spent in a medical facility being examined and treated for an injury. These references made it apparent that the employee was receiving medical treatment during the overtime requested. When Officers Witzel, Trussoni and Daily completed their overtime voucher forms for the matters referenced above, they did not include any reference therein to an injury or time spent in a medical facility being examined and treated for an injury. Thus, it was apparent from these overtime vouchers that the employee was receiving medical treatment during the overtime requested.

FACTS

Officer Jason Fink was on duty in his job with the Police Department on August 10, 2009. That day, his regular shift ended at 7 a.m. About 5 a.m., while attempting to contact a subject to follow up on an incident, Officer Fink was stung by a bee on his right bicep.

As the following facts show, he suffered an allergic reaction to that sting. After being stung, his hands swelled. He then returned to Police Headquarters and told his supervisor what had happened. The supervisor told Fink to change out of his uniform. As he did so, Fink noticed that his bicep was swollen and that he had a rash on his chest. He then reported the swelling and the rash to his supervisor. It was agreed that Officer Fink should seek medical attention. The supervisor made arrangements for another officer to transport Officer Fink to a local hospital. At approximately 6:45 a.m., Officer Fink was transported to the hospital.

At the hospital, Officer Fink was treated for the bee sting which included immediate admission to the emergency center. He was on a gurney with an IV drip. Later, he was on a bed in a private room. During the time Officer Fink was at the hospital, he was out of uniform and did not have his duty weapon with him.

About 8:50 a.m., Officer Fink was released from the hospital, whereupon he called the Police Department and requested transportation. He was transported back to Police Headquarters where he filled out a Worker's Compensation "Report of Injury" form. Officer Fink noted on the "Report of Injury" form that he had left work at 6:45 a.m. and that he did not return to work until 9:15 a.m. Officer Fink then left Police Headquarters and went home. He returned to work the next day.

Officer Fink subsequently submitted an overtime voucher for the time he spent at the hospital beyond the end of his regular shift (namely, the time period between 7:00 a.m. and 9:30 a.m.) He wrote on that form that the reason he was seeking overtime for that time period was "treatment at E.R. for on-duty injury." His overtime request for two and one-half hours was approved by his supervisor and was later paid.

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In the Police Department, overtime and/or compensatory time requests are normally approved by the supervisor on duty at the time the employee leaves work. The supervisor of the succeeding shift signs the overtime/compensatory time requests. The supervisors on succeeding shifts rely on the information provided by employees on the vouchers themselves.

Overtime vouchers which are paid in the Police Department are not forwarded to the City's Human Resources (HR) Department. As a result, the City's HR Department did not know at the time that Officer Fink was paid overtime for the matter referenced above. It learned of that overtime payment six months later when the following unfolded.

In early 2010, the City's Human Resources Specialist, Peggy Kadrich, was reviewing Worker Compensation claims for 2009 in order to complete an OSHA report when she saw that Officer Fink had been paid for overtime on the same date he filed a Worker's Compensation "Report of Injury" form with the City. She called Jennifer Johnson, Administrative Assistant at the Police Department, and asked for the basis of the overtime entry for Officer Fink on August 10, 2009. She was informed that the overtime was to cover time spent at the hospital receiving medical treatment for the bee sting allergic reaction. Kadrich then brought this situation to the attention of Human Resources Manager Donna Whalen because she (Kadrich) knew, based on her 16 years of experience in the HR Department, and her knowledge of City policies, that the City does not pay overtime to employees for the time they are receiving medical treatment outside their scheduled hours of work.

After Whalen reviewed the matter, she determined that Officer Fink had been incorrectly paid overtime for the time he was at the hospital being treated for the bee sting which was beyond the end of his regularly scheduled shift. Thus, Whalen decided to reverse the decision (which the police supervisor had made) to pay Fink overtime. To effectuate her decision, Whalen sent a memorandum to Officer Fink on February 1, 2010 which essentially said that the overtime payment referenced above had been paid by mistake. That memo provided in pertinent part:

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> The City of Waukesha's policy relating to the compensation of time for Worker's Compensation injuries states that employees will receive their regular base pay from the City for time missed due to worker's compensation injuries. This means that employees will not suffer any loss in pay as a result of a worker's compensation injury. The policy does not provide for pay above and beyond an employee's regular shift due to the employee's seeking and receiving medical treatment. Likewise, time spent on worker's compensation leave is equal only to the number of hours the employee is regularly scheduled to work. It does not include additional time for medical treatment outside of an employee's regularly scheduled hours of work. We are not aware of any other instances when an employee was compensated for time during medical treatment outside of his or her regularly scheduled hours of work.
>
> I am sorry that this policy and practice of the City will result in a reduction of pay for you. I believe that you will understand that it would not be equitable to pay you for time spent getting medical treatment when we have not done so for others. It is also part of my job to apply the human resources policies and practices of the City as they are written and in a consistent manner.

