



## I. Introduction

This matter came on for hearing pursuant to a collective bargaining agreement between the parties effective January 1, 2007 - December 31, 2009. A hearing occurred on July 29, 2008 in a conference room of the Stillwater, Minnesota City Hall. Mr. Michael Wilde, Esq., represented the International Union of Operating Engineers, Local 49, hereinafter Union. Ms. Susan K. Hansen, Esq., represented the City of Stillwater, hereinafter Employer.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter had been properly submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The arbitrator officially closed the hearing on the receipt of briefs from the parties on September 5, 2008.

### ISSUE

WHETHER THE IMPOSITION OF A THREE (3) DAY LEAVE WITHOUT PAY (SUSPENSION) ON GRIEVANT WAS FOR JUST CAUSE? IF NOT, WHAT IS THE APPROPRIATE REMEDY?

### STATEMENT OF THE FACTS

This is a case of contract interpretation. Article XIII of the collective bargaining agreement (CBA) between the City of Stillwater, Minnesota and the International Union of Operating Engineers, Local 49 requires Public Works employees to be available for overtime

work with little or no advance notice when unusual circumstances, defined generally as, fire, flood, sleet, breakdown of municipal equipment or facilities occur unless unusual circumstances prevent the employee from working. There is no definition in the CBA of the type of occurrences that would qualify as unusual circumstances that would excuse an employee from reporting when requested.

However, during the hearing there was testimony from the Employer and Union that employees have been excused, without penalty, from reporting for overtime work when requested because of vacations, funerals, personal illness, illness of a child, childcare obligations, coaching children's sports activities, children's school events, birthday of a spouse, at dinner in a restaurant in Minneapolis, or failure to get the call. There are no written criteria for exercise of the supervisor's discretion in deciding when and if to excuse an employee from reporting for overtime when requested.

The decision to declare unusual circumstances requiring overtime work is solely within the Employer's discretion. It determines how many employees are needed and calls those employees from an established call list by order of seniority. If an employee declines the overtime or fails to answer the call, his/her name goes to the bottom of the call list until all other employees have been called. This was the procedure in place at the time of this incident and the only procedure that has existed between the parties on this issue.

There was heavy snowfall during the day on Saturday, December 1, 2007. Grievant was at home all day but the Employer did not call and request him to report to work. On or about 5:45 p.m., the lead worker called Grievant and left a message saying that Grievant was requested to report to work at 10:00 p.m. for snow plowing. Five minutes later, Grievant returned the call

and told the lead worker that he would be unable to report because he was on the highway taking his elderly parents to a family holiday party in Minneapolis. Grievant offered to report to work early Sunday morning.

At approximately six o'clock, Grievant received a call from the assistant superintendent of public works who ordered him to cancel his family plans and return to Stillwater to plow snow. Grievant refused. The Employer threatened Grievant with a job consequence if he did not comply. Grievant still refused, but continued to say that he would come in early Sunday morning. Both parties agree the conversation was heated.

On Monday, December 3, 2007, the director of public works imposed discipline, a three-day leave without pay, on Grievant for failure to report for overtime snow plowing on Saturday evening. A three day leave without pay is the disciplinary step immediately below and precedent to discharge. The director of public works based this level of discipline on Article XIII of the CBA which he interprets as requiring mandatory overtime whenever the Employer requests an employee to report to work outside his/her regular hours. In addition, the Employer charged Grievant with insubordination for not obeying the supervisor's directive to cancel his family plans and report to work. Grievant appealed the disciplinary action through the appeal procedure until it reached this arbitration.

In addition to the incident facts, it is important to understand the background of the Grievant. He has worked for the City of Stillwater for eight years. He has never been disciplined and has never before been unavailable when called back for overtime work. The Employer testified that the Grievant was an excellent worker, "very reliable," who was particularly skilled driving the Champ Grader snow plow on one of the city's most difficult

routes. A diagram of the Grievant's route showed a configuration similar to a basket of narrow snakes. The Employer testified that although other workers were trained on the same piece of equipment, none were as proficient on that difficult route as Grievant. Lastly, the Employer testified as support for its imposition of discipline that "other workers were burdened by Grievant's absence and had complained."

