

BUREAU OF MEDIATION SERVICES

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	BMS# 15-PA-0201
CITY OF LAKE CITY)	
)	
and)	
)	John Remington,
)	Arbitrator
LAW ENFORCEMENT LABOR SERVICES,)	
LOCAL #121)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the interpretation of their collective bargaining agreement, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Minnesota Bureau of Mediation Services to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on February 12, 2015 in Lake City, Minnesota at which time the parties were represented by counsel and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties waived oral closing arguments and instead requested the opportunity to file post hearing briefs which they subsequently did file on March 12, 2015.

The following appearances were entered:

For the City:

Robert A. Alsop,
Kennedy and Graven

Attorney at Law
Minneapolis, MN

For the Union:

Isaac Kaufman,
General Counsel

Attorney at Law
St. Paul, MN

THE ISSUE

DID THE CITY VIOLATE THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT DECLINED TO PAY OVERTIME FOR CERTAIN WORK PERFORMED BY OFFICERS MATT KLESS, MICHAEL BACKLUND AND AARON FOSS IN JUNE OF 2014 AND, IF SO, WHAT SHALL THE REMEDY BE?

BACKGROUND

The City of Lake City, Minnesota, hereinafter referred to as the "EMPLOYER" or "CITY" is a municipal corporation of the State of Minnesota and a public employer within the meaning of Minnesota Statutes. All essential employees of the City's police department excluding supervisory employees, confidential employees and all other City employees, are represented, for purposes of collective bargaining by the Lake City Law Enforcement Association, Local #121, an affiliate of Law Enforcement Labor Services, Inc. , and hereinafter referred to as the "UNION."

The relevant facts of this matter are essentially undisputed. Matt Klees, Michael Becklund and Aaron Foss, the "GRIEVANTS," are all full time police officers employed by the City and members of the bargaining unit covered by the above collective agreement. The Chamber of Commerce of Lake City sponsors an annual festival known

as “Water Ski Days” in commemoration of the City’s history in the establishment of water skiing as a recreational sport. All three Grievants worked as police officers at the 2014 Water Ski Days which occurred on June 27-29, 2014, their regular days off. All three requested overtime compensation for this work which the City denied, in whole or in part. The City’s denial was based on its determination that the Grievants had not worked sufficient hours during the pay period in which June 27-29 fell to qualify for overtime pay.

The crux of this dispute is over whether or not Paid Time Off (PTO) hours are to be deemed part of the normally scheduled daily work shift or work week within the meaning of the parties’ collective agreement. Full time employees covered by the agreement receive Paid Time Off based on their years of employment in lieu of traditional sick leave, personnel days and vacation benefits. All three Grievants utilized PTO during the relevant pay period (June 22 through July 5, 2014) which, in the determination of the City, limited their entitlement to overtime compensation.¹

Union Steward Kevin Dather filed the following grievance on behalf of the Grievants on July 22, 2014:

Nature of Grievance:

That all three Officers during the pay period inclusive of June 22 through July 5, 2014, worked overtime throughout the pay period. The three listed Officers were notified by pay check that they were reimbursed for straight time wages for the overtime hours due to usage of Paid Time Off (PTO) during other portions of the pay period.

¹ Lake City police officers are normally scheduled to work an eighty hour shift during a two calendar week work cycle. Most, but not all, officers work four, ten hour days each calendar week.

Contract Violation:

The Employer's action violates the Collective Bargaining Agreement, specifically but not limited to Article 7 which states in part; *"the normal work year shall consist of Two Thousand Eighty(2080) hours accounted for by c. Authorized leave time and paid time off"* and Article 8 which states in part: *"All hours worked by an employee in excess of a normally scheduled daily work shift shall be paid at the rate of one and one-half (1 1/2) times the employee's regular straight time rate of pay."*

Remedy Sought:

Officers Klees, Becklund, Foss and others similarly situated now and in the future are compensated for all overtime hours appropriately and any other remedy necessary to make them whole.