. . .

The City subsequently deducted two and one half hours overtime pay ($114.22) from Fink's paycheck. After that happened, the Association filed a grievance challenging that action. The grievance was ultimately appealed to arbitration.

Insofar as the record shows, this case marks the first time the Police Department's approval of overtime was reversed by the HR Department.

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As already noted, Whalen's memo to Fink dated February 1, 2010 stated that it was her view that "we are not aware of other instances when an employee was compensated for time during medical treatment outside of his or her regularly scheduled hours of work." While preparing for the hearing in this case, the City's HR Department learned otherwise. Specifically, it learned of the overtime/comptime which was paid to Officers Witzel, Rottscholl, Kermendy, Klemann and Trussoni in 2009 and Daily in 2010 (and which was referenced in the **BACKGROUND** section). It's the City's view that that overtime/comptime was paid to the officers by mistake.

POSITIONS OF THE PARTIES

Association

The Association contends that the City violated Article 5.01 of the collective bargaining agreement when it failed to compensate the grievant for time spent seeking medical treatment which occurred outside of his regularly scheduled shift for a duty related injury. As the Association sees it, overtime was owed under the circumstances. It elaborates on this contention as follows.

First, it addresses the contract language contained in the first sentence in Section 5.01. According to the Association, that sentence is clear and unambiguous in providing that overtime applies to all "hours worked" in excess of the scheduled workday or workweek. The Association contends that in this instance, the grievant "worked in excess of the scheduled workday" when he had to seek medical treatment for his on-duty injury. The Association notes that that medical treatment extended beyond the end of his regular shift. The Association submits that the grievant certainly did not want to spend the morning of August 10, 2009 in the hospital emergency room being treated for an allergic reaction to a bee sting, but that's what happened. It's the Association's view that all the time the grievant spent at the hospital that day qualified as compensable work time, because it was one continuous act with no break between on and off duty. The Association maintains that the time the grievant spent at the hospital is no different than when an officer is held over at the end of a shift to ensure the security and integrity of a crime scene. Building on that premise, it's the Association's position that overtime was warranted for the time which extended beyond the end of the employee's regular shift. The Association argues that the department supervisor got it right when he approved the grievant's overtime request, and the HR Department got it wrong when

it subsequently reversed the supervisor's decision. Building on the latter point, the Association avers that "the City cannot now change its mind on this issue, particularly when it is clear that this time was spent primarily for the benefit of the employer as it was an on-duty injury."

Next, the Association argues that if the arbitrator finds the language in Section 5.01 is ambiguous, then the arbitrator should use the parties' past practice to fill in the contract's gaps. According to the Association, the past practice in the Police Department is not only consistent with the language in Section 5.01, but also reflects the Association's view (that under that language, overtime is owed to the grievant). The instances which the Association relies on are the following: 1) the situation in January of 2009 where four officers were involved in an incident with a suspicious death at a citizen's home, and all were taken to the hospital and examined and treated for carbon monoxide poisoning. The Association notes that each individual received overtime/compensatory time pay for the time spent at the hospital after their shifts concluded; 2) the situation in February of 2009 where an officer was struck by another vehicle and was taken to the hospital to be examined for her injuries. The Association notes that she received compensatory time pay for the time spent at the hospital after her shift was concluded; and 3) the situation in June of 2010 where an officer was assaulted by a suspect while on bicycle patrol and was taken to the hospital to be examined and was treated for a knee injury. The Association notes that he received compensatory time pay for the time spent at the hospital after the conclusion of his shift. The Association emphasizes that in each of these instances, the employees sought medical treatment for an on-duty injury, and their medical treatment was contiguous to their regular shift.

