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In the Matter of the Arbitration  
of a Dispute Between

CITY OF NORTH ST PAUL

Tuerk Overtime Grievance  
BMS Case No. 11-PA-0933

and

LAW ENFORCEMENT LABOR SERVICES, INC

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APPEARANCES:

Abrams & Schmidt LLC, by Ms. Marylee Abrams, Attorney at Law, appearing on behalf  
of the City

Mr. Scott A. Higbee, Staff Attorney, Law Enforcement Services Inc., appearing on behalf  
of the Union

**ARBITRATION AWARD**

City of North St. Paul, hereinafter the City or Employer, and Law Enforcement Services Inc., hereinafter the Union, are parties to a collective bargaining agreement providing for the submission of grievances to final and binding arbitration before an arbitrator selected by them. A hearing in the captioned matter was held by the undersigned on September 13, 2013, in North St. Paul, Minnesota. <sup>1</sup> The parties submitted post-hearing briefs the last of which was received by the undersigned on September 27, 2013

ISSUE:

The parties stipulated that the undersigned to the following statement of the issue to be resolved by the undersigned:

Did the Employer violate the labor agreement when it denied Officer Tuerk .25 hours of overtime on February 4, 2013?

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<sup>1</sup> At hearing, the parties stipulated the undersigned has 60 days from the receipt of briefs to issue his award in this matter.

PERTINENT CONTRACT LANGUAGE:

ARTICLE III – DEFINITIONS

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- 3.9 OVERTIME: Work performed at the express authorization of the EMPLOYER in excess of the employee's regular scheduled shift.

ARTICLE VII EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE

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- 7.5 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.

ARTICLE XII – WORK SCHEDULES

- 12.1 The normal work year is two thousand eighty hours (2,080) to be accounted for by each employee through:
- a) hours worked on assigned shifts;
  - b) holidays;
  - c) assigned training;
  - d) authorized leave time
- 12.2 Holidays and authorized leave time are to be calculated on the basis of the actual length of time of the assigned shifts.
- 12.3 Nothing contained in this or any other ARTICLE shall be interpreted to be a guarantee of a minimum or maximum number of hours the EMPLOYER may assign employees.

ARTICLE XIII – OVERTIME

- 13.1 Employees will be compensated at one and one-half (1½) times the employee's regular base pay rate for hours worked in excess of the employee's regularly scheduled shift. Changes of shift do not qualify an employee for overtime under this ARTICLE.
- 13.2 Overtime will be distributed as equally as practicable.
- 13.3 Overtime refused by employees will for record purposes under Section 13.2 be considered as unpaid overtime.
- 13.4 For purposes of computing overtime compensation, overtime hours worked shall not be pyramided, compounded or paid twice for the same hours worked.
- 13.5 Overtime will be calculated to the nearest fifteen (15) minutes.

13.6 Employees have the obligation to work overtime or call backs if requested by the EMPLOYER unless unusual circumstances prevent the employee from so working.

BACKGROUND:

The grievant, Officer Tuerk began his employment with the City in 2008 as a Patrol Officer. On January 11, 2011, Sergeant Bomstad advised all department officers via a memo that “during the two weeks of January 24<sup>th</sup> –28<sup>th</sup> and January 31<sup>st</sup> – February 4<sup>th</sup> , 2011,” there would be a low light barricade shoot at the East Metro Firearms Range (Ramsey County LEC). His memo also stated, “ [E]veryone should attend on-duty as time allows or as an extension of your shift either prior or after”, and that the range hours for the shoot would be from 0530 hours to 2030 hours. On February 3-4, 2011, Tuerk was scheduled and did work the 11 p.m. (2300 hours) to 7 a.m. (0700 hours) shift, and had not yet been able to attend that low light barricade shoot. He testified he had been unable to attend because there was only one overlapping day per week when there were three officers on the overnight shift, and that the City always wanted two officers on duty and within the City at all times. He stated that he thought the two days during the time frame for the shoot were January 27<sup>th</sup> and February 4<sup>th</sup>. He also testified at that time in 2011 he was working an 8 hour shift with five days on duty and 2 days off duty.

