

IN THE MATTER OF ARBITRATION BETWEEN

CITY OF LAKEVILLE
(Employer)

and

MINNESOTA PUBLIC EMPLOYEES
ASSOCIATION
(Union)

DECISION
(Contract Interpretation
and Application)
BMS Case No. 12-PA-1055

ARBITRATOR: Mr. Frank E. Kapsch, Jr.

DATE AND PLACE OF HEARING: The hearing took place on June 27, 2013 at the Lakeville City Hall located at 20195 Holyoke Avenue, Lakeville MN.

RECEIPT OF POST-HEARING BRIEFS: Both Parties submitted timely briefs as of August 6, 2013.

APPEARANCES

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JURISDICTION

The Parties stipulated that this Arbitrator has been properly selected and appointed in accordance with the provisions of Article 7, Section 7.4 of the applicable labor agreement and thereby possesses the duties, responsibilities and authorities, set forth therein, to hear and determine this dispute.

THE ISSUE

The Parties were unable to agree on a specific Statement of the Issue and agreed that this arbitrator may formulate a Statement of the Issue, based upon the record evidence and testimony. Accordingly, the Issue is; *Did the Employer violate the terms of the applicable labor agreement when it failed and refused to pay holiday premium pay for overtime hours worked on a holiday by Detective Bradley Paulson and other similarly situated employees? If so, what shall be the remedy?*

THE EMPLOYER

The Employer, herein, the City of Lakeville, is a southern suburb in the Minneapolis-St. Paul Metropolitan Area. The City covers approximately 38 square miles and current population is over 56,000. Among its municipal functions, the City operates a full-time Police Department consisting of some 44 sworn officers, approximately 9 full-time and part-time non-sworn Community Service Officers and Park Rangers and administrative support staff. Supervision includes the Chief of Police, a Captain in charge of the Investigations Division and another Captain overseeing the Patrol Division. Minnesota Public Employees Association (the Union and/or MPEA) currently represents the Department's non-supervisory Officers, for purposes of collective bargaining.

THE UNION

Minnesota Public Employees Association is a relatively new labor organization/Union dedicated solely to the representation of law enforcement employees and related public safety personnel throughout the State of Minnesota. The Union's offices are located in Roseville MN and over the course of the past several years it has become the designated collective bargaining representative for approximately 40 or more bargaining units throughout the state, including the City of Lakeville police officer bargaining unit.

COLLECTIVE BARGAINING HISTORY

Until about March, 2012, Law Enforcement Labor Services, Inc. (LELS) represented the City of Lakeville's non-supervisory police officers for purposes of collective bargaining and that relationship was reflected in a succession of labor contracts dating back 20 years or more. In about late 2011 or early 2012, Minnesota Public Employees Association (MPEA) challenged LELS for the right to represent the Lakeville police officer bargaining unit and won the ensuing election conducted by MN Bureau of Mediation Services (BMS). By March, 2012, MPEA became a successor to LELS as the new collective bargaining representative for the bargaining unit. MPEA also acknowledged and accepted the then current labor agreement that had been negotiated by LELS to be effective from January 1 to December 31, 2011 or until a new agreement was in

place. The Parties agree that this is the applicable labor agreement in this matter.

FACTUAL BACKGROUND

As indicated by the Statement of Issue, as above, this matter involves questions relating to how employees are to be paid for overtime work performed on a designated holiday. The basic facts giving rise to the underlying Grievance are not in dispute.

The Grievant is Detective Bradley Paulson, a veteran officer with some 11 years of service with the police department and a member of the contractual bargaining unit. In 2011, Detective Paulson was working a schedule of 7 AM to 5 PM, Monday through Thursday and off duty Friday through Sunday.

On December 31, 2011, New Year's Eve, Bradley was called into work. He reported to work and worked 7.5 hours that day. Upon completion of that work, he returned to off-duty status.

Subsequently, Bradley completed his personal time record for that pay period and for his call-in work on New Year's Eve, December 31, he claimed 7.5 hours of Overtime pay for the work performed, because he had already completed his regular 40-hour workweek as of Thursday, December 29. Next, because New Year's Eve is a designated holiday (a half-day), he also claimed 4 hours of holiday pay.¹ Paulson then calculated that since his 7.5 hours of work occurred on a designated holiday, he was entitled, under the applicable labor agreement to claim an additional "Holiday pay premium." For this calculation he multiplied his 7.5 hours of work x 0.5 (holiday premium factor for a full day) = 3.75. Then, because New Year's Eve was only a half-day holiday, he multiplied the 3.75 figure by another 0.5 and the result was 1.875. He decided to round that figure down to 1.75 to reflect the "Holiday premium factor" for his 7.5 hours of work on New Year's Eve day. His time sheet, as submitted to the Investigations Division Captain, Kevin Manias, claimed; 1) 7.5 hours of work on New Year's Eve at the overtime rate of 1.5 times straight time rate, 2) 4 hours of holiday pay at straight time and 3) 1.75 hours of time at straight time to reflect the "Holiday premium factor"; do to the fact that the 7.5 hours of work performed that day occurred on a holiday.