This grievance was denied on August 6, 2014 in a memo from Chief of Police Cory

Kubista to Dather which states, in relevant part:

The City hereby denies the Union's grievance on the grounds that the unambiguous terms of Article 8 of the Collective Bargaining Agreement only requires payment of overtime for hours "worked" by an employee. PTO does not count as hours worked under this provision of the agreement.

The grievance was appealed at Step 2 by LELS Business Agent Kevin Hinrichs to City Administrator Alan Lanning on August 6, 2014. This appeal reiterates the original grievance and seeks the same remedy. Lanning responded on August 15, 2014, as follows:

The City hereby denies LELS's Step 2 Grievance for the following reasons:

You state in your August 6, 2014 letter that the City is in violation of the Collective Bargaining Agreement (CBA) with respect to its refusal to pay overtime in instances where employees have used paid time off (PTO) during the payroll period. Your claim of a violation of the CBA is

purportedly based on Section 7.3 of the CBA which defines the normal work year. Conversely to the (sic) your contention, however, the payment of overtime is only authorized by this section with respect to situations where employees are required to attend department meetings at times other than the employee's work shift (see Section 7.3(d)). Contrary to Section 7.3(d), however, Section 7.3(c) of the CBA (authorized leave time and PTO) does not include the same reference to the payment of overtime and therefore is not payable by an employee's use of authorized leave time or PTO.

This interpretation is substantiated by Section 8.1 of the CBA, which is the controlling provision for the payment of overtime by the City under the contract. Section 8.1 provides that "[a]ll hours worked by an employee in excess of a normally scheduled daily work shift shall be paid for at a rate of one and one-half (1 ½) times the employee's regular straight time rate of pay." As previously asserted by the City, this Section only requires payment of overtime for hours actually worked by an employee and PTO does not count as hours worked under this provision of the CBA. This interpretation of the CBA is also supported by instances of past practices of the City that have not been challenged by LELS.

Hinrichs again appealed the grievance to Step 3 on August 19, 2014 in language identical to the original grievance and the above Step 2 appeal. Lanning responded on August 15, 2014 (apparently an error on the date of the letter since August 15 is actually before the date of the Step 3 appeal and the subsequent Personnel Committee review noted below). The response states:

The City of Lake City is in receipt of Law Enforcement Labor Services, Inc. (LELS)'s Step 3 Grievance that was filed with respect to Officers Matt Klees, Mike Becklund, Aaron Foss and others similarly situated. The grievance was considered by the Personnel Committee at a special meeting conducted on August 27, 2014.

Please be advised that the Personnel Committee for the City of Lake City hereby denies LELS's Step 3 Grievance for the reasons previously articulated to you in prior

responses from the City to this grievance. Please contact me if you have any questions. Thank you.

The grievance was subsequently appealed to arbitration on September 8, 2014 in accordance with the provisions of Article 6 of the parties' collective agreement. There being no contention that the grievance was untimely filed or irregularly processed through the grievance procedure, it is properly before the Arbitrator for final and binding determination.

RELEVANT CONTRACT LANGUAGE

ARTICLE 5 EMPLOYER AUTHORITY

5.1 The Employer retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules, and to perform any inherent managerial function not specifically limited by this Agreement.

5.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish, or eliminate.

ARTICLE 7 WORK SCHEDULES

7.1 The Employer shall be the sole authority in determining work schedules, hours of employment, and changes thereto. When and under what circumstances work schedules and hours of employment are determined or changes shall be within the sole discretion of the Employer.

