

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**BLOOMER PROFESSIONAL POLICE ASSOCIATION, LOCAL 242**

and

**CITY OF BLOOMER**

Case 33  
No. 71256  
MA-15113

(Overtime Grievance)

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**Appearances:**

**Mr. Benjamin M. Barth**, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin, appearing on behalf of Bloomer Professional Police Association, Local 242.

**Ms. Mindy K. Dale**, Attorney, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin, appearing on behalf of City of Bloomer.

**ARBITRATION AWARD**

Bloomer Professional Police Association, Local 242, hereinafter "Union" and City of Bloomer, hereinafter "City," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which they would select a sole arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff was selected. The hearing was held before the undersigned on March 20, 2012, in Bloomer, Wisconsin. The hearing was not transcribed. The parties submitted briefs and informed the Arbitrator on April 27, 2012 that they would not be filing reply briefs, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

Did the City violate the expressed or implied terms and conditions of the Collective Bargaining Agreement when it did not offer the available overtime on August 30, 2011 to Officer Mark McElroy? Is so, what is the appropriate remedy?

The City frames the substantive issues as:

Did the City violate the Collective Bargaining Agreement when it filled the August 30, 2011 open shift with a part time officer? If so, what is the appropriate remedy?

Having considered both the Union and City's framing of the issues, I cannot accept either and frame the substantive issues as:

Did the City violate Article XIII of the collective bargaining agreement when it assigned part-time bargaining unit member David Hake to work the 5 a.m. to 5 p.m. shift on August 30, 2011? If so, what is the appropriate remedy?

### RELEVANT CONTRACT LANGUAGE

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### ARTICLE III - JURISDICTION OF WORK

Except in emergencies, work customarily performed by members of the bargaining unit shall not be performed by supervisory or other personnel not in the bargaining unit consistent with the provisions of Article XIII of this Agreement.

- A. A bargaining unit vacancy of six (6) hours or less may be filled as management sees fit.
- B. A bargaining unit vacancy of greater than six (6) hours must be offered to members of the bargaining unit first (those scheduled off duty). If an attempt to fill a vacancy in this manner is unsuccessful, the vacancy may be filled as management sees fit.

. . .

**ARTICLE XIII - OVERTIME/COMPENSATORY TIME**

. . .

13.03 Available overtime shall be offered to bargaining unit members on the basis of seniority.

Except for emergencies, employees shall not work more than sixteen (16) consecutive hours, including regularly scheduled shifts. For the purpose of this provision only, if an employee is called to work within four (4) hours after completing his/her regularly scheduled shift, he/she shall be considered to be working hours that are contiguous to such shift. The patrol sergeant cannot work more than twelve (12) consecutive hours.

The parties further agree that the employer may utilize regular, part-time, or qualified Reserve Deputies to replace shift vacancies created when regular, full-time employees are on vacation more than two (2) consecutive calendar weeks, or for shift vacancies created when regular full-time employees are on sick leave or worker's compensation for five (5) consecutive calendar days. The employer may fill shift vacancies immediately, when such vacancies are created when regular full-time employees are assigned by the Chief of Police, or designee, to attend certification training, or other police related training, seminar, or schools.

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**BACKGROUND AND FACTS**

The Grievant, Mark S. McElroy, is a full time police officer employed by the City for greater than ten years. At all times relevant herein, Jared Zwiefelhofer was the Police Chief, having accepted that position approximately one month before the filing of this grievance.

On August 1, 2011, Officer Kevin Zwiefelhofer submitted a leave request for August 30, 2011 which was approved by his supervisor on August 17, 2011. The vacant shift was listed on the August 2011 Available and Unavailable Shift form and Larry Szura and Mark McElroy were the only two bargaining unit members that volunteered to work the shift. Szura is more senior than McElroy. Chief Zwiefelhofer assigned the shift to Szura.

On August 26, 2011, Szura left a note for Chief Zwiefelhofer informing him that he (Szura) was no longer able to work on August 30. Zwiefelhofer, who was working on August 26 with part-time Officer Dave Hake, offered the shift to Hake. Hake, the least senior bargaining unit member with four and one-half years' experience with the City, accepted.

The following day McElroy approached Chief Zwiefelhofer about the August 30 overtime shift and asked Zwiefelhofer why Hake had been offered the overtime in lieu of McElroy. Zwiefelhofer responded because it was short notice. Hake worked the twelve hour, 5 a.m. to 5 p.m., shift on August 30, 2011.

The Union filed a grievance on September 14, 2011 alleging a violation of Article XIII – Overtime/Compensatory Time. The remedy sought was to reimburse the Grievant for twelve hours of work, at the overtime rate of \$32.79, totaling \$393.48. The City denied the grievance at all steps placing it properly before the arbitrator.

Additional facts, as relevant, are contained in the DISCUSSION section below.

### DISCUSSION

The facts are not in dispute and the sole issue is whether Chief Zwiefelhofer exceeded his management authority when he assigned the August 30, 2011 overtime shift to Officer Hake.

Article XIII-Overtime/Compensatory Time, sub-section three provides that “[a]vailable overtime shall be offered to bargaining unit members on the basis of seniority.” This is a strict seniority clause. It clearly and unambiguously states that when overtime is available, it must be assigned to 1) a bargaining unit member; and 2) by seniority. Both the Grievant and Hake are bargaining unit members, but the Grievant is the more senior and therefore, this section supports the Union’s position that the Grievant was entitled to the overtime shift on August 30.