Tuerk testified that he discussed with Sergeant Hanson that Hanson would attend the shoot first on the morning of February 4<sup>th</sup> and that he would go when Hanson returned to the City from the shoot. He said he did not expect the shoot would be completed within his regular shift hours and in order to minimize the time to get to the shoot and back he waited in his squad car so he could leave as soon as Sergeant Hanson returned. Tuerk’s Daily Patrol Log shows that he reported leaving for the shoot at 0621 hours and returned at 0713 hours. He subsequently submitted a request for .25 hours overtime because he had returned from the shoot 13 minutes after the end of his scheduled shift on February 4<sup>th</sup>. Initially, his request for overtime compensation was approved by Sergeant Bomstad, but was later denied by the Department. Tuerk grieved the denial of his request for overtime compensation for the time that he worked beyond the end of his regularly scheduled shift in attending the shoot, and that grievance is the subject of this arbitration award.

PARTIES' ARGUMENTS:

The Union contends that because officer Tuerk worked in excess of his regularly scheduled shift on February 4, 2011, he is, therefore, entitled to overtime compensation as provided in Article XIII Overtime “for hours worked in excess of his regularly scheduled shift”. It claims that Tuerk attended the mandatory shoot with the permission of his Sergeant under circumstances where working beyond his shift was inevitable. The Union argues that the undersigned should resist the City’s invitation to read limitations into Article XIII that are not present. It asserts that while the City quibbles with Tuerk’s assertion that Sergeant Hanson would not allow officers to attend training if it would mean only one officer would be on duty in the City, but called no witnesses to dispute his testimony. It also argues that if that were not the case then Sergeant Hanson would have encouraged Tuerk to attend the shoot at the same time he attended or at least allowed Tuerk to leave the City before he, Hanson, had returned. The Union also contends that the City’s response to the grievance implies that Tuerk manipulated the situation in order to claim overtime is not supported by the facts. It points out that Tuerk attended the shoot on one of the only two times that was available to him, his sergeant authorized his attendance at a time when he could not complete the shoot before the end of his shift. It also argues that this situation is no different from when Tuerk worked overtime on February 11, 2011, completing a DWI arrest that lasted until 0712 hours and received .25 hours of overtime compensation.

The Union insists that the language of Article XIII is clear and unambiguous and should be applied as written. It argues that the City’s claim that employees are not entitled to overtime compensation unless the employee is on pace to work 2080 hours in a year is misplaced, referencing the Fair Labor Standard Act (FLSA) provision adopting the concept of “tour of duty” when addressing the issue of overtime hours. The Union argues that while the FLSA recognizes that law enforcement employees work schedules may not yield a convenient 40 hour week every week and allows employers to avoid overtime obligations in long calendar week periods because it is understood that the overage will be balanced out by shortages in other weeks. It asserts, however, that in this case the City had adopted a 40-hour workweek schedule in 2010 with officers working five days on and two days off and, thus, officer Tuerk would inevitably reach 2080 hours

over the course of 52 weeks. The Union claims that the City's assertion that the 40 hour work week could change in the future is speculation and not the basis for determining overtime compensation entitlement. It also argues that there is no reference in Article XIII Overtime to the 2080 hours and the Article XII reference to 2080 hours deals with the "normal work year", and does not in any way indicate it is intended as a limitation on overtime.

The City argues Articles XII and XIII of the collective bargaining agreement govern the matter of overtime compensation. Article XII states officers' work schedules are based upon 2080 hours and sets forth how those hours are to be accounted for, including assigned training time. It asserts that Chief Lauth testified that the officers' work schedules have changed over the years due to staffing needs of the community and the number of available officers. It argues that officers are currently working a 6-3 schedule, which requires careful monitoring to insure officers put in the requisite 2080 hours. It also contends that whenever officers have been assigned mandatory training they have been compensated at straight time until they have met the 2080 hour requirement.