7.2 The normal work week shall be an average of forty (40) hours in a five (5) day period.

7.3 The normal work year shall consist of Two Thousand Eighty (2,080) hours, accounted for by each employee through:

- a. Hours worked on assigned shifts;
- b. Assigned training by Employer;
- c. Authorized leave time and paid time off;
- d. Employees required to attend department meetings at a time other than during the employee's work shift, shall be paid at the rate of time & one-half (1 ½), computed on the employee's regular rate of pay for each hour part thereof, with a one (1) hour minimum at the time & one-half (1 ½) rate of pay. Nothing in this section shall be construed to limit the Employer's right to call department meetings at any time, to require attendance thereof or to limit the length of said meetings.

7.4 Voluntary shift switching by employees may be arranged between employees provided: a written request is submitted not less than 72 hours (three days) in advance of the schedule shift; it is approved by the police chief or designate; and such switching is not used as the basis for a claim for overtime.

7.5 Nothing contained in this or any other Article shall be interpreted to be a guarantee of a minimum or maximum number of hours the Employer may assign employees per day, per week or per year.

ARTICLE 8 OVERTIME

8.1 All hours worked by an employee in excess of a normally scheduled daily work shift shall be paid for at the rate of one and one-half (1 ½) times the employee's regular straight time rate of pay. In computing overtime compensation, overtime hours shall not be pyramided, compounded, or paid twice for the same hours worked. To receive compensation for overtime the overtime shall be approved in advance by the Employee's immediate supervisor except in case of an emergency.

8.2 A change of shift does not qualify an employee for overtime under the provisions of this Article.

8.3 Employees required to appear in Court during their off-duty hours shall receive a minimum of three (3) hours pay at one & one-half (1 ½) times their regular straight time hourly rate.

8.4 An employee called back to work after completion of a regular shift, or on a day off, shall receive a minimum of two (2) hours at one and one-half (1 ½) times his/her regular straight time hourly rate of pay. This Section shall not apply to any time contiguous with the beginning or ending of an employee's scheduled shift.

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ARTICLE 9 PAID TIME OFF

9.1 Employees who are regularly scheduled to work at least 1.0 FTE (40 hours per week) (Eligible Employees) will receive paid time off (PTO) hours in lieu of the traditional vacation and sick leave. Paid Time-Off (PTO) shall be distributed in lieu of traditional sick leave, personnel days and vacation benefits.

9.2 Eligible Employees will be compensated at their regular rate of pay and are eligible to be compensated for PTO upon initial date of hire.

A. PTO hours must be used to maintain the Eligible Employee's normal work schedule.

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CONTENTIONS OF THE PARTIES

The Employer takes the position that payment for overtime worked under the contract is governed exclusively by Article 8 of the Labor Agreement as well as applicable federal laws. It argues that Article 8 only requires payment of overtime compensation for hours actually worked by an employee and PTO clearly does not count as hours worked under the agreement. Further, the Employer contends that it has historically not included PTO in calculating overtime for members of the LELS

bargaining unit. The Employer maintains that Article 7 (Work Schedules) of the agreement actually supports its position rather than that of the Union since this article does not provide any definition or other indication of what should be included in hours worked within the meaning of Article 8.1 of the labor agreement. Finally, the Employer takes the position that the Union's claim of a past practice is inapplicable here since the language of Article 8.1 is clear and unambiguous. However, it argues that consideration by the Arbitrator of prior or past practice concerning payment of overtime actually supports the position of the Employer as noted above.

The Union takes a position similar to that of the City with respect to Article 8.1. Like the Employer, the Union maintains that this language is clear and unambiguous but that its interpretation favors the position of the Union. Here the Union argues that it is undisputed that Grievants actually worked shifts that they had not been scheduled to work during 2014 Water Ski Days, and that these shifts were effectively "hours worked ... in excess of [their] normally scheduled daily work shift." Alternatively, the Union argues that Section 7.3 of the labor agreement explicitly provides that "authorized leave and paid time off" are recognized components of the normal work year. It argues that "if this concept is applied consistently throughout the CBA, it follows that it was also the intent of the parties to count PTO hours as hours worked for purposes of determining eligibility for overtime under Section 8.1." Finally, the Union asserts that there is a past practice of including paid time off in the determination of overtime eligibility. In this connection the Union notes that all City police officers have been required and expected to work Water Ski Days for many years and that when they have done so on their scheduled days off they have been paid overtime.