Grievant testified that his elderly parents asked him on Friday evening, November 30, 2007 to drive them to Minneapolis the next night. He replied that he would do so if he was not called in to work by five o'clock on Saturday. He said that his mother was particularly anxious to attend the family party because her ill sister whom she did not see often was going to be present. Further, Grievant testified that his parents were frightened driving at night on snowy roads and would not have attended the event unless he drove them in his four-wheel drive vehicle. At five o'clock Grievant picked up his parents and started for Minneapolis.

#### RELEVANT CONTRACT PROVISIONS

##### Article VII

- 7.1 The Employer will discipline employees for just cause only.
- 7.5 Discharges will be preceded by a three-day suspension without pay.

##### Article XIII

- 13.3 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 usual circumstances prevent the employee from so working.

##### Article XIV

- 14.2 Overtime will be distributed as equally as practicable by department.

14.3 Overtime refused by employees will for record purposes under Article 14.2 be considered as unpaid overtime worked.

### POSITION OF THE PARTIES

#### UNION'S POSITION

The Employer's action represents a drastic, abrupt deviation from the procedure under which the parties have operated in the past. No other employee has ever been disciplined for refusing to report for overtime. At least as far back as 2002, the parties established a procedure for calling employees in to work through a call-back list. The call-back list, available to every employee, states specifically: "You will be called out in order of seniority, if you deny to go out when called your name will go to the bottom of the list until everyone else has been called then the list starts over." Relegation to the end of the list is the only penalty ever imposed when an employee is unable, unwilling, or unreachable when called back for overtime. The Employer's imposition of a new disciplinary scheme is a breach of the collective bargaining agreement and past practice between the parties. The grievance should be sustained.

#### EMPLOYER'S POSITION

The Grievant's conduct shows a total disregard for his supervisor's directive and Grievant's duties and responsibilities as a maintenance worker. Maintenance workers are hired by the Employer in large part to plow snow in the winter. It is an essential duty and responsibility and the primary reason the positions exist. Grievant presented no evidence that he was "prevented" from reporting to work by unusual circumstances. Failing to report when specifically ordered to do so by his supervisor was insubordination. If the Employer is not

allowed to discipline in this case, other maintenance workers will believe they can simply not respond to requests to report for overtime snow plowing whenever it is inconvenient to do so. The discipline should be upheld.

### ANALYSIS AND FINDINGS

There is a fundamental understanding between the parties in the employment relationship.<sup>1</sup> A potential employer is willing to part with its money only in return for something it values more highly, the time and satisfactory work of the employee. The potential employee will part with his/her time and work only for something he/she values more, the money and fulfilling work offered by the employer. This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do “satisfactory” work.

“Satisfactory” work in this context has four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer’s ability to operate the business successfully. The main addition to the fundamental understanding that Unions seek in collective agreements is job security. Most frequently, the agreement protects job security by limiting the employer’s power to discipline and discharge.

The fundamental understanding, as amended in the collective bargaining agreement, can be stated as follows: employees will provide “satisfactory” work in return for which the

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<sup>1</sup>This discussion on the fundamental understanding follows the theory of Professors Laura Cooper, Dennis Nolan and Richard Bales in *ADR In The Workplace. (2000)*

employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is “just cause” to terminate it.

“Just cause” is obviously not a precise concept. It cannot be applied to a particular dispute by an employer or an arbitrator without careful analysis and exercise of judgment. There will never be a simple definition of “just cause,” nor even a consensus on its application to specific cases, but this does not mean the phrase is devoid of meaning. On the contrary, it is possible to make sense of the term and give it substance. This can be done by viewing the just cause standard as an amended form of the fundamental understanding. Just cause, in other words embodies the idea that the employee is entitled to continued employment provided the employee attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with the employer’s ability to efficiently conduct its business with activities on or off the job. An employee’s failure to meet these obligations will justify discipline up to and including removal.

There are three inquiries to determine whether just cause exists. The first is whether the evidence establishes that the Grievant committed the offenses forming the basis of discipline. The second is whether the Grievant was afforded due process. The last inquiry is whether the penalty is appropriate considering the nature and severity of the offenses and any mitigating factors.

