

IN THE MATTER OF ARBITRATION BETWEEN

Minnesota Teamsters Public & Law Enforcement
Employees Union, Local 320,
Union,

and

City of Shakopee, Minnesota,
Employer and/or City.

OPINION AND AWARD

Joe Honermann Grievance

BMS Case No. 11-PA-0875

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

December 10, 2011

HEARING SITE:

Shakopee, Minnesota

HEARING DATES:

September 27, 2011

RECORD CLOSED:

November 15, 2011

REPRESENTING THE UNION:

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JURISDICTION

The hearing in this matter was held on September 27, 2011. The undersigned was selected to serve as arbitrator pursuant to the parties’ collective bargaining agreement (“Agreement”) and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted a contract interpretation issue to arbitration. No procedural issues were raised. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties closed the record by submitting post-hearing briefs, duly received on or before November 15, 2011, and the matter was taken under advisement.

ISSUES

The parties stipulated to the following statement of the Issues:

1. Did the City violate Article X when it failed to call the grievant for overtime on November 13, 2010?
2. If so, what should the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE IX. WORK SCHEDULES

* * *

9.3 In the event that work is required because of unusual circumstances such as (but not limited to) fire, flood, snow, sleet or breakdown of municipal equipment or facilities, no advance notice need be given. It is not required that an employee working other than the normal work day be scheduled to work more than eight (8) hours; however, each employee has an obligation to work overtime or call backs if requested unless circumstances prevent him from so working.

* * *

ARTICLE X. OVERTIME

10.1 Overtime, as defined in 3.7, will be compensated at the rate of time and one-

half (1 ½) the employee's base rate of pay. Employees will have their choice of cash or compensatory time off.

- 10.2 Overtime shall be distributed as equally as practicable using a rotating overtime call list. No prior notice is required for overtime because much of it is of a "call out" nature requiring immediate response.

Overtime will be offered to seasonal employees only if full-time employees are contacted and do not want it.

* * *

ARTICLE XI. CALL BACK TIME

An employee who is called in for work at a time other than his normal scheduled shift will be compensated for a minimum of two (2) hours at the rate of time and one-half and will be paid in cash or in compensatory time-off, as determined by the City Administrator.

* * *

BACKGROUND AND SUMMARY OF THE EVIDENCE

The instant grievance arose after the Employer did not call Grievant to determine if he wanted to work overtime on a weekend. The overtime opportunity arose in response to a snow storm that stuck the City on Friday and Saturday, November 12-13, 2010. Whether Grievant should have been called to see if he wanted to work is the pivotal issue in the grievance.

At the time of the incident, Grievant was employed by the City of Shakopee as a full-time Maintenance Operator. He had accumulated some 38 years of service and was part of the street maintenance operator group. The members of this group are normally the first-responders for snow plowing requirements.

In 2006, however, Grievant moved his residence from the Shakopee area to Litchfield, Minnesota. The resulting one-way commuting distance was approximately 65 miles. According to Mapquest, the one-way driving time was 1 hour and 25 minutes.

Following his move to Litchfield, Grievant let it be known that he would prefer not to be called in to work for short-term overtime opportunities because it "... was not worth his time ..."

considering the costs and the time to drive the round trip. The expected duration of the kind of short-term overtime opportunity for which Grievant did not wish to be called is one of the principal points of contention in this grievance. Grievant contends he informed his supervisors he did not want to be called for any work longer than a "... short call-back ..." of 2 hours or less. The parties' Agreement only provides for a 2-hour minimum payment for such assignments. According to the Employer's witnesses, however, Grievant did not want to be called for less than 3 to 4 hours of work.

Grievant testified he would have come in for the plowing in question if he had been called. He recognized the general obligation to work overtime provided in Article 9.3 of the Agreement.

The snow event in question began on the late evening of Friday, November 12, 2010. It was initially forecasted to be a prolonged storm that would drop approximately 6 inches of snow over a 20-hour period. That much snow normally resulted in all of the City's streets being plowed as well as all of the parking lots for parks and City facilities.

There was a light covering of snow on the streets the following morning when the Employer's management personnel met to discuss how to deal with the situation. The plan they initially decided upon was to just plow and sand/salt the collector streets. They thought they should wait until later in the day to do an "all-call" of maintenance personnel to plow all of the City's streets.

Accordingly, the initial expectation was that the collector street work would only provide approximately 3 hours of work. Some members of the bargaining unit were called to come in by 9:00 a.m. to carry out that task. Grievant's immediate supervisor questioned his manager whether Grievant should be called in as well. At the time, Grievant's total of overtime hours worked gave him the third lowest number.¹ They decided that Grievant would not want to be called because the initial work would be less than 4 hours.