DISCUSSION, OPINION AND AWARD

The Arbitrator is compelled to first address the claim of a past practice with regard to the payment of overtime when paid time off has been utilized during a particular pay cycle. Here the claim that a bona fide past practice exists cannot be sustained. As the Employer correctly argues in its post hearing brief, consideration of past practice is inappropriate where a subject has been clearly addressed by the parties in their collective bargaining agreement. The parties have specified the conditions under which overtime is to be paid in Article 8.1, and while interpretation of that article in this grievance is undoubtedly related to the interpretation of Articles 7 and 9, the collective bargaining agreement is neither silent nor contradictory. However, even assuming arguendo that the contract was silent or contradictory, there is insufficient evidence within the record to establish the existence of a longstanding practice mutually agreed to by the parties that has been consistently implemented. As the Arbitrator observed to the parties during the hearing, the testimony and evidence presented concerning the prior practice of the parties indicates a mixed practice of overtime payment when paid time off was utilized during the same pay cycle. Indeed, the credible testimony of City Finance Director/ Treasurer Barb Pratt which supported the City's position revealed that there was at least one instance in 2011 where overtime had been paid where paid time off had been utilized for scheduled work hours. While documentary evidence and testimony provided by the Union appears to show that there were many occasions when officers had received overtime pay and utilized paid time off during the same pay cycle, the City's failure to distinguish in its records between the various situations when an officer gets paid one and

one-half their normal hourly rate of pay obscures the factual basis for why these overtime payments were actually made. The Arbitrator can only conclude that there has been a mixed prior practice which at times has been inconsistent with the requirements of the collective agreement.

The Arbitrator is persuaded, as both parties have argued, that the disposition of this matter is governed by the interpretation of the plain language of Article 8, and that Article 8 must be interpreted in light of the language of Articles 7 and 9 of the parties' labor agreement. It is well established in labor arbitration that the collective agreement must be read in its entirety to aid in the interpretation of a single article. Article 9 (Paid Time Off) describes the contractual creation of PTO "in lieu of traditional sick leave, personal days and vacation benefits" and requires that PTO hours "be used to maintain the Eligible Employee's normal work schedule." PTO is therefore clearly part of the normal work schedule and it is undisputed that all three Grievants are Eligible Employees within the meaning of Article 9.

Article 9 goes on describe the formula for accumulating PTO (9.2); the maximum accrual of PTO (9.3); "banking" PTO (9.4); and granting PTO (9.5). It is evident in Article 9.5 that the granting and scheduling PTO is wholly at the discretion of the Employer and that PTO can only be authorized following a written request by the Eligible Employee submitted "not less than fourteen days prior to the posting of the schedule during which the PTO is requested....." There can therefore be no doubt that PTO is an integral part of the Employee's work schedule set in advance and controlled solely by the Employer.

Article 7 (Work Schedules) reiterates that the Employer is the “sole authority in determining work schedules, hours of employment, and changes thereto.” This Article goes on to define the normal work week as an average of forty (40) hours in a five (5) day period (7.2), and lists the components of a normal work year as: hours worked on assigned shifts (7.3.a); assigned training by the Employer (7.3.b); and authorized leave time and paid time off (7.3.c). Section 7.3 also includes a final provision, apparently unrelated to the above listed components, concerning departmental meetings and the payment of overtime for these meetings if an employee is required to attend at times other than during their scheduled work shifts (7.3.d). As a matter of contract construction, 7.3.d. can only be deemed a subordinate and unique provision not applicable to the earlier provisions of 7.3.

