

IN THE MATTER OF THE ARBITRATION BETWEEN  
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American Federation of State, County, and Municipal  
Employees, Greater Minnesota Council 65,  
Union,

and

City of Princeton, Minnesota

**OPINION AND AWARD**  
Grievance of  
AFSCME, Council 65  
(Contract Interpretation)  
Employer.  
BMS Case No. 11-PA-0786

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ARBITRATOR: Janice K. Frankman, J.D.

DATE OF AWARD: January 5, 2012

HEARING SITE: City Hall  
705 North Second Street  
Princeton MN 55371

HEARING DATE: October 12, 2011

RECORD CLOSED: November 21, 2011

REPRESENTING THE UNION: Teresa L. Joppa, Staff Attorney  
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## **JURISDICTION**

The hearing in this matter was held on October 12, 2011. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of BMS. 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 submitted post-hearing briefs which were received on November 21, 2011, when the record closed and the matter was taken under advisement. The parties' Collective Bargaining Agreement ("CBA") requires the filing of an Award 30 days from the date of the close of the record. They authorized an extension of time to file this decision.

## **ISSUE**

The parties entered into a stipulation at the hearing, authorizing the Arbitrator to state the issues following review of the hearing record. After careful review of the hearing record, the Arbitrator believes the following is an accurate statement of the issues:

Whether the City violated the terms and conditions of the parties' CBA with regard to scheduling of work and compensation for work performed by bargaining unit members, and, if so, what is the remedy?

## **BACKGROUND AND SUMMARY OF THE EVIDENCE**

AFSCME Council 65 represents "(a)ll employees of the City of Princeton who are public employees within the meaning of Minn. Stat. 179A.03, subd. 14, excluding supervisory, confidential and essential employees." Joint Exhibit 1, page 2 The bargaining unit represented in this case consists of four to five City employees who report to the Department of Public Works Director. The parties stipulated to the consolidation of the issues raised in Grievances filed by the Union on behalf of the bargaining unit by letters dated December 22, 2010; January 21, 2011; and February 18, 2011. The Grievances involve disputes with regard to compensation for work performed during hours, scheduled by the City, and different from the bargaining unit's customary 40 hour work week, Monday through Friday from 7:00 a.m. to 3:30 p.m.

The dispute arises from three separate incidents and disagreement as to the interpretation of Contract language and the interface of its provisions with those in the Employer Personnel Manual. Past practice has been raised by the Union in support of its case. The parties followed the CBA's step grievance provisions without resolution and agreed to submit the matter to arbitration. The Arbitrator was advised of selection to hear the case by email notice on August 2, 2011. Potential dates for hearing of the consolidated case, beginning in early September, were provided to the parties on August 10. The October 12, date for hearing was confirmed on August 12.

### The Grievances and Procedure

## First Grievance

Union Staff Representative Jo Musel Parr directed her Grievance letter dated December 22, 2010, to Supervisor Keith Koehler. She set out the Union's complaints alleging violation of CBA Articles 2, 3, 8 and 10 and Personnel Policy Article 5, arising from "calling Public Works Employees on Sunday December 12<sup>th</sup> for snow removal during the early morning hours and then failing to pay overtime for hours worked; followed by a mandatory send home of Employees on the subsequent Friday." Joint Exhibit 2, page 1. She set out the remedies sought from the City:

Honor practice, contract & policy in the future, pay Employees appropriate wages for Sunday overtime shift at time and one-half, as well as reinstate pay for the regularly scheduled hours which were not paid due to the 'send home' on Friday December 17<sup>th</sup>, and in all ways make Employees whole.

Joint Exhibit 2, page 1

The Grievance was denied by letter dated December 29, 2010, from Mr. Koehler to Ms. Musel Parr. He acknowledged the Grievance letter and detailed the circumstances from which the Grievance arose:

The letter asserts that the city violated the current contract by notifying the Public Works Employees on Friday, December 10<sup>th</sup> that they may be called in to plow snow as the forecast for the Princeton Area was for 10-12" of snow falling that evening and during Saturday, December 12<sup>th</sup>. (sic) Indeed said employees were subsequently required to plow snow on Sunday, December 12<sup>th</sup>. The union's letter is also correct in that the city adjusted the work schedule to keep the employees' hours under 40 by having them not work on the following Friday, December 17<sup>th</sup>.