The snow storm was the first of the 2010-2011 winter season. As a result, the City's plowing equipment had not been readied for quick deployment. Plows had not yet been installed on trucks nor had the trucks been loaded with the sand/salt mixture. As a result, the plowing equipment did not actually start out for the streets until later that Saturday morning. According to the Union's

¹ Because of the nature of the snow event, the parties agree that the use of the call list was not required.

witness who was part of the initial deployment, they did not go out until approximately 10:45 a.m. He testified that, by that time, it was known that they would plow the entire City; the snow storm was dropping snow faster than initially forecast. According to the Employer's witnesses, the decision to do the "full-plow" was not made until approximately noon.

As things developed, by the time the managers decided to do the "all-call/full-plow," the earlier collector street plowing likely would have reduced the remaining work time needed to, again, less than 4 hours. Once again, Grievant's immediate supervisor asked whether Grievant should be called in. Once again, the assumption was that Grievant would not want to be called because of the short remaining duration they anticipated.

Grievant was not called to work the snow event but virtually everyone else was. This included three seasonal employees to plow parking lots and cul-de-sacs. Another member of the bargaining unit was away from the City in Mankato, Minnesota. This member called in to find out if he was needed. He was told to come in if he could make it. He did not report until 2:00 p.m. but still was able to do 4 hours of work. The three seasonal employees each worked 4½ hours or more. Other than the employee who came in from Mankato, all other City employees who participated were able to work at least 6 hours of overtime. Seven of them worked 8 or more hours of overtime.

Because snow continued to fall that Saturday evening, management planned to do some "clean up" plowing on Sunday beginning at 4:00 a.m. It was expected to provide less than 4 hours of overtime. Nonetheless, Grievant was called to see if he wanted to do the work. Grievant declined after learning the assignment was only expected to last 3-4 hours.

The instant grievance was filed after Grievant returned to his regular shift the following Monday and learned of the facts associated with the previous weekend plowing.

Although the grievance does not specify a number of hours sought for the remedy, the correspondence from the steps of the grievance process shows that Grievant wanted to be compensated with 5 hours of overtime pay. The Employer has offered Grievant 4 hours of "make-up" overtime to be worked on a future date. According to the Employer's testimony, by City policy, it does not compensate for time not actually worked.

According to Employer Exhibit No. 2F, Grievant has made a practice of declining overtime "... calls of two hours or less." Employer Exhibit No. 11 lists overtime hours worked for snow

plowing during the 2008-2009 season. Of the 9 events that involved plowing on a weekend, Grievant did not work any of the 8 events that provided 4 hours of work or less. The only Saturday he did work provided 8 hours for an “all-plow” on Saturday, February 21, 2009.

During the grievance process, Grievant was asked to put his request in writing to state when he did not want to be called for overtime work. By handwritten note dated December 6, 2010, he specified “... two hours or less.” No such written clarification existed at the time of the incident.

POSITION OF THE UNION

The Union’s position is that Grievant was entitled to be called and offered the opportunity to work the overtime in question. The Employer’s failure to call him violated the Agreement. As a result, Grievant is entitled to be paid for the overtime hours he would have worked. The Union asks that the grievance be sustained accordingly.

POSITION OF THE EMPLOYER

The Employer’s position is that it did not violate the Agreement as alleged in the grievance. Grievant’s did not want to be called for overtime of 4 hours or less and his practice had been to decline such opportunities. Grievant declined another overtime opportunity of 4 hours or less when called that same Saturday evening.

In the event a remedy is deemed appropriate, a number of make-up hours is the only proper remedy given the Employer’s policy that prohibits paying compensation for time not actually worked.

Accordingly, the Employer asks that the grievance be denied.

OPINION AND FINDINGS

As previously noted, the principal question at issue in this dispute is the propriety of the Employer’s decisions not to call Grievant and offer him the opportunity to work some portion of the overtime in question. Before directly addressing this question, certain observations about the overall circumstances are warranted.

Normally, a member of a bargaining unit cannot make an enforceable private agreement with

the Employer that is contrary to the provisions of the applicable collective bargaining agreement. That is essentially what Grievant and the Employer did in this relationship. Nonetheless, the fact of that private “agreement” is not in dispute. Moreover, the Union recognizes that it was aware of the situation and did not object to it. Accordingly, the legitimacy of Grievant’s request is not one of the factors in dispute. As a result, by-passing Grievant for an overtime opportunity would not, by itself, constitute a violation of the Agreement. That said, however, the precise parameters of Grievant’s request to be by-passed is squarely in dispute.

Grievant maintained that he only wanted to be by-passed for weekend overtime opportunities of 2 hours or less. The Employer contends that the overtime opportunities the Grievant wanted to avoid was actually 4 hours or less.