¹ Article 25 of the applicable labor agreement provides for a total of 12 designated, paid holidays and a floating holiday during the calendar year. Christmas Eve and New Year's Eve are half-days and the other ten are 8 hour days. On January 1st of each calendar year, each eligible employee is credited with 88 hours of holiday pay, paid at straight time rate. Over the subsequent course of the year, the employee claims holiday pay from that credited amount as the holidays occur and pay for the qualified holidays is paid as a lump sum in December. Detective Paulson routinely claimed 4 hours of holiday pay for the New Year's Eve holiday and was paid 4 hours of straight time. See Relevant Contract Language.

Captain Manias subsequently passed the time sheet on to the Human Resources Department for payment. Cindi Joosten, the Human Resources Manager, routinely reviewed Paulson's time sheet and did approve payment of his 7.5 hours of work on New Year's Eve at the Overtime rate. She also credited him with 4 hours of holiday pay from his banked holiday hours, but she rejected his claim for the 1.75 hours of "Holiday premium factor" pay.

RELEVANT CONTRACT LANGUAGE

Article 13 - Overtime:

13.1 Employees will be compensated at one and one-half times (1-1/2) the employee's regular pay rate, all remuneration, including longevity, educational incentive pay, K-9 Office and Investigator pay, for hours worked in excess of an employee's regularly scheduled shift. Changes in shifts do not qualify an employee for overtime under this Article.

13.4 For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded or paid twice for the same hours worked.

Article 15 - Call Back Time:

An employee who is called to duty during his scheduled off-duty time shall receive a minimum of three (3) hour's pay at one and one-half times the employee's base pay rate. An extension or early report to a regularly scheduled shift for duty do not qualify the employee for the three (3) hour minimum.

Article 25 - Holidays:

25.1 There shall be eleven (11) holidays per year as follows:

*New Year's Day, January 1
Martin Luther King's Birthday, Third Monday in January
President's Day, Third Monday in February
Memorial Day, Last Monday in May
Independence Day, July 4th
Labor Day, First Monday in September
Veteran's Day, November 11
Thanksgiving Day, Fourth Thursday in November
Christmas Eve, One-half Day
Christmas Day, December 25th
New Year's Eve, One-half Day
Floating Day*

25.2 Employees who work on a holiday shall be paid at one and one-half (1-1/2) times their regular hourly rate of pay. Employees shall be paid in the month of December for the holidays they have earned beginning with

January 1, New Year's Day. The rate of pay shall be the rate in effect on the date of the holiday.

Upon learning that his claim for the "Holiday premium factor" of 1.75 hrs. had been rejected by the City, Detective Paulson consulted with his Union representatives (LELS) and a decision was reached to file a formal grievance concerning the issue.

THE GRIEVANCE

On January 28, 2012, Detective Paulson and LELS presented Captain Manias with a written Step 1 Grievance, concerning the denial of the claimed Holiday premium pay for Paulson's work on New Year's Eve, December 31, 2011. According to the grievance document, the grievance was being presented on behalf of Detective Paulson and "*all others similarly affected.*"²

The grievance recited the factual specifics of Detective Paulson's work call-out on New Year's Eve. It stated that Paulson submitted his hours for that work on his time card, including compensation for the hours actually worked (Article 13.1) and for the holiday time worked (Article 25.2). It noted that Paulson was subsequently notified by the City's finance department that he was only being compensated for the overtime hours worked.³

The grievance document concluded by stating that it is the Union's position that Detective Paulson and others who worked overtime during the contractually listed holidays are to be paid both overtime pay and holiday pay as per the cited sections of the contract.

On January 27, 2012, Captain Manias sent a letter to the Union advising them that he was denying the grievance, based on Articles 13.1 and 25.2 of the contract.

On February 3, 2012 the Union (LELS) sent a letter to Thomas Vonhof, the Chief of Police, advising him that the Union was appealing Captain Manias' denial of the grievance at Step 1. The Union's letter contained the same fact recitation, contract citations and requested remedy as those set forth in the original grievance document.

² Officers Jensen and Watson also worked overtime on December 31st, 2011 and also were not paid the additional "Holiday premium factor" pay, as claimed by Detective Paulson. However, neither of the officers subsequently chose to file grievances on that issue.

³ The record evidence and testimony subsequently established that the City did, in fact, pay him Overtime for the 7.5 hours worked on December 31 and also paid him the 4 hours of Holiday pay for the half-day New Year's Eve Holiday. The only element of his pay claim for December 31 that was denied by the City was his claim for the 1.75 hours of "Holiday premium pay".

On February 9, 2012, Police Chief Vonhof sent a letter to the Union acknowledging receipt and review of the grievance and simply stated that he was denying the grievance at Step 2.

On February 13, 2012, LELS sent a letter to Steve Mielke, the City Administrator, advising him that the Union was appealing Chief Vonhof's denial of the grievance at Step 2.

On February 17, 2012, the two union stewards, who had been previously handling the grievance with Detective Paulson, also sent a letter to Mr. Mielke, the City Administrator, appealing Chief Vonhof's Step 2 denial of the grievance. Their letter also advised Mr. Mielke that the bargaining unit officers had voted to change their bargaining representative from LELS to MPEA and requested that Mielke copy MPEA on further correspondence concerning this grievance.