Joint Exhibit 3, page 3

Mr. Koehler then quoted and cited Contract Articles 5.1, 5.2; 8.1-.4; and 9.1 and 9.5 in support of the denial.<sup>1</sup> In addition, he referred to Article 5 of the Personnel Policy and concluded:

While Article 5 of the Personnel Policy states that hours worked on weekends shall be considered overtime, Article 9 of the AFSCME Contract defines overtime as hours worked over 40 and does not include any language relating to weekends. The Personnel Policy also states that '*If at any time there should be a conflict between a description in this manual and a labor agreement, the terms of the actual contract will govern in all cases.*' Accordingly, the 40 hour test in the AFSCME Contract supersedes the weekend language of the Personnel Policy.

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<sup>1</sup> Relevant provisions of the CBA and Personnel Policy are quoted below at pages 8-11.

The city asserts that the city retains the right to alter the work schedules and did so according to the contract. Further, and pursuant to the FLSA, the city only pays overtime for hours actually worked. The employees in question did not work over 40 hours that week and, accordingly, earned no overtime pay.

Joint Exhibit 2, page 3

Ms. Musel Parr responded by letter, captioned "Class Action Grievance Step 2" on January 5, 2011, sent to City Administrator Mark Karnowski. She wrote, in part, as follows:

AFSCME has zero doubt that the Employer understands the complete reasoning behind which this grievance is filed. The Employer included a nice summary of the dates in the response letter to Step 1 of the grievance.

Further, the Employer is clearly aware they have paid overtime for these hours in the past (i.e. past-practice). 'As usual' it appears the employer would like to quibble about how the grievance is worded, rather than attempting to rectify the actual alleged violation of the contract.

Joint Exhibit 3, page 2

Mr. Karnowski responded on January 14, denying the Step 2 Grievance. He wrote, in part:

Nothing in your letter of January 5<sup>th</sup> addresses the points made in the city's December 29<sup>th</sup> letter. Accordingly, I am denying the Step 2 grievance based on the points raised in our December 29<sup>th</sup> letter.

The city re-asserts that we we (sic) retain the right to alter the work schedules and did so according to the contract. Further, and pursuant to the FLSA, the city only pays overtime for hours actually worked. The employees in question did not work over 40 hours that week and, accordingly, earned no overtime pay.

Joint Exhibit 3, page 3

### Second Grievance

By letters dated January 21, 2011, Ms. Musel Parr responded to the City's response and filed the second Grievance. Mr. Karnowski responded to both letters on February 1, 2011. Portions of the three letters are provided below.

### Musel Parr to Karnowski re Class Action Grievance Step 3/4

#### **Response to Step 2 Denial:**

Again, the City seems to be unaware of the remedy AFSCME workers are requiring to resolve this grievance. AFSCME is alleging that the Employer violated the contract and past practice by denying overtime and doing a mandatory send home of Employees. This violates the past practice related to snow removal, as well as the areas in the contract which have been outlined. AFSCME is unsure how much more clear we can be about the dispute of (sic) how the Employer has chosen to interpret the clear language in the contract and the practice we have all followed over the years. We disagree with the new interpretation the Employer is claiming and fully intend to enforce the spirit and past practice involved in this situation.

Joint Exhibit 4, page 3

Musel Parr to Koehler re Class Action Grievance Step 1

**Alleged Violation**

The Employer violated Article 2 – Recognition; Article 3 – Definitions; Article 8- Work Schedules; Article 10 – Call Back; Article 11 – On-Call Pay; Personnel Policy Article 5 (including 5-2); Past Practice and any other applicable Articles, policies and statutes when informing Public Works Employees on Thursday January 13<sup>th</sup> not to report to work until 3:00 p.m. on Friday the 14<sup>th</sup> for snow removal and then working into the late evening of Friday night and then failing to pay overtime for hours worked.