As part of its past practice argument, the Association contends that the following instances (which the City cited) are not relevant here. First, the Association addresses the Micklitz grievance from 1999 which the Association did not appeal to arbitration. The Association asserts that the record is silent as to why the Association elected not to proceed. The Association opines that it could have been money reasons, it could be that Micklitz did not want to proceed, or it could have been any other legitimate reason other than the Association did not believe in its argument. Additionally, the Association emphasizes that the overtime involved in that case (i.e. the Micklitz case) was not contiguous with the employee's regular shift (whereas in the instant case, the overtime was contiguous with the employee's regular shift). The Association sees that as a significant difference. Second, the Association addresses the situation where Officer Sander was injured in 2007 while on duty and he chose not to file for overtime for the time he spent seeking medical treatment for his injury. The Association asserts that Sander did not discuss this decision with any of the Association leaders or with Human Resources, and therefore made an individual decision (not to request overtime for time spent receiving medical attention). According to the Association, "such an individual decision cannot be held against the Association to vitiate an otherwise consistent past practice." It's the Association's view that these two instances don't diminish what happened in the Department in 2009 and 2010 (namely, that the Department paid overtime to those employees who sought medical treatment for an on-duty injury, and their medical treatment was contiguous to their regular shift).

Also as part of its past practice argument, the Association addresses the City's contention that the instances where overtime was paid in 2009 and 2010 (i.e. the instances which the Association relies on) were mistakes and should not have been paid. It contends that with this theory, the City is "trying to effectively jam the City's Human Resources into a collective bargaining hierarchy above that of the City's Police Chief and administrative supervisors." According to the Association, "there is no place for such a distinction when it comes to administering the terms of the collective bargaining agreement." It further opines that "it is absurd to expect a patrol officer, or even a local Association representative to consistently seek two opinions for every contractual issue, one from the Police Department and one from the Human Resources Department." The Association submits that if the City wants the Human Resources Department to "supervise" the Police Department, then it needs to formally do so and inform the Association of its new hierarchy.

Also as part of its past practice argument, the Association addresses the fact that "the City brought forward testimony and documentary evidence regarding how other City bargaining units and their representatives view this issue." As the Association sees it, that evidence has no relevance to this case. It cites an arbitration award for the proposition that a practice from another bargaining unit is not generally binding unless there is a showing that the parties have mutually considered a bargaining unit to be linked to another unit with similar language. It notes that here, though, the City presented no evidence of identical language, of coordinated/cooperative bargaining practices, or of any meetings where the City and the various bargaining unit representatives ever came together to talk about proper payment for an on-duty injury medical treatment that occurred contiguous with an employee's shift. That being so, it's the Association's view that what occurs in other City bargaining units should not be used in the arbitrator's consideration of this case.

Finally, while the Association sees the City's worker's compensation policy as being irrelevant to determining the proper application of Section 5.01, it nonetheless opines that the City's position on this work-related injury is "somewhat eye-opening." What the Association is referencing is this: the grievant testified that his physicians were very concerned that the lack of timely treatment for his injury could have caused his air passages to swell up in such a manner as to cause serious injury or even death. The Association submits that it was only because of the "prompt and diligent efforts" of the grievant and his supervisor that the City's damages for this on-duty injury were limited to two and one-half hours of overtime. It opines that the City was not obligated to pay "any death benefits nor were they subject to additional days off because treatment did not occur or was delayed and the grievant's condition exacerbated." Building on that, it's the Association's view that it would have been "a colossal risk management mistake" to send the employee home after his shift without City-paid medical treatment.

The Association therefore asks the arbitrator to uphold the grievance and find a contract violation. As a remedy, the Association seeks the following. First, henceforth the City is to pay overtime for all "on-duty injury medical treatment that occurs contiguous with an employee's shift." Second, it also seeks a make-whole remedy for the grievant for the wages that were deducted from his pay.

City

The City contends it did not violate Article 5.01 of the collective bargaining agreement when it failed to compensate the grievant for time spent seeking medical treatment which occurred outside of his regularly scheduled shift for a duty related injury. As the City sees it, overtime was not owed under the circumstances. According to the City, the collective bargaining agreement does not require it to pay for time spent receiving medical treatment outside of the employee's regularly scheduled hours of work. It elaborates as follows.