On March 27, 2012, Mr. Mielke, the City Administrator, sent a letter to MPEA responding to the grievance appeal to Step 3. His response was as follows:

"I have reviewed the information received from both parties concerning the above referenced grievance alleging violation of Article 25.2 of the current labor agreement. I do not agree with the union's argument and am denying the grievance.

The grievance requests that we pay an employee holiday premium in addition to the overtime pay for the December 31, 2011 holiday. The stipulated article states, 'Employees who work on a holiday shall be paid at one and one-half (1 1/2) times their regular hourly rate of pay.' This has been consistently interpreted for over a decade to be a premium paid on regular hours and has not been applied to overtime hours. Therefore past practice supports the City's denial."

On March 28, 2012, MPEA sent a letter to MN BMS, w/copy to City, indicating that the Union was proceeding to arbitration on the grievance and requesting a list of perspective arbitrators.

Ergo, here we are in arbitration.

SUMMARY OF THE PARTIES' MAJOR ARGUMENTS

THE UNION:

The Union acknowledges that, given the nature of the underlying grievance in this matter, it bears the initial burden of proof to establish that a violation of the labor agreement has occurred. Based on the record testimony and evidence presented in the hearing, the Union is confident that it has met that burden.

It is the Union's position, in this matter, that the labor agreement expressly provides for two (2) different types of premium pay; 1) Holiday hours for those hours worked on a listed holiday per Article 25.1 and 2) the Overtime rate for those hours worked in excess of an employee's regularly scheduled 40 hour shift per Article 13.1. These two compensation premiums are covered by the two separate cited contract provisions and each provides a separate and distinct premium benefit to the employee.

Both the cited Articles must be given effect so that employees called into work on a holiday should be paid (hours actually worked times Holiday premium factor times regular pay rate) and (hours actually worked times regular pay rate times the Overtime time and one-half rate (1 1/2)). This calculation of pay for work performed on a holiday does not violate the provisions of Article 13.4, which specifically prohibits the "pyramiding" of overtime.

For Detective Paulson, the missing 1.75 hrs. of pay is based on a half-day Holiday premium factor of 0.25. If it had been a full-day holiday, the Holiday premium factor would have been 0.5.

Argument A: The labor agreement provides for different types of premium pay as different incentives for motivating employees and all applicable contract terms must be given effect.

As paid by the City for his work on December 31, 2011, Paulson received the same amount of compensation that he would have received had his call-in and 7.5 hours of work occurred on Friday, December 30, 2011. He received no extra compensation/consideration for the fact that he was required to work on a holiday, despite the fact that the agreement provides employees an extra incentive for working on holidays. This interpretation of the agreement by the City ignores the basic premise that "an interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred over an interpretation which leaves a part unreasonable, unlawful or of no effect. Restat. (2nd) of Contracts, §203(a). "Words and other conduct are interpreted in the light of all the circumstances and if the principal purpose of the parties is ascertainable, it is given great weight." Restat. (2nd) of Contracts §202(l). The only reasonable interpretation of Article 25.2 is to provide an incentive to employees to work on the most undesirable work days.

1. Overtime Pay. First, "Overtime" is defined in Article 3.8 of the Agreement as "*work performed at the express authorization of the Employer in excess of the Employee's scheduled shift.*" . Further, Employees are "*compensated at one and one-half (1 1/2) times the employee's regular pay rate...for hours worked in excess of the employee's regularly scheduled shift.*" Article 13.1.

Paulson submitted his time worked on December 31st as Overtime, because it was for hours worked in excess of his regular shift that week and the City did pay him appropriately for the 7.5 hours at the time and one-half rate.

2. Holiday Pay. Second, "*employees who work on a holiday shall be paid at one and one-half (1 1/2) times their regular hourly rate of pay.*" per Article 25.2. Article 25.1 lists 11 holidays that are to be paid at this rate, including New Year's Eve. However, the Christmas Eve and New Year's Eve holidays are only listed as "One-half day." Employees who work on either of these two half-days are effectively paid at one and one-quarter times their regular pay rate. This is paid during the regular pay cycle. Notably, Article 25.2 makes no mention of Overtime or pyramiding. On the other hand, neither Article 13.1 or 13.4 make any mention of Holiday pay.

Accordingly, Paulson worked on a half-day holiday so he should have been paid; 7.5 hours actually worked x 0.25 Holiday premium factor x his regular rate of pay.

3. Holiday Bank Differentiated. As noted in the hearing, per Article 25.1 of the agreement, all employees earn eleven (11) paid holidays over the course of the year. Paulson testified that a full-day holiday is paid at 8 hours and a half-day holiday is paid at 4 hours for a total of 88 hours of banked holiday pay per year. The banked holiday hours are paid in December as a lump sum payment.

Detective Paulson acknowledged, in the hearing, that he did receive payment of 4 hours of straight time holiday pay for the half-day New Year's Eve holiday, as part of his lump sum banked holiday payment in December, 2011.

If the anti-pyramiding provision in Article 13.4 does not apply, then the agreement requires payment for each of the above separately provided for pay incentives. The absence of anti-pyramiding language in any of the Holiday articles in the agreement supports this conclusion by the plain face of the agreement language.

Argument B: The Agreement does not prohibit premium pay for both Holiday and Overtime.