**Remedy Required**

Honor practice, contract & policy in the future, pay Employees appropriate wages for Friday overtime shift at time and one-half, as well as reinstate pay for the regularly scheduled hours which were not paid due to the mandatory late report on Friday January 14<sup>th</sup>, and in all ways make Employees whole.

Joint Exhibit 4, page 2

Karnowski to Musel Parr re Reply to Class Action Grievances – Step 3/4 and Step 1

The city, again, re-asserts that we retain the right to alter the work schedules and did so pursuant to the contract. Further, and pursuant to the FLSA, the city only pays overtime for hours actually worked. The employees in question did not work over 40 hours that week and, accordingly, earned no overtime pay.

The city's right to set the work schedules is not something the city is willing to negotiate away. Accordingly, as suggested by AFSCME, it appears best to move immediately to arbitration.

Further, since the second grievance filed on January 21, 2011, deals with the same issues, the city is suggesting that the two grievances be combined and be arbitrated simultaneously.

Joint Exhibit 4, page 1

### Third Grievance

By letter dated February 8, 2011, Ms. Musel Parr advised Mr. Karnowski that the Union accepted the City's suggestion to consolidate the two grievances for hearing. By letter dated February 18, 2011, she filed the third Grievance, consolidated with the first two for hearing in this case. She alleged the City violated Articles 2, 3, 8, 10, 11, 21 and 22 and Personnel Policy Article 5 (including 5-2) "when unilaterally changing the terms and conditions of employment related to On Call and call back, mandating comp time use versus vacation, etc. in relation to those employees scheduled for On Call duty." She set out the remedy sought:

Honor practice, contract & policy in the future, pay Employees appropriate wages for Sunday overtime shift at time and one-half, as well as reinstate pay for incorrect calculations of on-call which were not paid due to the Employer's actions, and in all ways make Employees whole.

Joint Exhibit 6, page 1

### The Union's Case

Every employee in the bargaining unit was called in to plow snow on Sunday, December 12, 2010, beginning at 2:00 a.m. They had been given a heads up by their Supervisor on Friday, December 10, that snow was expected. They worked 5 eight hour days Sunday through Thursday, after which they were told to take a three day week-end and report to work the following Monday at 7:00 a.m. Their schedules are often changed to accommodate the wide range of maintenance work they do including street and sewer maintenance, tree-trimming and responding to emergency situations which require immediate attention. They sometimes begin work very early in the day to avoid traffic disruption. They are paid overtime at the rate of time and one-half whenever they work more than forty hours in a pay period. Week-end duty rotates among the bargaining unit members, and they are compensated for the "on-call" time, accordingly.

The first Grievance was filed because the bargaining unit was accustomed, under their previous supervisor, to working their full 40 hour week and being paid overtime or "banking" compensatory time when they plowed snow. They had not been sent home in the past so that the City could avoid paying overtime. The two employee witnesses who testified, had worked for the Public Works Department since 2002 and

2003 respectively. They did not produce paystubs to verify their earlier receipt of overtime in similar situations, and they could not recall any specific dates when they were paid overtime for week-end work and allowed to work their normal work week . Neither of them could recall more than one such incident, and were not aware that more than one Grievance had been filed in this case.

Ms. Musel Parr was contacted by the Union Steward three times in about a month and one-half with similar complaints which resulted in the filing of the three Grievances. She was told that bargaining unit members had always been allowed to work their full regular workweek when they had been called in on a week-end for which they were paid overtime. In January, 2011, she was told that bargaining unit members were directed not to report until 3:00 p.m. on a Friday for snow removal. She considered the incident to be a “send home” the same as had occurred in the first incident, and believed the employees should be paid overtime because they had not worked their regular shift. She could not recall the date of the incident, and did not know how many hours had been worked in the pay period when the employees were told to report later in the day. Sometime shortly after the second incident, she was called by a new employee, who is no longer with the City, who reported that he had been directed to take compensatory rather than vacation time in reporting his time for one pay period. Ms. Musel Parr did not review pay records in any of these matters because the bargaining unit members “know when they work”. See, Musel Parr testimony.