First, the City contends that the contract provision which the Association relies on (namely, the first sentence in Art. 5.01) does not apply to the situation involved here (where the employee was seeking medical attention outside the employee's regularly scheduled hours of work for an on-duty injury). Here's why. The City maintains that the overtime provision "assumes that an employee is working during the time he/she is claiming overtime." As the City sees it, the grievant was not working during the time he was at the hospital receiving medical treatment for his injury. It cites the following to support that premise: 1) that the grievant had changed into his street clothes and did not have his duty weapon with him; 2) that while he was receiving medical treatment at the hospital, he was not capable of responding to a call (i.e. doing work) even if he wanted to do so; and 3) that when the grievant filled out the "report of injury" form, he wrote on it that he left (work) at 6:45 a.m. Given the foregoing, the City submits that the grievant was not "on duty", and thus was not working, while he was receiving medical treatment at the hospital.

Second, the City maintains that another basis of support for the City's position that overtime is not owed in this matter is the City's worker's compensation policy (E-5). It notes that that policy is incorporated by reference into the collective bargaining agreement. It further notes that nothing in that policy says anything about pay for time spent seeking medical treatment outside of an employee's regular schedule. The City avers that if the arbitrator were to find in the Association's favor in this case, he would need to amend that policy to pay beyond the employee's regular base pay in those instances where the employee seeks medical treatment outside of the employee's regular schedule. It cites Elkouri for the proposition that if he did that, the arbitrator would be engaging in "contract making" rather than contract interpretation.

As the City sees it, the language contained in Article 5.01 and the City's worker's compensation policy support the City's position in this case that it was not required to pay the grievant overtime for the time that he spent at the hospital after his shift ended. Said another way, it's the City's view that that language does not support the Association's position that overtime was owed under the circumstances. The City avers that if the arbitrator finds otherwise (i.e. finds that overtime was warranted), this would lead to an absurd result because the Association's position has no parameters (meaning if the employee was treated for an on-duty injury for a long time, the City would be liable for the "payment of wages 24 hours per day.") The City cites the arbitral principle that absurd results are to be avoided and urges its application here.

Next, if the arbitrator finds it necessary to review the parties' past practice to help him interpret the contract language, it's the City's view that its practice has been to deny any claims for overtime when the employee is seeking medical treatment during a time outside their scheduled hours of work. The City essentially divides its past practice argument into two separate categories. The first category deals with what has happened in bargaining units outside the Police Department while the second category deals with what has happened in the law enforcement bargaining unit. The latter category (i.e. the law enforcement unit) is, in turn, subdivided into two parts: those instances where overtime was not paid and those instances where overtime was paid. It addresses those categories in the order just listed.

The first category which the City addresses is what has happened in bargaining units outside the Police Department. First, it cites the testimony of HR Specialist Peggy Kadrich who testified that during her 16 year tenure in the HR Department, the City has not paid overtime to employees for the time they are receiving medical treatment outside their scheduled hours of work. Second, the City notes that there are ten bargaining units in the City. AFSCME represents five of those units. The City avers that a grievance once arose in one of those units where an employee sought overtime for the time spent seeking medical treatment for a work related injury which occurred on the job. That grievance was settled with an agreement by the parties "that the City is not liable for the payment of overtime for time spent in medical treatment due to an on-the-job injury." It also avers that the record indicates that employees in the five AFSCME bargaining units have never been compensated for time spent obtaining medical treatment for work related injuries which falls outside of their regular shift. Third, the City notes that OPEIU represents one of the City's bargaining units. The City avers that the record establishes that the employees in that unit are not eligible for pay during time spent seeking medical treatment which falls outside of their scheduled work hours. Building on the foregoing, it's the City's view that its "non-payment of overtime or compensatory time for time spent receiving medical treatment for on-the-job injuries or illnesses" qualifies as a binding past practice. According to the City, it meets the generally recognized criteria for establishing a past practice (namely, that it be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties).