The Agreement says, "*for the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded or paid twice for the same hours worked.*" Pyramiding overtime has been defined "*...as an attempt by an employee to collect overtime pay for the same hours worked under two or*

more sections (sic) of the contract." See Teledyne Monarch Rubber, 61 LA 1052 (2011) (Baldwin, Arb.) or, alternatively, has been defined as "*...the payment of overtime on overtime.*"

The intention of the parties controls and the seminal case, New York Dock Railway v. U.S., 609 F.2d 83, 100-101 (2nd Cir., 1979) rejects a strict either-or approach, as argued by the City. In interpreting the relevant pyramiding term, the 2nd Circuit found that "*...an employee, in electing coverage under one set of employee protective conditions, should not be rendered ineligible to receive benefits contained in the other sets that have no counterpart in the set he elected.*" Here, the agreement restricts the application of the pyramiding prohibition to "*computing overtime*"; which has no counterpart in computing Holiday pay.

Here, the anti-pyramiding provision, as set forth in Article 13.4, has a specific meaning and application. This provision is intended to prohibit the calculation of the employee's Overtime rate based on another provision granting a premium for that shift, like Holiday pay. Pyramiding in this specific situation would be; Hours Worked x Regular Rate of Pay x Holiday Premium at time and one-half x Overtime Premium at time and one-half. Under this labor agreement, that would result in a pay rate of 2.25 times the number of hours worked. This prohibition is supported by the fact that the City's payroll system requires employees to manually include an additional 50% of *hours* when recording Holiday time, rather than simply granting an additional 50% *rate premium*, as it does for Overtime hours. The fact that Holiday hours are separately calculated leads to the conclusion that this is the only intended prohibition. Detective Paulson has not requested that his overtime rate be calculated on top of the Holiday premium.

Argument C: The City has not shown a past practice defense to support their interpretation.

In the hearing, the City made a great show of a stack of time sheet records in support of its contention that past practice prohibits the paying of both Overtime and Holiday premium pay. However, when reviewed and analyzed, those time sheets failed to prove the City's point.

"*Past Practice*" has been generally defined as a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances. Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance; 1) clarity and consistency, 2) longevity and repetition, 3) acceptability, 4) a consideration of the underlying circumstances and 5) mutuality.

Frankly, it is impossible to tell precisely from the time sheets offered into evidence to which specific hours during a given shift the Overtime and Holiday

premiums were applying. The arbitrator heard testimony from HR Manager, Cindi Joosten, who oversees the City's payroll operations. Under vigorous cross-examination, Ms. Joosten admitted that she did not have any context or facts behind how the hours worked were reflected by the time sheets submitted by an employee. However, the time sheets did list many cases where employees were paid both Overtime and Holiday pay on the same day. What those records do show is that these are *not* days when an employee was called to work nearly an entire work shift on a day off. Rather, almost all of the time sheets show either a minimal "hold-over" or situations involving three (3) hours of work or less. This is significant because the amount of additional compensation due the employee for Holiday pay is small, when compared to what they already receive for an eight or ten-hour shift at the Overtime rate. In those situations where employees should have claimed Overtime and Holiday pay, it is likely that the employee simply felt that the extra money was not worth the protracted 20-month battle this grievance has turned into or, alternatively, they were simply unaware of that benefit.

Ms. Joosten claimed that she was able to "tell" by looking at the time sheets that employees have not and are not paid for both Holiday and Overtime pay. However, during cross-examination, she acknowledged that there are very few situations like Paulson's, where an employee is called into work an extra shift on his normal day off, which also happens to be a designated Holiday. The majority of time sheets provided by the City show that an employee worked a regularly scheduled shift on a Holiday, but either stayed over after the end of the shift or came in early and, again, Joosten could not provide context or facts behind the hours worked, as shown on the time sheets. The majority of those time sheets that do show extra hours in addition to the regularly scheduled shift are below the three-hour call-in minimum, so it is impossible to tell whether the employee actually worked for three hours or just a few minutes. There is a significant difference for the employee between extending a regularly scheduled shift on a Holiday and being called into work a shift on a day the employee planned to be off work.

From the Union, the arbitrator also heard testimony from Paulson and Joosten; who both said that Paulson had been previously paid both Overtime and Holiday premium pay for Overtime work on a Holiday. One such instance occurred on Veterans Day, November 11, 2010. Paulson testified that this was the only other time that he could recall when he was called in to work an extra shift on a Holiday. Joosten testified that another employee, Troy Hokanson, was paid exactly as Paulson was and compensated for both the Veterans Day Holiday and Overtime premiums.

Additionally, Joosten testified that at least three (3) City managers/officials sign-off on every time sheet before it is paid. In Paulson's case, this meant that three City managers/officials approved payment for his 2010 Veterans Day Holiday work. First, Paulson's supervisor, the Chief of Police, approved the payment and

was in a position to know Paulson and the requirements for the extra shift. Then the time sheet was submitted to more City employees; who were supposedly checking for any discrepancies. During pay periods containing Holidays, one would expect that these people would be watching for "errors" in the calculation of Holiday pay. That all three of these individuals approved Paulson's payment claim for his work on Veterans Day suggests that it was not an "error" on their part.