### The Employer’s Case

Mark Karnowski became City Administrator in 2003. Mr. Mishmash was Director of Public Works at the time. Bob Gerald was Supervisor of Public Works under Mishmash until 2008 when he succeeded him as Director. Mr. Karnowski could not recall an incident the same as that which occurred in December 2010, when either Mishmash or Gerald was the Director. There was one snow incident when a supervisor was injured and another was out of town so a bargaining unit employee was directed to delay reporting for work so that he could work on a Saturday and not be paid for overtime. The matter was grieved but overtime was not paid.

Karnowski referred to Contract language which provides the Employer “with sole authority”, in support of the action taken in December, 2010. He authorized Mr. Gerald to direct his staff to take a three day week-end following the Sunday through Thursday work. Karnowski testified that the bargaining unit work schedules are frequently changed as to the hours they start work, and the days of the week which they work.

Mr. Gerald was hired by the City as a Public Works employee in June, 2002. He became supervisor in 2005, and Director in 2008. He testified that work hours were shifted and changed to adjust for the work load. Applicants for the work are advised during the interview process that work schedules are subject to change. He agreed that he called the employees Saturday afternoon, December 11, and directed them to report for work at 2:00 a.m. on Sunday morning. When the snow removal work was completed

Thursday morning at about 11:00 a.m., he told them they should not report for work again until 7:00 a.m. on Monday. He recalled a winter event in 2003/2004 when he was “one of the guys” and the same sequence of events occurred without objection. He testified if there had been essential work that needed to be done, the bargaining unit would have worked on Friday, December 17, 2010, and been paid overtime for the pay period.

### On Call, Call Out and Call Back Work

Department on-call week-end work began in 1995, when the City installed a Waste Water Treatment Plant which required monitoring seven days per week. The on-call schedule begins at 4:00 p.m. on Friday and ends at 7:00 a.m. on Monday. A calendar is set which rotates the on-call duty among the bargaining unit employees. They are paid for a minimum of three hours at overtime rate for each week-end day.

“Call-out” and “call-back” are distinct from “on-call” work. Employees are paged from the City. Call-back occurs at the end of an eight hour shift when more work is needed to complete a task. When an employee is called out, he is paid for a minimum of two hours which, like on-call time, does not need to be fulfilled. Pay for all three, generally, is at the time and one-half rate. Gerald testified that staying longer hours is not necessarily call-back time, and that adjustments may be made in those cases to limit time in a pay period to 40 hours. He attends City Council meetings where budget matters are addressed. In December, 2010, the Employer was directed to stay within budget limits for employee compensation.

Mr. Gerald explained the process and paperwork completed by the employees and him with regard to pay period schedules, times and election to take overtime or compensatory time when appropriate. He takes information from worksheets submitted by the employees, and prepares time cards which the employees sign. He could not recall directing the employee who reported an incident leading to the third Grievance to elect compensatory time rather than vacation pay as alleged. He believed it was an “oversight by the employee”. See, Gerald testimony

### Relevant Contract and Employer Policy Provisions<sup>2</sup>

#### **ARTICLE 5 – EMPLOYER AUTHORITY**

- 5.1** The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, . . . ; 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.  
(emphasis added)

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<sup>2</sup> The CBA is included in the record as Joint Exhibit 1. The Employer’s Personnel Policy, SECTION V HOURS OF WORK, paragraphs 5.1 -5.5 is included in the record as Union Exhibit1.

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. (emphasis added)

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## **ARTICLE 6 – EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE**

### **6.5 ARBITRATOR'S AUTHORITY**

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. . . .

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## **ARTICLE 8 – WORK SCHEDULES**

8.1 The sole authority in work schedules is the EMPLOYER.

8.2 The EMPLOYER will give as much advance notice as is practicable, to employees affected by the establishment of scheduled shifts different from the employees' normal scheduled shift.

8.3 In the event that work is required because of unusual circumstances such as . . . snow. . . no advance notice need be given.

8.4 Nothing contained in this or any other article shall be interpreted to be a guarantee of a minimum or maximum number of hours. (emphasis added)

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## **ARTICLE 9 – OVERTIME PAY**

9.1 Hours worked in excess of forty (40 ) hours within a seven (7) day period will be compensated for at one and one-half (1 ½ ) times the employee's regular base pay.