The second category which the City addresses deals with what has happened in the law enforcement unit. The City first addresses the two instances where overtime was not paid. First, the City cites the Micklitz case which arose in 1999. It notes that what happened there was that Micklitz was injured on duty and returned to work on a modified duty status. While on modified duty status, she attended a physical therapy session for her work related injury. This physical therapy session did not occur during her scheduled hours of work. Her request for overtime for the time spent at the physical therapy session was denied and she grieved. In denying the grievance, the City's then-HR Director wrote as follows:

> . . .None of the provisions cited above includes, intends, nor has payment ever be (sic) made which, includes an overtime premium. The extensive history of the City shows that it has never paid an employee overtime for a job related

> injury or illness. There is no legal provision that grants an employee the ability to make or have approved such claim. The City has always encouraged employees to seek medical attention while off the clock, where appropriate and as appropriate to her work schedule. Ofcr. Micklitz's medial (sic) treatment was off the clock.

The Association appealed the matter to arbitration, but subsequently withdrew the request prior to hearing. When it did so, it stated simply that "the matter is closed." The City opines that by withdrawing the arbitration request, the Association acquiesced to the City's position that only time spent receiving medical attention for an on-the-job injury which occurs during an employee's scheduled work time will be compensated. Also, it's the City's view that since the Micklitz grievance was withdrawn without prejudice, it created a precedent. Finally, responding to the Association's contention that the arbitrator should ignore the Micklitz matter because it did not relate to time contiguous with the employee's regular shift, the City dismisses that contention as a "distinction without significance." It asserts that no evidence was presented which showed that "the parties ever intended to distinguish time contiguous to a shift from time that was not contiguous to a shift as they relate to eligibility for compensation. No policy, no practice, no conversation. Nothing." Second, the City cites the instance in 2007 when Officer Sander was injured on-the-job and sought medical treatment which extended beyond his work hours. In that instance, Sander did not seek overtime for the time his medical treatment extended beyond the end of his scheduled shift. The City sees that as significant. It also points out that Sander is a former president of the local.

Next, the City addresses those instances in the law enforcement unit where overtime was paid to employees while they were receiving medical treatment for an on-the-job injury. It acknowledges that in 2009 and 2010, the City paid overtime/comptime to six employees while they were receiving medical treatment for an on-the-job injury. It notes that four of those instances dealt with a situation where the officers were exposed to carbon monoxide during a death investigation, while the other two instances involved separate unique circumstances. The City points out that when three (of the six) officers involved completed their overtime vouchers, they did not write on the form that they were receiving medical treatment during the overtime requested. Building on that, the City avers that their overtime vouchers "are of no probative value whatsoever as the approving supervisors had no way of knowing that the requests were for time spent seeking medical treatment." By employing this rationale, it's the City's view that it has reduced the number of instances where overtime was paid from six to three. The City then argues that these three overtime claims were paid by mistake and should not have been paid. It also characterizes them as "isolated" (to the Police Department). Building on these points, it's the City's view that the fact that overtime was paid in these three instances should not be sufficient to negate the existing City-wide practice, nor should it be sufficient to establish a new binding past practice in the Police Department that the City has to pay overtime to employees receiving medical treatment outside their regular work hours. Once again, the City cites the standard arbitral principles for establishing a past practice (i.e. that it be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties) and asserts that

none of those criteria were established here. To support that premise, it notes that the HR Department did not know that the Police Department had paid overtime to the employees in the 2009 and 2010 instances just noted until it was researching the matter for this hearing.

Based on the above, the City asks that the grievance be denied.

DISCUSSION

This case poses a very narrow question dealing with overtime. Before I identify that question though, I'm first going to review the following facts to try to put the issue in an overall context.

Here's a short overview of the facts. On the day in question, the grievant was stung by a bee and suffered an allergic reaction. When this happened, he was on duty performing his patrol officer duties for the City. Thus, the bee sting and subsequent allergic reaction constituted an on-the-job injury. While still on duty, he went to a hospital to receive medical treatment. This occurred shortly before his shift ended at 7:00 a.m. He was at the hospital receiving medical treatment for about the next two hours, whereupon he left the hospital shortly after 9:00 a.m. and went back to the police station. It can be surmised from the record that he left the station about 9:30 a.m. It's the two and one-half hour time period between 7:00 and 9:30 a.m. that's involved here because the grievant sought overtime for that time period. His overtime request was granted by his supervisor and subsequently paid. Later, though, the City's HR Department reversed the decision to pay the grievant overtime and recouped the money previously paid. That action prompted the instant grievance.