Turning to Article 8 (Overtime), the language provides that “all hours worked by an employee in excess of a normally scheduled daily work shift shall be paid for at the rate of one and one-half (1 ½) times the employee’s regular straight time rate of pay,” accordingly, any work actually performed beyond the employee’s assigned schedule is subject to this overtime provision. With regard to the instant grievance, it is undisputed that the Grievants all worked on June 27, 28, and 29, 2014 and that these days were outside their normally scheduled daily work shift. While the Arbitrator is in agreement with the Employer that Paid Time Off cannot be considered hours worked under the labor agreement, the crucial question here is not whether paid time off should be considered hours worked but rather, whether paid time off was part of their normally scheduled daily work shift. Based on the foregoing discussion, it cannot be denied that Paid Time Off is part of an employee’s normal schedule.

While it is possible that, read without consideration of the provisions of Articles 7 and 9, the phrase “normally scheduled daily work shift” might be deemed ambiguous, the language of Articles 7 and 9 taken together with Article 8 and the requirements of the Fair Labor Standards Act, provides clarity. The parties are in agreement that a normally scheduled daily work shift is ten hours for most officers. However, because of variations in the assignments of some officers and the fact that to provide twenty-four hour, seven day police protection , the Employer is required to create a schedule where some officers work more than forty hours in some weeks and less than forty hours in others. Such scheduling complies with the requirements of the Fair Labor Standards Act and effectively mandates a normal schedule of eighty hours in a two week cycle. It is only when work is performed beyond this schedule that an officer qualifies for overtime payment as provided for in Article 8.1. In the instant matter, the Grievants were normally scheduled for a daily work shift of four, ten hour shifts including Paid Time Off and were paid at a straight time rate for these PTO hours as required by Article 9.2 which specifies that PTO hours are to be compensated at the regular rate of pay and must be used to maintain the Eligible Employee’s normal work week. They were then additionally scheduled, at the Employer’s sole discretion, to work on June 27, 28 and 29, 2014. They worked these hours in addition to their regular schedule and are therefore entitled to payment at one and one-half (1 ½) times their regular straight time rate for all hours worked on these days.

The Arbitrator has made a particularly detailed review and analysis of the entire record in this matter, and he has given particular attention to the observations and arguments raised by the parties in their cogent post hearing briefs. In this connection he

has determined that the crucial issues raised at the hearing and in the post hearing briefs have been addressed above, and that certain other matters noted by the parties must be deemed immaterial, irrelevant or side issues, at the very most, and therefore has not afforded them any significant attention, if at all, for example: whether or not the City attempted to accommodate the officers' schedules for Water Ski Days by considering requests for days off during the festival; whether or not the City only began excluding Paid Time Off hours from overtime compensation calculation in connection with extra duty work performed at the municipal marina in the past few years; whether or not any other police officers not named in this grievance were properly compensated for hours worked during 2014 Water Ski Days; the various arguments raised concerning past practice; the findings and award of this Arbitrator in BMS Case #13-PA-0463; the award of Arbitrator Yaeger in BMS Case #11-PA-0933; the alleged distinction between internally funded and externally funded overtime; who made the changes in the Grievants' time sheets; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties collective bargaining agreement, the preponderance of the evidence dictates a finding that the Employer violated the parties' collective agreement when it declined to make overtime payments to Grievants for hours worked on June 27, 28 and 29, 2014. Accordingly, an award will issue, as follows:

AWARD

THE CITY VIOLATED THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT DECLINED TO PAY GRIEVANTS KLEES, BECKLUND AND FOSS OVERTIME FOR HOURS WORKED ON JUNE 27, 28 AND 29, 2014.

REMEDY

GRIEVANTS SHALL BE COMPENSATED AT AN ADDITIONAL ONE HALF (1/2) TIME THEIR REGULAR RATE OF PAY FOR ALL HOURS WORKED ON JUNE 27, 28 AND 19, 2014.

JOHN REMINGTON,
ARBITRATOR

April 6, 2015

Gilbert, Arizona