9.2 For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded, or paid twice for the same hours worked. (emphasis added)

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## **ARTICLE 10 – CALL BACK**

An employee called in for work at a time other than the employee's normal scheduled shift will be compensated for a minimum of (2) hours' pay at one and one-half (1 ½ ) times the employees base rate of pay. An extension of or early report to an assigned shift is not a call back. The EMPLOYER shall not make work to fill the two (2) hour period. (emphasis added)

In addition, the weekend on-call Employee called back pursuant to this section shall be reimbursed by the Employer for actual mileage for up to 20 miles (maximum round trip total) to be paid at the IRS rate in effect.

## **ARTICLE 11 – ON CALL PAY**

Employees who are scheduled to be on call for a normal Saturday/Sunday weekend, which begins at 4 p.m. the previous Friday and ends at 7 a.m. the following Monday shall be compensated for a total of six (6) hours at the applicable rate of pay for that period. (emphasis added)

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Joint Exhibit 1

## **SECTION V**

### **HOURS OF WORK**

#### **5.1 Regular**

Work schedules or regular hours of employment for personnel will be established by the appropriate department head with the approval of the City Council. The regular work week for full-time employees is five 8-hour working days in addition to a lunch period, Monday through Friday, except as otherwise established by the department in accordance with custom and needs of the department. . . .

#### **5.2 Overtime**

The City recognizes that in emergency situations and during peak workload periods some employees may be required to work overtime. This overtime shall consist of any authorized employment: 1) exceeding the regular hours of work, based on a 40-hour work week; 2) on weekends; or 3) on holidays. . . . While employees authorized to work overtime may receive overtime compensation in the form of a cash payment or compensatory time, the department head reserves the right to determine form of compensation within established department head policies and State or Federal regulations. The cash payment shall be at the rate of one and one-half (1 ½) times the employee's regular hourly rate of pay.

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#### **5.3 Callbacks**

The City recognizes that some emergency situations will necessitate an employee being called back to work to perform extra duty. A callback exists when: 1) a supervisor requests an employee to return to work; 2)

after the employee has completed the regular 8 - hour workday or on a non-working day; 3) the employee has physically left the premises of employment. An employee performing such duties will be entitled to a minimum of two hours of overtime compensation. . . .(emphasis added)

Union Exhibit 1

## **OPINION AND FINDINGS**

It is appropriate to sustain this consolidated class action Grievance in part. Notwithstanding the parties' conclusion that the three Grievances are the same or similar, and therefore appropriate for consolidation, the Arbitrator has necessarily considered each individually, reaching distinct conclusions in each case. The first Grievance is sustained in part, while Grievances two and three are denied. The detailed Background and Summary of the Evidence has been provided above and will only be highlighted for understanding of the conclusions which have been reached.

With regard to the first Grievance, the Union has demonstrated that the Employer breached the parties' CBA when it incorrectly failed to pay employees at the overtime rate for work performed on Sunday, December 12. It has failed to support its claim that the bargaining unit was entitled to work 48 hours during the pay period or that the Employer was precluded from "a mandatory send home" after the employees had worked forty hours.

The Employer has a clear right to schedule and change the schedule of its employees' work. In addition, the CBA unambiguously prohibits an interpretation in support of a conclusion that an employee is guaranteed either a minimum or maximum number of hours. Nonetheless, the City does not have unfettered right to determine at what rate of pay employees will be compensated for the work they perform.

These conclusions are based solely upon interpretation of the relevant CBA and Personnel Policy provisions. They are not based upon past practice. Indeed, past practice, relevant to the issues raised in this case, has not been established.

In further support of the conclusions reached relative to Grievance 1, it is noted that the CBA expressly anticipates the facts of the case, prohibiting the pyramiding, compounding or paying twice for the same hours worked. If the bargaining unit had worked its regular 40 hour work week in addition to the eight hours it worked on Sunday, December 12, it would have been entitled to overtime compensation for the Sunday work and regular pay for its 40 hour work week.