This defeats the City's past practice argument because there is simply neither *clarity nor consistency* in the way in which the City has paid its police officers in this type of situation. If anything, the past practice is to pay for both Holiday time and Overtime premiums to employees when they work the majority of an extra shift on a Holiday.

Conclusion: Based upon the foregoing and the record testimony and evidence, as a whole, Grievant Paulson respectfully requests that this arbitrator sustain his grievance in full and direct the City to make him whole for the additional 1.75 hours of Holiday premium pay, which the City has thus far denied him. Additionally, the Union respectfully requests that the arbitrator direct the City to make whole all similarly situated employees who earned, but were also not paid Holiday premium pay from the date of the grievance filing forward.

THE EMPLOYER: We are all in agreement that this is a contract interpretation case and that the basic facts underlying the situation are largely undisputed.

It is acknowledged that Detective Paulson was called in to work on December 31, 2011, New Year's Eve, to investigate a case. By that date, Paulson had already completed his regularly scheduled workweek of at least 40 hours, so the hours worked on December 31 were Overtime hours and routinely merited payment at the time and one-half rate. This was required regardless of whether or not December 31st was a designated Holiday, per Article 13.1 of the applicable labor agreement. According to Article 25.1 of the agreement, December 31 also happened to be New Year's Eve and a designated Holiday (one-half day) and all eligible employees routinely received four (4) hours of Holiday pay at their regular rate of pay. Paulson claimed and acknowledges payment for the 7.5 hours worked at the Overtime rate, time and one-half, and also acknowledges that he received payment for the four (4) hours of Holiday pay, at his regular pay rate.

The issue herein arises from the fact that in his claim for compensation for his call-in work on December 31, 2011, he also claimed payment for an additional 1.75 hours. His calculations for the additional 1.75 hours was based on his reading of Article 25.2 which stated that if an employee worked on a designated Holiday, s/he would be paid for that work at one and one-half times their regular rate of pay. The record clearly shows how Paulson calculated what has been generally referred to as the "*Holiday premium pay*" or "*Holiday premium pay*

factor." The Holiday premium pay factor is separate and distinct from Holiday pay per Article 25.1.

When Detective Paulson's time card for the pay period, including December 31, came to HR Manager, Cindi Joosten, for routine review prior to payment, she deleted Paulson's claim for the 1.75 hours of Holiday premium pay.

Two other Officers, Jensen and Watson, also worked on December 31st and, like Paulson, were not paid any Holiday premium pay - only the four (4) hours of banked Holiday pay. Detective Paulson subsequently filed the instant grievance in this matter, but neither Jensen nor Watson chose to grieve their situations.

Ms. Joosten has worked for the City in the Human Resources (HR) Department for over twenty-five (25) years and for the past eight years has served as the Department Manager. She credibly testified that the labor contract covering the City's police officers, with respect to the computing of overtime and holiday pay, has remained unchanged during her tenure in HR. She noted that during her tenure, the City and the union representing the officers have negotiated more than ten (10) labor agreements.

Ms. Joosten testified that as a matter of contract application, the police department employees have not been paid anything akin to the Holiday premium pay factor. However, Ms. Joosten also testified that in preparing for this arbitration, she did discover two instances in calendar year 2010 where Paulson and another Officer were, in fact, erroneously paid the claimed "Holiday premium pay." However, with the exception of those two "mistakes," for the past 25 years the past practice with respect to Overtime and Holiday pay has been absolutely consistent. Holiday pay has never been pyramided with overtime pay.

The City entered six (6) years of time cards into the record where overtime was worked on a holiday by some 116 (103 excluding sergeants, who are not part of this bargaining unit) employees. Of the 103, only two employees, Paulson and another officer, were mistakenly paid Holiday premium pay in 2010. In calendar year 2011, there were 25 employees who worked overtime on a holiday and not one was paid the so-called Holiday premium pay.

The arbitrator should note, as indicated in the hearing, that the language in Articles 13 and 25 has remained unchanged in the 2012-2013 labor agreement between the City and MPEA.

Arguments:

Under Article 25.1 of the applicable labor agreement, bargaining unit employees receive ten full-day holidays and two half-day holidays. At the beginning of the calendar year, the holidays are "banked" and are paid out in December, regardless of whether or not the employee worked on a holiday. Article 25.2 provides, "*employees who work on a holiday shall be paid at one and one-half (1*

1/2) times their regular rate of pay." Article 25 is silent on how this integrates with otherwise working overtime, but Article 13.4 provides an answer: *"For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded or paid twice for the same hours worked.*

These provisions have been in the Parties' successive labor agreements for over twenty-five years and they have been interpreted by both Parties to mean that when employees work overtime on a holiday, they are paid time and one-half for overtime plus they receive their banked holiday pay in December. The holiday pay and overtime are not pyramided and employees are not paid any additional half-time for working overtime on the holiday. If this long-standing contract language and long-standing past practice are to change, that change must take place at the bargaining table. During the 2012 contract negotiations, the City proposed an amendment to the Holiday Article, as part of a proposal package, but the Union rejected the package, thereby leaving the language of Article 25 unchanged.

With respect to past practice, to be binding upon both parties, a past practice must be 1) *unequivocal*, 2) *clearly enunciated and acted upon* and 3) *ascertainable as a fixed and established practice accepted by both parties.* Elkouri and Elkouri, How Arbitration Works, 608 (6th ed. 2003).