As was noted in the first paragraph, this is an overtime case. Before I turn my attention to that matter though, I've decided to comment on the following. First, while the grievant went to the hospital before his shift ended, he was paid his regular wages for the time he spent at the hospital during his regular shift (i.e. up to 7:00 a.m.) Thus, this case does not involve the grievant's pay before his regular shift ended at 7:00 a.m. Instead, it only involves his pay after 7:00 a.m. (if any). Second, building on that point, it is noted that this case does not involve whether the grievant could have been paid for the two and one-half hour period between 7:00 and 9:30 a.m. at straight time. Instead, this dispute was framed as an overtime dispute in what I'm calling an "all or nothing" format. By that, I mean the grievant either gets two and one-half hours of overtime pay, or he gets nothing at all. Thus, in this case, there's not going to be any middle ground.

Having noted the foregoing, the issue here is whether the City had to pay the grievant overtime pay for the time he was at the hospital receiving medical treatment which extended beyond the end of his regular shift (i.e. from 7:00 to 9:30 a.m.). The Association contends that overtime is owed to the grievant for that time period while the City disputes that assertion. Based on the rationale which follows, I answer that question in the negative, and find that the City does not have to pay the grievant overtime pay for that time period.

My discussion is structured as follows. Attention will be focused first on the applicable contract language. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves an alleged past practice.

Since this contract interpretation case involves overtime, I'm going to start by reviewing the contractual overtime provision. It's found in the first sentence of Article 5.01 and provides thus: "Employees will be paid . . . time and one-half . . . for all hours worked in excess of the scheduled workday. . ." (Note: the remainder of that paragraph is not relevant to this case, so it need not be referenced). In many contract interpretation cases, there's a disagreement over what the language means. Here, though, there is no disagreement about what the overtime provision means. It means that if an employee works "in excess" of their scheduled workday, they get paid overtime. Conversely, if they don't work "in excess" of their scheduled workday, they don't get paid overtime. In this case, the first question is whether the overtime provision even applies. Here's why. As just noted, overtime only applies to "hours worked in excess of the scheduled workday." In this case, there's no question that the grievant had the end of his regular workday extended by two and one-half hours. His regular workday was supposed to end at 7:00 a.m. but he didn't end up leaving the police station until 9:30 a.m. During that time period, he was receiving medical treatment at the hospital. This particular situation poses the following rhetorical question: during that two and one-half hour period, was he "working" within the meaning of the contractual overtime clause? Said another way, does receiving medical treatment qualify as "work" within the meaning of Article 5.01? The reason that particular question is posed – and needs to be answered – is because the overtime provision specifically uses the word "work" in the phrase "hours worked". The inclusion of that word in Article 5.01 meant that the parties intended that an employee is to "work" (or, put in the active sense, be working) for the Employer during the time that he or she is claiming overtime. In other words, to qualify for overtime, the employee must perform "work" for the Employer. In most overtime situations, there's not usually a dispute about what the word "work" applies to or covers. Here, though, that's part of what's disputed. It's disputed because the City contends that the grievant was not working while at the hospital getting medical treatment. The Association disputes that contention. In its view, it's essentially self-evident that the grievant was working for the Employer's benefit during the time period that he was being treated for his on-the-job injury.

Notwithstanding the Association's contention, I find that the grievant was not "working" within the meaning of the overtime provision while he was receiving medical treatment at the hospital. Here's why. First, when the grievant went to the hospital, it was to receive medical treatment for himself. At the hospital, he was in his street clothes (instead of his uniform) and did not have his weapon with him. Second, a big part of being a police officer is responding to calls for service. Simply put, it's what they do. Even if the grievant wanted to respond to a call for service, it's hard to see how he could have done so since he was on a gurney hooked up to an IV. Third, even if he tried to respond to a call for service that was outside the hospital, he had no squad car with him to do so. This was because he had been driven to the hospital by another officer. When he left the hospital, he had to call the

police department for a ride back to the station. When considered collectively, these facts persuade me that the grievant was not working within the meaning of Article 5.01 when he was being treated at the hospital. Having so found, the next question is this: if it wasn't "work", what was it? Quite frankly, I don't know what to call what he was doing while he was being treated at the hospital, but it wasn't "work" within the meaning of Article 5.01. The parties are certainly capable of defining what qualifies as "work" under the overtime provision. Specifically, they could have said, among other things, that being treated at a hospital for an injury qualifies as "work". However, they have not done so. Given the absence of such language in either Article 5.01 or elsewhere, I'm not going to infer such language into the collective bargaining agreement.