The City also argues that past practice supports its interpretation of the contract language in that on November 3, 2010, Officer Tuerk attended a firearm shoot for 3 hours while off duty, had not yet reached his 2080 hours, and was paid at straight time. It also asserts that in 2010 Tuerk worked other hours in excess of his regular assigned shift, was paid at his straight time hourly rate for those overtime hours, and did not grieve. The City argues that the time records for officers Degoey, Larsen, Lang O'Hern, Theisen, and Wahlberg show that they also attended the shoot in January/February 2011, which extended their shifts and put in for straight time, not overtime, compensation.

The City asserts that it is a fundamental principle of labor relations that the Union cannot achieve through grievance arbitration what it could not acquire through negotiation. Both Chief Lauth and Tuerk testified that the Union had previously proposed changes to the 2080 hours language in prior contract negotiations, but that the Union was unsuccessful in changing the language. It claims that the Union is now asking the arbitrator to change the definition in the contract at Article XII governing 2080 time, but that the bargaining history weighs against the Union's position.

The Employer also argues the collective bargaining agreement must be considered as a whole, that language should not be interpreted in such a way as to nullify or render meaningless other language in the agreement, and that all words and clauses of the agreement need to be given weight and meaning. It claims adopting the Union's arguments in this case would require the arbitrator to ignore the language of Article XII and the parties' consistent past interpretation of it.

#### DISCUSSION:

While this grievance is only for .25 hours of overtime compensation, the parties indicated at hearing the grievance was advanced to arbitration because of the contract interpretation issue the grievance presents, and because there were other grievances pending that raise the same language interpretation question. The task for the undersigned is to interpret and apply the parties' collective bargaining agreement's Articles XII Work Schedules and XIII Overtime to Tuerk's grievance claiming entitlement to .25 hours of overtime for attending a mandatory firearms shoot. The Union argues that the language of Article XIII Overtime governs the grievance, whereas, the City contends that the right to overtime in this case is controlled by Article XII Work Schedules. The record evidence is that apparently this is the first occasion when an officer has requested overtime compensation when he/she worked beyond the scheduled ending time for his/her regular shift hours while attending a firearms shoot. Before this occasion officers put in for straight time pay for the time spent beyond the end of their regular shift ending time attending a shoot. The City argues that has been the case because the collective bargaining agreement requires officers to work 2080 hours per year and until they have worked 2080 hours, or are "on track to work 2080 hours" in a work year, they are not entitled to overtime compensation. The Union, on the other hand, argues that the language of Article XIII overtime is clear and unambiguous and obligates the City to grant .25 hours of overtime pay to Tuerk for the time he worked beyond the end of his regularly scheduled shift attending the mandatory shoot on February 4, 2011.

In order to resolve the parties' dispute, the undersigned must carefully examine the provisions of their collective bargaining agreement and any practices bearing upon their dispute. Looking first to the parties contract, Article XIII Overtime states,

“[E]mployees will be compensated at one and one-half (1½) times the employee’s regular base pay rate for hours worked in excess of the employee’s regularly scheduled shift”.

That language of Article XIII, in the undersigned’s opinion, is explicit, clear on its face, and written using the mandatory language, “will be compensated”. There is no ambiguity regarding when an employee is to be compensated at a premium pay rate – “for hours worked in excess of the employee’s regularly scheduled shift”.

On February 3<sup>rd</sup> and 4<sup>th</sup> 2011, Tuerk was working the 11 p.m. to 7 a.m. (2300 – 0700) shift and worked 13 minutes beyond 7 a.m., the scheduled end of his shift. Overtime is defined at Article III Definitions as being, “[W]ork performed at the express authorization of the EMPLOYER in excess of the employee’s regular scheduled shift”. The Employer argues, in essence, that the language of Article XII Work Hours creates an exception to the Article XIII requirement regarding overtime compensation when an employee who works beyond the end of his/her regular shift, but is not on track to meet the 2080 hour “normal work year” requirement. Sergeant Bomstad articulated the City’s rationale in his February 21, 2011, letter denying Tuerk’s overtime compensation grievance stating,

“[U]pon checking the projected scheduled hrs I observed that you are approximately 7.75 hours short of the projected 520 hrs by March (512.25/520 March hrs)”.<sup>2</sup>

The City argues that it has consistently dealt with these same circumstances in the past, including with Tuerk, and its treatment of those hours has not been grieved. And, Chief Lauth testified that since at least 2005, when he became Acting Chief, training time has been compensated as part of the 2080 hours and compensated at straight time. He said that if an employee is already at 2080 hours and there is no way to accomplish the training within the 2080 hours then the City would pay overtime, but that mandatory training does not generate overtime.