It is also well accepted that:

A union-management contract is far more than words on paper. It is also all the understandings, interpretation and mutually acceptable habits of action which have grown up and around it over the course of time. Stable and peaceful relations between the parties depend upon the development of a mutually satisfactory superstructure of understanding which gives operating significance and practicality to the purely legal wording of the written contract. Coca-Cola Bottling Co., 9 LA 197 (1947) (Jacobs, Arb.)

The National Academy of Arbitrators Forum, published by the Michigan Law Review, defines past practice as a course of conduct that is *"shown to be the understood and accepted way of doing things over an extended period of time."*

Richard Mittenenthal, Past Practice and the Administration of Collective Bargaining, 59 Mich. L. Rev. 1017, 1019 (1961). "[E]stablished practices which were in existence when [a collective bargaining] agreement was negotiated and which were not discussed during negotiations are binding upon the parties and must be continued for the life of the agreement." *Id.* at 1035, see also Greater Minnesota AFSCME Council 65 v. Virginia Regional Medical Center, BMS Case No. 11-HA-935 (2011) (Frankman, Arb.); Minnesota Teamsters Public & Law Enforcement Employees Local No. 320 v. County of Beltrami, BMS Case No. 09-PA-0912 (2010) (Bognanno, Arb.). The Minnesota Supreme Court has ruled, in Ramsey County v. AFSCME Council 91, Local 8, 309 N.W.2d 785, 793 (Minn. 1981), that past practice can even supersede unambiguous contract language.

For at least the past twenty-five years the past practice has been unequivocal and has been acted upon and accepted by the Parties. When an employee works overtime on a holiday, the employee is paid time and one-half for the overtime hours and is paid banked holiday pay in December for the holiday itself. Nothing additional is paid for overtime worked on a holiday.

The Union introduced three arbitration awards at the hearing as Exhibits. None involve the past practice present here, none have a similar bargaining history and none have similar contract language.

Law enforcement Labor Services v. St. Cloud, BMS Case No. 07-PA-0461 (2008) (Bognanno, Arb.) This case involved very different contract language, did not have an anti-pyramiding provision and had little or no past practice in its interpretation. The Arbitrator noted, "*the contract does not explicitly prohibit pyramiding of premium pay and...the City's contract with the City's police sergeants explicitly does.*" Id at 13.

Law Enforcement Labor Services v. City of Winona, BMS Case No. 09-PA-0178 (2009) (Fields, Arb.) has an interesting discussion of laches and estoppel, but the case involves the interpretation and application of a shift differential clause which is unrelated to the issues in this matter.

Cambridge Medical Center v. International Union of Operating Engineers, Local 70, FMCS Case No. 061220-50874-7 (2006) (Jacobs, Arb.) involved a pyramiding provision that Arbitrator Jacobs found "ambiguous" and which he interpreted in view of the bargaining history and surrounding facts. He noted, "*The testimony from the witnesses was similarly murky and clear-cut conclusions about what was actually agreed to were difficult at best.*" Id at 12. He also found that "*there was insufficient showing that the practice was consistent either in time or throughout the facility to constitute a binding past practice.*" Id at 10.

In stark contrast, the bargaining history and past practice are clear and consistent in this arbitration matter. With the exception of two (2) mistakes or errors, for at least the past twenty-five years, with the same pertinent labor agreement language carried forward in more than ten (10) labor contracts, holiday pay has never pyramided on top of overtime pay.

Conclusion:

The Employer - City respectfully urges this arbitrator to deny the Grievance in its entirety. The Union bears the burden of proving by a preponderance of the evidence that the contract has been violated and it has not done so. Under the plain language of the labor agreement, the bargaining history and long-standing past practice, the Grievant is not entitled to an additional 1.75 hours of holiday pay in addition to the time and one-half overtime pay and four hours of holiday pay he has already received for the work he performed on December 31, 2011.

ANALYSIS, DISCUSSION AND FINDINGS

As clearly outlined and noted previously, the factual situation herein is undisputed. To review the salient points;

- Detective Paulson was called in to work on 12/31/11, New Year's Eve and worked 7.5 hours.
- As of the New Year's Eve call-in, Paulson had already completed his regular 40 hour shift schedule for that week, so any additional hours worked in that pay period were considered Overtime, per Article 13.1 of the labor agreement, and were paid at one and one-half times his regular rate of pay.⁴ Accordingly, he was paid for 7.5 actual hours of work times the 1.5 Overtime rate or 11.25 hours at straight time.
- Paulson was called in to work outside of his regular shift schedule and Article 15 of the labor agreement provides that he be paid a minimum of three (3) hours at one and one-half his regular rate of pay. However, because Paulson worked more than three (3) hours on the 12/31/11 call-in and his hours that day already qualified for Overtime pay per Article 13.1; this contractual requirement became moot.
- Regardless of whether or not Paulson had actually worked on 12/31/11, he was eligible for four (4) hours (half-day) at his regular pay rate as Holiday pay per Article 25.1. Accordingly, he received four hours of Holiday pay at straight time.
- However, Paulson, in completing his time sheet for the week's work, apparently noted the language of Article 25.2 which states that "*Employees who work on a holiday shall be paid at one and one-half (1 1/2) times their regular hourly rate of pay.*" He apparently concluded that provision constituted what has been referred to herein as "Holiday premium pay." Paulson then computed what he considered to be the amount of Holiday premium pay to which he was entitled per Article 25.2;
 - Step 1 - Determine hours actually worked on holiday = 7.5.
 - Step 2 - Calculate the Holiday premium pay factor = 0.5 for a full holiday or 0.25 for a half-day holiday.
 - Step 3 - Multiply the hours worked on the holiday (7.5) by the appropriate Holiday premium factor (0.25 for New Year's Eve) = 1.875 hours of Holiday premium pay. On his time sheet entry, Paulson "rounded" the 1.875 figure down to 1.75 hours.
- Paulson subsequently turned in his completed time sheet and claimed pay for his call-in work on 12/31/11 as; 1) 7.5 hours at the Overtime rate or 11.25 hours straight time, 2) Holiday pay for the New Year's Eve half-day holiday, four (4) hours at straight time and 3) 1.765 hours of Holiday