The Employer has argued that overtime compensation is restricted for work in excess of 40 hours in a pay period as set out in Article 9.1 of the parties' CBA. It argues further that express Personnel Policy language at Section 5.2 is in conflict with the Contract language and is, therefore, superceded by it. Specifically, the Personnel Policy recognizes emergency and peak workload situations requiring overtime work,

and mandates compensation for it. Section 5.2 acknowledges and expands upon the Contract definition of overtime work. It is not in conflict with it. Holidays and week-ends are identified along with work exceeding regular hours based upon a 40 hour work week. Each stands alone as entitling an employee to compensation at the overtime rate. In addition, it is noteworthy that compensation for on call pay, defined at Article 11 of the CBA, is dependent upon the provisions of Personnel Policy 5.2. The “applicable rate of pay for that (on call) period” is provided in the Policy.

The Contract permits the Employer to reduce the normal work week or schedule the five days as it did without advance notice. However, in doing so, it cannot ignore express provisions of the CBA and its Personnel Policy in computing compensation for the work that is performed. While the Employer was clearly entitled to limit the bargaining unit’s work to 40 hours in the pay period, it could not ignore express Contract language which distinguishes work during the regular work week from week-end and holiday work.

With regard to the second and third Grievances, the Union has failed to sustain its burden to demonstrate contract language or past practice support for its claim made in Grievance Two; or to prove the facts upon which the third Grievance claim was made. To be clear, the Employer has express broad discretion in the scheduling of its employees. There is no provision which precludes the later scheduling of the regular work week hours, and no evidence to suggest that the bargaining unit members were asked to work in excess of 40 hours of the work week in question.

#### Past Practice

The Union claims that long-term past practice has been to allow the bargaining unit to work its regular work week in tandem with week-end overtime work for which it is entitled to overtime compensation. In any event, it asserts entitlement to work its regular work week. However, its bald assertions have not been supported by hard evidence. Clear and unambiguous Contract and Policy language supports the foregoing conclusions. Established past practice, sufficient to defeat that language, must reflect clear and consistent, long-term conduct, recognized by both parties. The Union has not satisfied its burden of proof.

#### Contract Interpretation

Many principles of interpretation are employed in resolving contract disputes. In this case, as noted just above in the discussion of past practice, the Contract and Policy language which supports this Award is clear and unambiguous. Consequently, proper interpretation here requires close reading of specific provisions within the context of the portions of the Contract and Policy in which they appear and within the context of the Agreement as a whole in order to give the parties’ Contract its intended meaning.

The Employer has been given broad authority to alter the bargaining unit’s work schedule to accommodate the work it is required to do. At the same time, there is clear

acknowledgment of a “normal” “regular” work week distinct from “emergency situations” and “peak workload periods”. Scheduling and computation of compensation are addressed in separate provisions. Several distinct provisions recognize work for which overtime compensation is due, and are not properly defeated by the manner in which work is scheduled.

It is appropriate to sustain this Grievance, in part, making whole all bargaining unit members who were adversely affected by the Employer’s decision to compensate them only at their regular rate of pay for work performed during the pay period beginning on Sunday, December 12, 2010, and ending on Saturday, December 18, 2010. It is also appropriate to direct the Employer to comport with all provisions of the parties’ Contract and its Personnel Policy which require the computation of compensation to include overtime compensation. Finally, it is appropriate for the Arbitrator to retain jurisdiction of this matter for a reasonable period of time, for the sole purpose of assisting the parties with the implementation of this Award.

### **AWARD**

The Grievance is sustained in part, and is otherwise denied. Consistent with the foregoing Opinion and Award, the Employer shall:

1. Make whole the bargaining unit members for work performed during the December 12-18, 2010, pay period.
2. Cease and desist from disregarding express Contract and Policy compensation provisions in order to avoid overtime compensation.

The Arbitrator shall retain jurisdiction of this matter for a period of 60 days from the date of this Award for the sole purpose of assisting the parties with implementation of it.

Dated: January 5, 2012

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Janice K. Frankman, J.D.  
Labor Arbitrator