After considering the contract language and the parties prior history the undersigned is persuaded, for several reasons, that the City’s reliance upon Article XII to

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<sup>2</sup> Bomstad testified that his reference to 520 hours in his letter denying Tuerk’s grievance was derived from dividing 2080 hours by 4, which equaled 520 hours, that January through March represented ¼ of a calendar year, and that Tuerk, in order to be on pace to satisfy the 2080 normal work year hours requirement for 2011, would have to have worked 520 hours by the end of March 2011.

deny Tuerk's claim for .25 hours of overtime compensation cannot overcome the clear language of Article XIII. First, Article XII does not deal with compensation, but rather only provides that the normal work year for employees is 2080 hours. The record evidence is that the City has in the past had numerous different work schedules for its officers, e.g. 4 on 4 off, 5 on 5 off, 6 on 3 off etc. The Chief testified that in the Fall of 2010 the City was no longer able to sustain the 4 days on 4 days off 10.5 hours per shift work schedule then in effect and went to a 5 days on 2 days off 8 hours per shift schedule for the remainder of 2010 and all of 2011 before changing to a 6 days on 3 days off work schedule. Clearly, the obvious significance of the 2080 hour "normal work year" language is to ensure that regardless of what work schedule the City utilizes it can require officers to work at least 2080 in a work year. But, that language does not deal with the issue of how employees are to be compensated for their hours worked, nor does it provide that an employee is only eligible for overtime compensation after he/she has already worked 2080 hours in the work year or is on track to do so.

The City has also argued that in past negotiations the Union attempted to change the language of Article XII without success, and concludes that this grievance is an attempt to achieve in arbitration what it did not achieve in past negotiations. It infers that the Union was attempting to change the 2080 hour language of Article XII so that an officer would be eligible to receive overtime compensation even when he/she was not, at that time, on track to work 2080 hours. However, the record evidence does not establish the City's claim. Chief Lauth testified only that the Union has in prior collective bargaining attempted to modify the 2080 hour language and was not successful, but offered no specifics regarding the Union's bargaining proposals, other bargaining history, or testified the Union's proposals to change the 2080 hour language was directed at preventing the City from denying overtime compensation to employees who had not yet worked 2080 hours and were not on track to work 2080 hours when the overtime occurred. Were there such evidence it would foot its argument that this grievance is an attempt by the Union to achieve in arbitration what it was unable to achieve in prior contract negotiations. But, there is no such record evidence.

The City also points to the Article XII reference to training time as hours worked to be included among those hours that can be counted toward satisfying the 2080 hour

requirement and argues that those hours are, therefore, to be compensated at straight time and not considered as overtime, regardless when worked. Again, the language of Article XII doesn't state that and it merely sets forth what employee hours can be utilized in satisfying the 2080 requirement, not the rate of pay at which the employee will be compensated for those hours worked.

The City asserts that if the undersigned were to uphold the grievance he would be nullifying or rendering surplus the language of Article XII and in doing so would violate generally accepted principles of contract interpretation. I disagree. First, as discussed earlier, Article XII does not deal with employee compensation and, just as innumerable other collective bargaining agreements set forth what is the normal work day, work week, etc, merely sets forth an employee's "normal" work year work hours requirement. It also articulates what work assignments, etc. will count toward the required the 2080 hours - hours worked on assigned shifts; holidays; assigned training; authorized leave time. Article XII further goes on to state,

"Nothing contained in this or any other ARTICLE shall be interpreted to be a guarantee of a minimum or maximum number of hours the EMPLOYER may assign employees."