Given that interpretation and application of Article 5.01, my preliminary finding herein is that the City was not required under the circumstances present here to pay the grievant overtime for the time he spent at the hospital after his shift ended. The reason I used the word "preliminary" in the previous sentence is because I'm still going to address other traditional components which arbitrators use to help them decide contract interpretation cases.

Another basis of support for my "preliminary" finding is the City's worker's compensation policy (E-5). Here's why. That policy says, in pertinent part, that an employee who misses work due to a job-related injury "shall receive their regular base pay from the City. . ." Nothing in that policy says anything about pay for time spent seeking medical treatment outside of an employee's regular schedule. Additionally, it says nothing about paying an employee more than their regular pay (i.e. overtime) under any set of circumstances. While E-5 is a policy, Article 10.01 says that "written policies as may now exist. . .are incorporated herein by reference as though fully set forth at length." That means that the policy referenced above (E-5) is incorporated by reference into the collective bargaining agreement. If I were to find that the City was required under the circumstances present here to pay the grievant overtime for the time that he spent at the hospital after his shift ended, I would be amending the policy just noted to say something that it does not currently say. Arbitrators are not supposed to do that.

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The focus now turns to the parties' past practice contentions. In litigating this case, both sides argued extensively about numerous instances where overtime was or was not paid and whether that did or did not create a past practice. I'm not going to address each and every one of those instances because I think it's unnecessary to do so. In the discussion which follows, I'm going to address what I consider to be the most important instances.

First, I'm going to deal with some instances in the Police Department where overtime was paid to an employee who received medical treatment for a duty-related injury which extended beyond the end of their regular shift. In early 2009 and 2010, the City paid overtime/comptime to six employees in the Police Department while they were receiving medical treatment for on-the-job injuries. Three separate incidents were involved: one was the

carbon monoxide poisoning matter (which involved four employees), another was the Trussoni matter and another was the Daily matter. In all these instances, the employee sought medical treatment for an on-duty injury, and their medical treatment was contiguous to their regular shift. Each was granted overtime or comptime. Knowing that these instances constitute the proverbial Achilles' heel for its position, the City makes three arguments why the arbitrator should ignore them and not use them as a basis for finding that the payment of overtime was warranted here as well.

I'm first going to address the two arguments which I don't find persuasive. First, the City tries to lower the number of instances where overtime was paid in the matters referenced above from six to three. It does this by hanging its hat on the fact that when three (of the six) officers involved completed their overtime vouchers, they did not write on the form that they were receiving medical treatment during the overtime requested. As the City sees it, that should be a sufficient basis for reducing the number of incidents (when overtime was paid) from six to three. I disagree. If the City wants officers to provide more detail on the overtime voucher forms than what was provided by these six employees, it can certainly do so prospectively. However, it cannot do that retroactively (to 2009 and 2010) so as to knock the number of incidents down by three. Thus, the number of employees who received overtime/comptime in the Police Department in 2009 and 2010 stays at six. Second the City characterizes these (six) instances as "isolated" because they are inconsistent with what happened elsewhere in the City. I'll deal with what has happened elsewhere in the City later in my discussion. Here, though, it suffices to say that if the parties reversed positions on this matter, and the Association relied on what had happened in other City bargaining units to support its claim, the City would probably ask the arbitrator to not consider what has happened in other bargaining units. That's because it's a general arbitral principle that even if a past practice exists in another bargaining unit, it (i.e. the past practice) is not applicable to another bargaining unit unless there is a showing that the parties have mutually considered a bargaining unit to be linked to another unit with similar language. In this case, the City presented no evidence of identical contract language, of coordinated/cooperative bargaining practices, or of any meetings where the City and the various bargaining unit representatives ever came together to talk about proper payment for an on-duty injury medical treatment that occurred contiguous with an employee's shift.

It follows then from the foregoing that in 2009 and 2010, there were three separate instances in the Police Department where six employees were paid overtime/comptime while receiving medical treatment for on-the-job injuries. As an arbitrator, I've had several cases where that number of instances was sufficient to find a past practice which was binding. However, it's not sufficient in this case for the reasons set forth below.