**A. DOES THE EVIDENCE ESTABLISH THAT THE GRIEVANT COMMITTED THE OFFENSE FORMING THE BASIS OF DISCIPLINE WHEN HE DECLINED OVERTIME WORK ON DECEMBER 1, 2007?**

In the universe of conflicts there are only three categories. The first and most common category is the conflict of values: how one believes he or she should be treated. Values conflicts

are all the familial, interpersonal (co-worker/co-worker/supervisor), age, gender, race, national original, harassment, threats, and violence disputes. Since every employee brings his or her childhood to the workplace, values conflicts can only be resolved through dialogue and an understanding of how the other person's childhood values interpreted the language or conduct in dispute.

The second category is instrumental conflicts: how should things work? These conflicts involve interpretation of the universe of organization procedures i.e., work rules, seniority, craft differences, etc. Usually work rules are well defined in the collective bargaining agreement and employers written policies, but ambiguities still arise that require good faith negotiation to resolve. The last and most difficult category of conflicts to resolve are disputes over the division of scarce resources, i.e., time, money, human resources, and space.

This conflict is squarely in the second category – how should things work? The Employer argues that Article XIII is a “mandatory overtime” clause that requires employees to report for duty whenever called regardless of their own off-duty plans. In addition, the Employer believes that it can require employees to seek advance approval of their off-duty plans. Collaterally, this case also asks a resolution of whether Grievant's conduct interfered with the Employer's ability to efficiently conduct its business. Lastly, the part of the grievance that alleges insubordination on the Grievant's part toward the supervisor, a values conflict, will also be addressed.

#### 1. The Employer Failed To Establish That Article XIII Requires Mandatory Overtime From Public Works Employees.

The Employer's interpretation of Article XIII is incorrect. Nothing in the plain language of Article XIII grants the Employer absolute authority over the off-duty time of employees.

First, among the several reasons that the Employer's position is not viable, is the plain meaning of Article XIII in the parties' CBA. Specifically, Article XIII states:

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 usual circumstances prevent the employee from so working.

The word mandatory is conspicuously absent. The most reasonable reading of Article XIII says the Employer can "request" overtime work from employees when unusual circumstances, totally within the Employer's discretion, do not allow prior notice, but equally, an employee can determine whether "unusual circumstances" prevent his or her acceptance of the offer to work overtime. The "obligation" to work overtime is conditional on whether the employee determines that some prior, future, or personal reason supercedes in importance the Employer's offer to work overtime. Since "unusual circumstances" on the employee's side is not defined in the CBA, the subjective decision of what constitutes "unusual" is totally within the employee's discretion. The conditional language, "unless," is inconsistent with a mandatory obligation.

The Employer accepted a conditional promise at the bargaining table and cannot now enforce what it would like Article XIII to say. The rule in contract interpretation is that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation and their meaning is to be derived entirely from the nature of the language used. Bottom line: one who in words promises to render a future performance if he so wills and desires when the future time arrives, has made no promise at all.

Secondly, other contract language not support the Employer's interpretation that employees are required to report for overtime when ordered. Article XIV provides for an equalization of overtime among all employees and provides a procedure to record overtime refused.

Article XIV

14.2 Overtime will be distributed as equally as practicable by department.

14.3 Overtime refused by employees will for record purposes under Article 14.2 be considered as unpaid overtime worked.

This contract language, which contemplates the refusal of overtime, is also inconsistent with a mandatory overtime scheme.

Under the Employer's proposed interpretation, the employees would be little more than paid slaves. Their off-duty family outings, birthdays celebrations, religious ceremonies, or bouts of depression would all have to be approved by the Employer before they could be released from a duty to report for overtime. Employees would always be on-call without the option to refuse unless their planned off-duty activity had been pre-approved. Such draconian work rules have not existed since the advent of labor unions.

The Employer knows how to option the time of employees. The Employer has a class of workers who are paid to be on standby duty in case they are needed. Here however, the Employer has chosen not to option the time of Grievant whom it considers essential to the success of its snow plow deployments. The Employer is mistaken in their belief that Article XIII currently creates an option on employees' time.