⁴ Alternatively, Paulson would have also received time and one-half pay for those 7.5 hours per Article 15 - Call Back Time or Article 25.2 - Holidays.

premium pay at straight time. These three components of his pay claim totaled 17 straight time hours.

- Upon subsequent review of his pay claim, the City rejected/deleted his claim for 1.75 hours of Holiday premium pay and he was paid for 15.25 straight time hours for his call-in work and holiday pay for 12/31/11.

The Union argues that the plain language of Article 25.2 fully supports Paulson's claim and by failing to give full force and effect to that provision, the City is clearly in violation of the Agreement. The Union also contends that a purpose of the language in Article 25.2 is to provide an incentive or reward to employees who are summoned to work holidays, rather than being able to enjoy the holiday with family.

The City responds by pointing out that the contract articles and provisions being cited by the Union in support of its grievance have been unchanged and contained in at least ten previous labor agreements. The City further argues that for the past twenty or more years it has never recognized Article 25.2 as providing for any Holiday premium pay or similar concept. It notes that, with the exception of two administrative "errors" or "mistakes" that occurred in 2010, it has never paid employees Holiday premium pay for work performed on holidays over the course of the past twenty or more years. The City further notes, that this practice has been with the union's full knowledge and approval during that period, until the filing of the instant grievance in January 2012. Finally, the City points out that both Article 13.1 and 25.2 provide for payment at the Overtime rate of one and one-half (1 1/2) times the employee's regular rate of pay. It notes that Article 13.4 states that, "*For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded or paid twice for the same hours worked.*"

Contract language: In the grievance, the Union repeatedly referenced Article 13.1 and Article 25.2 as the provisions of the labor agreement violated by the City's refusal to pay Paulson, *et. al.* what is referred to herein as Holiday premium pay. However, nowhere in the grievance documents does the Union explain or detail exactly how those Articles relate to the grievance issue. In fact, in some of those documents, the Union acknowledges that Paulson was paid Overtime pay for the 7.5 hours, but alleges that the City denied him "holiday pay". We now know, of course, that he did indeed receive the four (4) hours of holiday pay for New Year's Eve. The only item the City refused to pay was his claim for the 1.75 hours of "Holiday premium pay."

I have carefully analyzed Articles 13.1, 25.2 and all the other cited and related Articles and sections of the applicable labor agreement with respect to "holiday premium pay" or any remotely similar concept or provision. I utilized both an Objective and a Subjective perspective. Neither of those approaches revealed any contract language which arguably could even remotely authorize, sanction, or cover the concept of "holiday premium pay."

It is an axiom that in order to have a valid grievance, the grievant must be able to cite specific language in the contract that establishes the basis for the grievance. A "grievance" by definition is an alleged violation of the applicable labor agreement and the grievant must be able to point to a specific section(s) of the contract that are directly relevant to the issue being grieved. Also, as I noted in the hearing, *"If it isn't in the contract, then you probably don't have it."*

In view of the foregoing, I find that there is no language in the applicable labor agreement which arguably requires the City to pay "Holiday premium pay", in addition to regular holiday pay to employees who are required to work on a designated holiday.

Pyramiding, Article 13.4: The Union contends that the language in Article 13.4, which prohibits "pyramiding" or "compounding" overtime pay does not apply to Holiday premium pay because there is no nexus or relationship between overtime pay and Holiday premium pay. It specifically points out that the prohibition occurs only in Article 13 regarding Overtime and there is no reference or cross-reference to Article 25 - Holidays.

Article 13.4 specifically states that, *"For the purpose of computing overtime compensation, overtime hours worked shall not be pyramided, compounded or paid twice for the same hours worked."*

I agree with the Union to the extent that there does not appear to be any specific nexus or relationship between Article 13.4 and Article 25. However, in reviewing Detective Paulson's formula from calculating Holiday premium pay, I note that he uses his 7.5 hours worked on 12/31/11 as the basis for the calculation of the Holiday premium pay amount. One might possibly contend that the 1.75 hrs resulting from the computation constitutes paying him twice for a portion of the same 7.5 hours. Since I am not 100% certain as to what basis was used to pay Paulson time and one-half for the 7.5 hours - see Footnote 4 - I am going to refrain from making a formal finding on this item.