Just as Article XII doesn't deal with employee compensation it also doesn't guarantee that an employee will be scheduled to work 2080 hours in a work year. For these reasons even if Article XIII Overtime is interpreted as requiring that employees receive overtime premium pay compensation for hours/time worked outside of their regularly scheduled work shift when they have not yet worked 2080 hours and are not on track to do so in the work year, Article XII has not been rendered meaningless or a nullified.

Even though the City has a history of not granting premium pay to employees for overtime hours worked, this case differs from the more common situation involving a past practice that has developed when the contract is either silent or ambiguous. In that situation a party no longer wanting to be bound by the practice generally announces its intention to no longer be bound by the practice under the successor contract, thus affording the other party the opportunity to contractualize the practice during negotiations for the successor agreement. Failure to do so then results in the termination of the practice. However, unlike that scenario, in this case the language of Article XIII

regarding employee compensation for overtime hours worked is clear and unambiguous. Even though the Union, for whatever its reasons, previously chose not to enforce the clear and unambiguous language of Article XIII, it is not estopped from doing so now. Furthermore, as Article VII makes clear, the undersigned “shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this AGREEMENT”. The City would have me read into the language of Article XII a requirement that employees have worked or be on tract to work 2080 hours before the clear and unambiguous overtime language of Article XIII is binding upon the City. Article XII, as currently written, makes no such provision. If it were the case that Article XIII was ambiguous or the contract was silent with regard to when overtime premium pay compensation is owed an employee for hours work beyond the employee’s regularly scheduled hours, which it is not, then the evidence adduced in this case would establish a binding past practice. Thus, the undersigned cannot ignore the requirement of Article XIII.

The Union requests that the undersign award Tuerk .25 hours of overtime compensation at 1½ times his straight time hourly rate for the time he worked beyond the end of his regular shift attending the mandatory firearms shoot on February 4, 2011. Notwithstanding that I have concluded Article XIII requires the City to compensate employees at 1½ times their straight time hourly rate of pay for overtime hours worked, regardless of whether an employee has worked or is on tract to work 2080 hours in that that work year when the overtime hours are worked, the collective bargaining agreement at Article III ,Section 3.9 also defines overtime as

“Work performed at the express authorization of the EMPLOYER in excess of the employee’s regular scheduled shift.”

The Union contends that because Sergeant Bomstad’s January 11, 2011, memo directing officers to attend the shoot stated,

“[E]veryone should attend on-duty as time allows or as an extension of your shift either prior or after”

the City thereby authorized that employees receive overtime compensation if they extended their work shift in order to attend the shoot. The undersigned disagrees that is the appropriate remedy in this case. It is clear Bomstad’s memo authorized employees to

extend their work shift to attend the shoot. However, in the undersigned's opinion, in light of the City's prior practice of not compensating employees at the overtime premium rate for hours worked outside their regularly scheduled work hours when they had not already worked 2080 hours in the work year and were not on track to do so there would be no reason for Bomstad to believe that his directive was authorization for employees to be compensated at the overtime premium rate if they extended their work shift to attend the training. Because employees cannot schedule their own overtime and it must be authorized by management, it is unreasonable, in light of the practice in existence at the time of Bomstad's January 11, 2011, memo to conclude that Bomstad understood he was authorizing overtime compensation for any employee extending his/her shift to attend the shoot. Therefore, the undersigned is persuaded an appropriate remedy in this case is to direct the City to cease and desist from ignoring the requirements of Article XIII and, henceforth, reimburse employees at the overtime premium rate of pay for any "hours worked in excess of the employee's regularly scheduled shift" when those overtime hours of work are authorized by the City.

Based upon the testimony, exhibits and argument the undersigned enters the following

**AWARD**

The Employer did violate the labor agreement when it denied Officer Tuerk .25 hours of overtime on February 4, 2013, and consequently, it shall cease and desist from ignoring the requirements of Article XIII and, henceforth, reimburse employees at the overtime premium rate of pay for any "hours worked in excess of the employee's regularly scheduled shift" when those overtime hours of work are authorized by the City.

Entered this 12th day of November 2013.

*Thomas L. Yaeger*

Thomas L. Yaeger  
Arbitrator