2. Past Practice Does Not Support A Conclusion That An Employee Cannot Refuse A Request To Work Overtime.

At least since 2002, the parties have operated under a negotiated scheme for distributing overtime, the call- back list. Under this scheme, employees are offered overtime work based on seniority. Until this incident the employee could accept or decline the offer. The list states at the bottom in conspicuous type:

“YOU WILL BE CALLED OUT IN ORDER OF SENIORITY, IF YOU DENY TO GO OUT WHEN CALLED YOUR NAME WILL GO TO THE BOTTOM OF THE LIST UNTIL EVERYONE ELSE HAS BEEN CALLED THEN THE LIST STARTS OVER.”

Therefore, when the Grievant was called on December 1, 2007, he had the choice to accept or refuse the offer of overtime. His refusal under past practice would have and did move his name to the bottom of the list until everyone else had been called (Union Exhibit 3). It should be noted that if an employee does not respond to the call, his or her name goes to the bottom of the list with no further consequence. At the hearing, the Employer did not provide any explanation as to why it deviated from a negotiated, long-standing, past practice.

In rebuttal, the Employer alleged that there are two kinds of requests for overtime work, one of which is excusable and the other not. In a “call-back” situation where the Employer requires only a few employees to handle its unusual circumstances, an employee can refuse the offer to work overtime with no consequences. On the other hand, in an “all-call” situation where the Employer needs every worker, these are mandatory orders to work overtime and cannot be refused. However, the Employer offered no authority in the CBA that employees could be disciplined for refusing either type of offer for overtime. Nor did the Employer present evidence

that employees even knew that there was a distinction between the two types of offers or been warned that discipline was attached to a refusal to accept “all call” overtime.

In the past, the Employer has excused employees who have refused the offer of overtime work because of personal illness, funerals, vacations, coaching a child’s sports team, lack of childcare, at a restaurant in Minneapolis, and those who missed the call. In addition, the assistant superintendent of public works testified that he “could work with” other reasons for refusals, such as the need to attend a child’s school event, a child’s birthdays, driving children to an event, a spouse’s birthday, and employees who had a few beers during off-duty time. Excusing employees from reporting for overtime in either type of overtime offer is also inconsistent with a mandatory overtime scheme. Grievant is the only employee whose refusal to accept overtime work has resulted in evoked discipline.

The Employer did not explain why Grievant’s refusal was not handled by the negotiated past practice.

### 3. Grievant Did Not Interfere With the Employer’s Ability to Successfully Conduct Its Business.

Although the Employer does not make the argument directly, it implies that since other workers less skilled on plowing Grievant’s difficult route complained about Grievant’s absence that Grievant’s conduct interfered with the Employer’s ability to efficiently run its business. That is not the kind of interference contemplated in the fundamental understanding of “satisfactory work.” The Employer testified that employees were cross-trained on equipment and routes so this argument is also without merit.

## B. WAS THE GRIEVANT AFFORDED DUE PROCESS?

### 1. The Employer Did Not Follow The Established Procedure.

What process was due? The “industrial due process doctrine” requires employers to follow basic notions of fairness, i.e., providing an employee threatened with discipline or discharge an adequate opportunity to present his or her side of the case before the imposition of discipline or discharge is the most fundamental. However, equally important is the duty of an employer to have some quantum of evidence on which to base discipline or discharge. Here, the Employer lacks that essential element. The CBA recognizes that overtime work will be distributed equally among employees by seniority. That means some employees will accept the offer and others will not. Those who refuse will move to the bottom of the call-back list. That is the parties’ agreement and their only agreement as to how to handle refusals. Therefore, failure to accept overtime work is not a disciplinable offense.

### 2. The Employer Failed To Provide Notice That Failure To Accept An Offer Of Overtime Could Result In Severe Discipline.

The Employer provided no warning that refusal to accept discipline would result in discipline. While some offenses, such as theft, require no prior warning, here, such a drastic deviation from past practice requires some notice to employees. The shoot-from-the-hip threat of discipline by the Employer on December 1, 2007 during a heated argument with Grievant was a blatant attempt to bully Grievant into abandoning his family plans, pure and simple. What happened on December 1, 2007 was an arbitrary, capricious, and unilateral attempt to manufacture work rules, not the kind of negotiated change necessary in labor relations.