Past Practice: The Union argues that, based on the review of the six years of time sheets presented in the hearing and the fact that in 2010 the City did pay claims for Paulson and another officer both of whom claimed "Holiday premium pay"; that no clear-cut past pattern of practice exists. I find this Union argument to be without merit for the following reasons:

- With the exception of those two administrative "errors" or "mistakes", it is otherwise undisputed that the City has routinely processed and paid employees who work on designed holidays in exactly the same manner as Paulson for his holiday work on 12/31/11 for at least the past twenty-some years. I do not find that the two "errors" or mistakes that occurred in 2010 are sufficient in nature or scope to invalidate the historical procedure.

- During those twenty-some years, there were no grievances or other disputes with the union regarding that holiday pay procedure and process, until the instant grievance.⁵
- The fact that the relevant contract language and the holiday pay process have remained unchanged and in full force and effect for at least two decades demonstrates that there has been a firm and demonstrable bargaining agreement and understanding between the Parties with regard to the holiday pay process. As a result, there has been a historical agreement between the Parties as to the interpretation and application of the relevant contract language to the holiday pay process and procedure.
- Via this grievance, the Union is essentially seeking to modify or amend the existing agreement to include a newly created employee benefit - Holiday premium pay - and is hoping to convince this arbitrator to adopt said benefit by arbitral fiat. Such action would also require the arbitrator to specifically revoke or set aside the existing historically agreed-upon interpretation and application of the contract.

The Union also argues, relatedly, that 1) the language of Article 25 is meant to provide an "incentive" for employees to work on holidays ("undesirable days") and Holiday premium pay in part of that "incentive" and 2) there is no language in the contract which prevents the City from paying "holiday premium pay".

With respect to the Union's "incentive" contention, I would note that unlike other types of employers, law enforcement departments and agencies don't necessarily have to provide "incentives" to entice employees to come to work. As quasi-military organizations, these agencies and departments have the inherent ability and authority to "order" employees to report to work and employees, by their oath and professional principles and mission, are bound to follow such orders. That said, of course, those departments and agencies do their best to try to minimize and soften the effects of such call-outs on both the officers and their families, but inevitably the mission comes first. Accordingly, I find this Union argument to be irrelevant to the Issue.

With respect to the contention that the applicable agreement doesn't contain any language to prevent the City from paying "Holiday premium pay"; I would agree wholeheartedly. The agreement also doesn't prevent the City from presenting a turkey to each employee around Thanksgiving - but that certainly doesn't empower the Union to require the City to do so. Remember; If it isn't in the contract, then you probably don't have it. See *Article 5.2 - Employer Authority*.

Finally, I have noted that MPEA became the new bargaining representative for the City's police officer unit in about March of 2012. MPEA succeeded and replaced Law Enforcement Labor Services (LELS) as the bargaining

⁵ I do note that LELS, or its predecessors, never questioned or challenged the holiday pay process/procedure, over the course of the preceding twenty-some years, until the Paulson situation unfolded in January, 2012. Why then did it become a *cause celebre*?

representative and also agreed to accept the 2011 labor agreement which had been previously negotiated by LELS.⁶ In stepping into the role of bargaining representative for the unit and adopting the labor agreement, MPEA also acquired not only the written contract, itself, but also the entire bargaining history; including the negotiations, grievance and arbitration history that are part of the contract history.

Based upon the foregoing and the record evidence and testimony, as a whole, I find as follows:

1. I find there is a total absence of evidence to indicate that the Parties to the applicable labor agreement ever discussed, negotiated or otherwise bargained about "Holiday premium pay" or any related compensation concept nor any evidence that they ever agreed to adopt such a benefit.
2. I can find no specific or relevant contract language that arguably can be construed to require the City to pay employees, who work on a designated holiday, what is referred to herein as "Holiday premium pay." In the absence of such language, by adopting the Union's position, I would be modifying, amending and/or adding to the contract agreement. Article 7.5(a) specifically prohibits me from taking such action and if I were so bold as to try, the courts would not approve such an action.
3. I also find that the City's current Holiday pay procedure and process is firmly based on a unequivocal, consistent, and commonly accepted interpretation and application of the relevant contract language that has existed, with the agreement of the Parties, for the past twenty or more years. The Union has provided no cogent basis, in fact or in law, sufficient to revoke or modify that existing interpretation and application.

CONCLUSION

In view of my analysis, discussion and findings above, I, therefore, conclude that the Union has failed to meet its burden of proof and establish by a preponderance of the evidence that the City-Employer violated the provisions of the applicable labor agreement, as alleged.

DECISION

Having concluded that the Employer did not violate the applicable labor agreement, as alleged by the Union in its Grievance of January 18, 2012, the grievance is hereby denied and is dismissed.

⁶ Paulson's grievance of January 18, 2012 was initially filed and processed by LELS. MPEA took over processing of the grievance in March, 2012 and apparently made the formal decision to proceed to arbitration.

Dated at Minneapolis, Minnesota, this 6th day of September, 2013.

/s/ Frank E. Kapsch, Jr.
Arbitrator

Note: I shall retain jurisdiction in this matter for a period of fourteen (14) calendar days from the issuance of this Decision to address any questions or problems related thereto.