The focus now turns to the argument which I do find persuasive. One of the requirements for establishing a past practice is that both sides must be aware of, and accept, the practice. It stands to reason that if a pattern of conduct is unknown to one side, then it cannot fairly be imputed to them. I find that to be the situation here. Certainly the supervisors in the Police Department who approved the overtime/comptime for the six employees in 2009

and 2010 knew that they had approved overtime/comptime for those employees. However, the City's HR Department did not know of those payments (in the Police Department) until it learned of them while preparing for the hearing in this case. It's somewhat common in public sector labor relations for the HR Department to not know everything that happens in other departments. It's apparent that's what happened here (relative to the granting of overtime/comptime to six employees in the Police Department in 2009 and 2010). Based on reasons that will be identified in the next part of my discussion, the HR Department considered those overtime/comptime payments to be a mistake. The Association contends that with this theory, the City is essentially "supervising" the Police Department and "trying to effectively jam the City's Human Resources into a collective bargaining hierarchy above that of the City's Police Chief and administrative supervisors." The Association sees that as improper. I don't. Here's why. City government consists of numerous departments. Those departments sometimes handle labor relations matters differently. When that happens, the HR Department is the final decider of contractual interpretation matters – not the department. To prove this point, one need look no further than the cover page of the collective bargaining agreement involved herein. It's between the Association and the City; not the Association and the Police Department. That being so, the City's HR Department was indeed empowered to conclude that the overtime/comptime payments made to six employees in the Police Department in 2009 and 2010 were mistakenly paid. When that is considered in conjunction with the fact that the HR Department did not know that the Police Department paid overtime to these six employees in 2009 and 2010, it satisfies me that those payments did not create a practice which binds the City to pay overtime to the grievant herein.

Next, I'm going to deal with those instances – outside the Police Department – where overtime was not paid to an employee who received medical treatment for a duty related injury which extended beyond the end of their regular shift. The record indicates that other than the payments made in 2009 and 2010 in the Police Department referenced above, the City has not paid overtime to any other similarly-situated employee. That's why the HR Department considered the payment of overtime to those employees to be a mistake. As part of its argument on this point, the City relies on the fact that employees in its AFSCME and OPEIU bargaining units have not been paid overtime for the time spent obtaining medical treatment for work-related injuries outside of their scheduled work hours. As the City sees it, its "non-payment of overtime or compensatory time for time spent receiving medical treatment for on-the-job injuries or illnesses" in these instances qualifies as a binding past practice which applies to the law enforcement bargaining unit. I disagree. Here's why. As was noted earlier in the past practice discussion, it's a general arbitral principle that even if a past practice exists in another bargaining unit, it (i.e. the past practice) is not applicable to another bargaining unit unless there is a showing that the parties have mutually considered a bargaining unit to be linked to another unit with similar language. In this case, the City presented no evidence of identical contract language, of coordinated/cooperative bargaining practices, or of any meetings where the City and the various bargaining unit representatives ever came together to talk about proper payment for an on-duty injury medical treatment that occurred contiguous with an employee's shift. That being so, I find that what has happened in other City bargaining units does not create a practice which applies to the law enforcement bargaining unit.

In this case, both sides believe they have past practice on their side. However, as the above discussion shows, it can fairly be said that the City's past payment of overtime under the relevant circumstances has been mixed. Simply put, it has been paid in some circumstances, but not in others. Even if I were to address all the remaining instances which the parties dealt with in their past practice arguments, including the Micklitz matter in the Police Department where overtime was not paid, I'm convinced it would not make the situation any clearer. The situation would still be muddled. That being so, I find that neither side established the existence of a past practice which covers the matter involved here.

. . .

Since no binding past practice was established by either side, it follows that the outcome of this case is not going to be based on an alleged past practice. Instead, the outcome is going to be based on the previously noted interpretation and application of the relevant contract language. As previously noted, my "preliminary" finding – before I addressed the parties' past practice contentions – was that the City was not required under the circumstances present here to pay the grievant overtime for the time he spent at the hospital after his shift ended. That "preliminary" finding has not been altered by an alleged past practice, so it therefore becomes my final finding. Accordingly, no contract violation has been found.

In light of the above, it is my

AWARD

That the Employer did not violate Article 5.01 of the labor agreement when it failed to compensate the grievant for time spent seeking medical treatment which occurred outside of his regularly scheduled shift for a duty related injury. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 13th day of May, 2011.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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