### 3. An Employee May Refuse Unreasonable Work Rules.

The Grievant was not insubordinate. When this Employer calls an employee during off-duty hours, the Employer is a supplicant seeking to purchase additional employee time. The universal rule on the shop floor, “obey now and grieve later,” does not apply after hours. The employee can choose or decline an offer of overtime under the parties’ CBA. The Employer has no power to order an employee’s off-duty hours.

### 4. The Employer Exceed Its Authority by Attempting to Control Grievant’s Off-Duty Hours.

No criteria exist for the exercise of the Employer’s discretion in excusing some employees and not excusing others. The Grievant is highly skilled on equipment and on a location essential to a successful snow plow deployment. He had never refused an offer of overtime work before and the Employer relied on his attendance. The pure disappointment of the assistant superintendent fueled this incident. This is where a conflict of values entered the equation.

The Employer seems amenable to excusing employees from overtime work when parental responsibilities are the excuse, but not amenable to accommodating a filial excuse to assist elderly parents. While every generation is sandwiched between its own children and elderly parents, both siren calls to the heart, Grievant’s generation are the children of the massive boomer generation and can expect as much pressure to assist declining parents as from their own sick children. Modern employers recognize that reality. If a coaching a child’s sports event will excuse a worker from overtime work, the Employer’s failed to show why accommodating elderly parents will not.

Interestingly, and purely a values conflict, is the effect of the word “party.” This word derailed the tranquil history between the Grievant Union and the Employer. To the Employer “holiday party” must connote pure frivolousness and a poor excuse for a highly competent and essential employee to refuse overtime. However, the values of the Grievant in accommodating his elderly parents’ request to drive them to a family function, “party,” superceded the opportunity to earn more money.

The Grievant did not receive due process here because the established, negotiated process that existed to resolve such problems was not utilized.

C. WHETHER THE PENALTY IMPOSED IS APPROPRIATE, CONSIDERING THE NATURE AND SEVERITY OF THE OFFENSE AND MITIGATING FACTORS, IF ANY?

The Employer over-reacted by imposing the most severe penalty short of discharge on a veteran, exemplary employee with no previous discipline. This penalty was intended to threaten and to chill the right of other employees to refuse overtime work. The correct penalty for refusing overtime work is relegation to the end of the call-back list. Therefore, not only is there not just cause to discipline Grievant, there is no cause at all. Article XIII does not require mandatory overtime from employees. Nor can the Employer require employees to get their off-duty plans approved by the Employer.

Beside the dispositive conditional contract language and established past practice, there are also strong public policy arguments against the Employer’s position. If the Employer’s interpretation was approved, could Friday, Saturday, and Sunday religious observants be disciplined for refusing to abandon their observances when called to plow snow? Could the Employer probe applicants about their religious preferences to eliminate people who could only

plow snow Monday through Thursday? Could a single parent could be ordered to work at ten o'clock at night and be forced to leave sleeping children alone? Could an employee be called away from the bedside of a sick aunt or nephew because they were not immediate family? The permutations of infringements on fundamental rights are endless and potentially expensive.

How things should work conflicts can only be resolved at the negotiating table. The Employer cannot promulgate an alternative, unilateral, undisclosed, and standardless category of disciplinable offenses as it attempted to do here.

#### FINDINGS OF FACT

1. At all times relevant, the Grievant performed satisfactory work.
2. There was no basis for Grievant's discipline.
3. The Employer may request, but not mandate overtime work.
4. The employee may refuse overtime work for his or her own reasons and the only penalty is removal to the bottom of the call-back list.

#### CONCLUSION

There will be an infinite number of snow storms in Minnesota, but a child has one sixteenth birthday. Parents celebrate one fiftieth wedding anniversary. A spouse may have the lead in the community musical once. Singing in the church choir on Saturday morning may be an important part of an employee's life. Some things are more valuable than money. The decision to forego personal events off-duty is the employee's alone.

This incident has poisoned the well of cooperation that existed before December 1, 2007. Before the Employer over-reacted there were no complaints by the Employer that employees did not conscientiously report for overtime when requested, but conscientiousness