The City asserts that Article III is relevant and authorizes the City’s action. Article III is a classic bargaining unit work provision. The article states that except in an emergency, “work customarily performed by members of the bargaining unit shall not be performed by supervisory or other personnel.” The language directs that bargaining unit personnel possess the sole right to bargaining unit work. Further, it clarifies that it was the parties’ intent to limit management’s right to assign work and overtime outside the bargaining unit, except in certain circumstances. Those circumstances, which allow management to assign work as it “sees fit” include when there is an “emergency,” when the shift is six hours or less, when the “attempt ... is unsuccessful,” or when the circumstances of the vacancy are governed by Article XIII. Given that the City assigned the August 30 shift to Hake, who is less senior than the Grievant, and that this assignment is inconsistent with strict seniority provision of Article XIII, the question is whether it did so consistent with any exception contained in the labor agreement. If the City’s actions are not covered by an exception, then it exceeded its authority.

The parties’ labor agreement does not define “emergency.” An accepted definition of emergency is “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action. Lennox Industries, Inc., 70 LA 417, 418 (Seifer, 2/17/78). The August 30 vacancy was neither unexpected nor sudden and the emergency exception does not apply.

The next exception is contained in sub-section A and allows the City to fill shifts of less than six hours as it “sees fit.” Since the August 30 shift was twelve hours in length, this exception does not apply.

Moving to sub-section B, it provides that a vacancy of greater than six hours “must be offered to bargaining unit members first (those scheduled off duty). It continues, “[i]f an attempt to fill a vacancy in this manner is unsuccessful,” then management has the authority to fill the shift as it “sees fit.” This section provides the manner in which vacancies are to be filled.

The evidence establishes that the manner by which the City “offers” overtime shifts to bargaining unit members is through a posting procedure. Chief Zwiefelhofer testified that once an officer requests leave for vacation or compensatory time, the vacant shift is listed on an Available and Unavailable Shift form. Vacant shifts are listed on the form as they are submitted. The form includes the current officer names, in descending order based on seniority, and for each shift posted, the officer circles either “YES” or “NO” indicating available or unavailable to work the shift. Zwiefelhofer explained that after a shift is “posted for a while,” he would assign the vacant shift to the most senior officer interested by making the notation “OK” on the form by the most senior officer’s name who indicated “YES” to the shift.

The Available and Unavailable Shift form recorded who was interested in working the August 30 shift. The City’s obligation to offer the overtime shift to the bargaining unit members did not end when Szura was assigned the position. Sub-section B does not state that the shift needed to be offered to the most senior bargaining unit member, instead it used the plural version of member – members. The City’s obligation was therefore to the collective membership rather than one member. After Szura relinquished the shift, McElroy was the next senior bargaining unit member that had already indicated an interest. Chief Zwiefelhofer need only have relied on the process in place to fill the open shift by going to the Available and Unavailable Shift form. Had McElroy turned down the shift, then Chief would have been well within the City’s rights to fill the vacancy as he saw fit since no other bargaining unit member had indicated their interest in working the August 30 shift.

The City argues it “offered” the overtime shift “first” to Szura and that after Szura withdrew his willingness to work the shift, then the City had fulfilled its contractual obligation. The City defines offer as the one-time act of extending an opportunity to work to a specific bargaining unit member. This is far too limiting a definition and negates the over-riding expectation that bargaining unit members are contractually afforded the right to overtime based on seniority. If I were to accept that an offer is merely the invitation to work a vacant overtime shift, then the City would need only ask, or offer, the most senior officer if he/she wanted to work vacant overtime shifts and this would satisfy sub-section B. The City would, in that scenario, then be at liberty to hire any bargaining unit member, regardless of seniority, supervision or other personnel, to fill the shift every time the senior officer turned down the shift. I cannot conclude that this is what the parties intended.

The City maintains that the language of the labor agreement does not require the City to repost the position. I agree. As of August 26 when Szura gave up the shift, the vacancy had properly been posted and offered to the bargaining unit members. The City was not obligated to repost the position, but it was obligated to honor the posting that had already been done.

The City next argues that temporary shifts are not always filled based on seniority. Assuming for the sake of argument that the City allows officers to find their own replacements and that when doing so, officers do not take into account seniority, that is not the procedure that was used to fill this shift from the outset. Officer Kevin Zwiefelhofer did not go to the Chief with a substitute. This vacancy was posted, and two officers applied. Even if there is some informal practice of securing one's own substitute, neither Kevin Zwiefelhofer nor Szura designated Hake as their substitute and there is specific contract language that dictates that overtime/compensatory time shall be offered to the bargaining unit based on seniority.

Having found that the City violated the collective bargaining agreement when it assigned Hake to work the August 30, 2011 5 a.m. to 5 p.m. shift, I move to remedy. The Union argues that McElroy is entitled to a make whole remedy while the City asserts since McElroy did not work the shift, he is not entitled to unjust enrichment. Given that McElroy pointed out to Chief Zwiefelhofer on August 27 that he had erred and he (McElroy) was entitled to the overtime shift, the City was afforded the opportunity to re-evaluate its decision to allow Hake to work on August 30. The City either did not review its decision or concluded that it was within its rights to assign Hake over McElroy. Given this notice, I conclude that a make-whole remedy is appropriate.

### AWARD

1. Yes, the City violated Article XIII of the collective bargaining agreement when it assigned part-time bargaining unit member David Hake to work the 5 a.m. to 5 p.m. shift on August 30, 2011.

2. The appropriate remedy is to compensate Mark S. McElroy for lost overtime wages and benefits for the twelve hour, 5 a.m. to 5 p.m. shift on August 30, 2011, when he was the most senior officer interested in, but not assigned to work overtime. McElroy is not required to perform any work to receive this overtime pay.

Dated at Rhinelander, Wisconsin, this 20th day of July, 2012.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator

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