Grievant had not provided any written guidance to the Employer in advance of the instant dispute. The considerable weight of the evidence is that Grievant would consistently decline weekend overtime of 4 hours or less. Although the Employer’s witnesses could not testify that Grievant had actually been called and offered the overtime depicted in Employer Exhibit No. 11, the exhibit shows that Grievant did not work any of the opportunities of 4 hours or less. If he was not actually called on each occasion, it is also reasonable to assume that Grievant became informed about the circumstances of each opportunity when he returned to work the following Monday – like he did in the instant dispute. The evidence does not establish that Grievant ever challenged being passed over for the opportunities of 4 hours or less via the grievance process. Given these considerations, the finding is that Grievant effectively lead the Employer to believe that he did not wish to be called for weekend overtime opportunities expected to produce 4 hours or less of paid work time.

Grievant’s post-incident note of December 6, 2010 does not affect the foregoing finding. The note only operates prospectively. Accordingly, while the Employer now must call him to offer weekend overtime of 4 hours or less, but more than 2 hours, it would be expected that Grievant will begin consistently accepting such opportunities of 4 hours or less to be in compliance with his obligation to do so per Article 9.3 of the Agreement.

Turning to the principal issue, the evidence presents two separate decisions to forego calling Grievant on the day in question. The evidence about the Employer’s initial plan is free of conflict.

The plowing and sanding/salting of only the collector streets is a 3-4 hour task. Therefore, the Employer's decision not to call Grievant for the initially contemplated work was in keeping with Grievant's standing preference to be by-passed and was not improper.

The second decision presents a significantly different factual situation. The weight of the evidence establishes that equipment preparation and loading delayed the start of actual plowing until just before 11:00 a.m. By that time, the rate of snowfall had increased to the point where the plan had changed to an "full-plow" effort. Significantly, seasonal employees were called in to deal with the storm. Even the employee in the Mankato area, who was not able to report before 2:00 p.m., was able to receive 4 hours of work.

Grievant should have been called for at least two reasons. First, Article 10.2 of the Agreement provides that work that will produce overtime pay for full-time employees cannot be offered to seasonal employees "... unless full-time employees are contacted² and do not want it." The Employer called in seasonal employees without contacting Grievant first. Second, the evidence strongly persuades that Grievant could have performed at least 4 hours of overtime work, and perhaps more, if he had been called. This inference is supported by the fact that Grievant's immediate supervisor asked, for a second time, whether Grievant should be called. The uncertainty about the remaining duration of work created, at the very least, a borderline situation where any question should have been resolved in favor of calling Grievant. The time it would have taken to make that one more incremental phone call would have been negligible.

Given the foregoing considerations, the finding must be that the Employer did violate the Agreement when it failed to call the Grievant for overtime on November 13, 2010. Thus the discussion of remedy considerations is required.

Given the facts of the driving time and weather conditions, Grievant would have taken between 2-3 hours to report. From the time he would have actually gotten into his vehicle after being called, the one-way driving time alone would have taken 1 hour and 25 minutes in good driving conditions. Although there may have only been a dusting of snow as he started out from his home in Litchfield, the evidence makes it clear that driving conditions would have significantly worsened

² Underscoring supplied for emphasis.

as he approached the Shakopee area. The employee who drove from Mankato was not able to report until 2:00 p.m. and was able to perform only 4 hours of work. In light of these facts, the finding is that Grievant's standing would have been sufficiently comparable that he would have been able to work 4 hours. Concluding that he would have received a total of more than 4 hours requires resort to an impermissible degree of speculation and conjecture.

While the Employer may have a policy against paying compensation for time not actually worked, the evidence does not show that the policy is incorporated in the Agreement. Therefore, it is not binding upon the grievance process. In addition, Article 10.1 of the Agreement gives the affected employee the choice between being paid for overtime in cash or compensatory time off. According to the instant grievance, the remedy sought is compensation in the form of additional gross wages.

Because Grievant was not called and did not report, he avoided the expenses associated with making the round trip of 130 miles. They are not negligible given the distance involved. This expense savings must be offset against his overtime loss to arrive at a proper make-whole remedy.

The mileage rate allowed by the Internal Revenue Service in 2010 was \$.50 per mile. The overall rate includes factors such as the cost of insurance and depreciation as well as gas and oil, other fluids, and wear and tear on the tires and other parts. Under the circumstances, it is appropriate to use 50% of the IRS mileage rate as an offset. Accordingly, Grievant is entitled to be paid for 4 hours at his applicable overtime rate less \$ 32.50 for avoided driving expenses.

AWARD

The Employer violated the Agreement when it failed to call Grievant for overtime on November 13, 2010. Therefore, the grievance is sustained. The Employer must provide Grievant with the remedy specified in the Opinion and Findings.



Gerald E. Wallin, Esq.
Arbitrator
December 10, 2011