

**SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION  
DIVISION OF LABOR & MANAGEMENT**

**AFSCME LOCAL 3968,  
Grievant,**

**HF No. 10G, 2010/11**

**vs.**

**DECISION**

**CITY OF YANKTON,  
Respondent.**

The Grievant, members of the American Federation of State, County, and Municipal Employees, Local 3968 (Union), filed with the Department of Labor and Regulation, pursuant to SDCL §§ 3-18-1.1 and 3-18-15.2, a Grievance Petition against Respondent, the City of Yankton (City). A hearing on the above matter was conducted by the Department on June 21, 2011. Executive Director of AFSCME Council 59, Paul Aylward, represents Union. Attorney A. Stevenson Bogue represents City. Testifying at hearing were Beth Parr, Pete Mueller, Brian Frick, Dave Laden and Doug Russell. Both parties have submitted post hearing briefs and the Department being advised fully, hereby makes this Decision.

**FACTS**

1. The City employs members of the Union under a Collective Bargaining Agreement (CBA). The effective dates of the CBA pertinent to this grievance are from January 1, 2011 through December 31, 2011.
2. The prior CBA between the parties was in effect from January 1, 2009 through December 31, 2010. City employees did not vote to organize a union until February 2008.
3. A grievance of general concern was filed by Union on February 11, 2011 alleging violation of Articles 12, 15 and 17 of the CBA plus any other applicable articles, ordinances, resolutions, policies, rules, regulations, or laws. The City denied the grievance at Steps 1, 2, and 3. The Union appealed the denial as specified in Step 4 of the grievance procedure.
4. Section 12.1 of the CBA regarding Hours of Work is as follows: "Except for emergency situations, work schedules shall not be changed without two (2) weeks notice unless the changes are mutually agreed upon by the Union and the City."
5. Article 15 of the CBA detailing Call-In Pay reads in full:

A. 15.0 Any employee called to work outside of their regularly scheduled work shift after having left the premises shall be paid for a minimum of two (2) hours at one and one-half times (1 ½ ) their regular work pay. In the event that the employee is required to work longer than two hours, such employee shall be paid for all hours worked at the rate of one and one half times (1 ½) their regular rate of pay which are outside of their regularly scheduled work shift.

B. 15.1 If the call time assignment and the employee's regular shift overlap, the employee shall be entitled to work his regular shift.

6. Article 17 of the CBA reads in full:

A. 17.0 Time and one-half the employee's regular rate of pay shall be paid for all work performed in excess of forty (40) hours in any workweek and all hours worked over the scheduled work day. Holidays, vacation and sick leave shall be considered as hours worked when computing overtime.

B. 17.1 If the employee works overtime, the employee may, with the approval of the Department Head, choose to take compensatory time instead of overtime pay. Compensatory time shall be awarded at the rate of one and one-half (1 ½) hours of compensatory time for each hour of overtime worked. The days to be taken off shall be at the option of the employee with the approval of the supervisor/department head. An employee may accumulate no more than forty-five (45) hours of compensatory time off.

C. 17.2 Overtime is to be distributed equally to all employees of a department. If an employee is requested to work overtime and because of other conditions and commitments cannot perform the overtime work assigned, then the Supervisor will direct a qualified employee to work overtime. The employee scheduled to work the overtime shall immediately notify the supervisor of any conflict so that the Supervisor shall direct a qualified employee to perform the overtime prior to the conclusion of the workday.

D. 17.3 The City shall make an effort to distribute overtime equally to all employees of a Department.

7. The Snow Removal Operations Plan sets out in pertinent part:

A. "The City Manager may declare a snow emergency and call for such assistance as is necessary. The City Manager or person designated by him shall make public announcements necessary for the City to carry out an effective snow and ice control operation."

B. "The Director of Public Works shall have the responsibility for carrying out the operations plan and shall determine the priority operations to complete this mission."

C. Before – Operational Procedures: Street Division: Supervisor of Operations: shall prepare a listing of snow alert crews and snow removal crews.

D. During – Operational Procedures

i) Snow Removal Manpower Requirements: The Supervisor of Operations will assess the snow removal situation and determine the amount of manpower needed for a particular operation using the crew guides listed below.

a. Alert Crew is a two-man crew consisting chiefly of street department personnel. The crew will on a weekly standby basis and used normally when the street division is in an off-duty status. The Supervisor of Operations will notify the listed alert crew when street conditions are such that treated sand or minor plowing of snow drifts is necessary.

b. Snow Removal Crew consists of two crews using the available manpower within the City's different departments or divisions. Crew No. 1 will be comprised mainly of street division personnel. Crew No. 2 will incorporate the remaining street division personnel along with several other departments or division personnel. A crew manning board shall be provided by the Supervisor of Operation and will include each member and the equipment to be operated.

ii) Street Division:

a. Action upon receipt of alert: Upon receipt of an advance weather forecast the Supervisor of Operations will alert the assigned personnel that the situation calls for snow removal and/or ice control operations.

b. Street Clearing: The Supervisor of Operations shall initiate snow clearing operations upon accumulation of two (2) inches of snow on the streets.

iii) Department of Parks and Recreation: Sidewalks: sidewalk clearing begins upon one and one-half (1 ½ ) inches of snow accumulation.

8. The Snow Removal Operations Plan also sets out the responsibilities of each Division or Department after a snow storm. These responsibilities include clean-up, clearing alleys, and removal of windrowed snow.

9. Two employees of Union are on call during the wintertime as required in the Snow Plan. They are the first people called out for snow removal.

10. When employees from the Street Department, the Transfer Station, the Sanitation Department, and the Airport are called in during snow emergencies, they are not paid overtime for the hours worked prior their regular shift.
11. An employee of the Parks and Recreation Department testified that he was paid overtime for any hours he worked prior to or after his regularly scheduled shift, during snow emergencies. This employee is also paid time and one-half for any hours worked on Saturday or Sunday.
12. The employees of the Parks and Recreation Department are also part of the Union and have a separate section of responsibilities in the City Snow Operations Plan.
13. During a snow emergency, employees for City have the option of leaving work after 8 hours, instead of working the available 12-16 hours.
14. The Snow Operations Plan has been in effect longer than the Collective Bargaining Agreement. The Snow Plan was not changed after the CBA went into effect.
15. City's goal is to remove snow curb to curb within 14 hours.
16. If called into work for a snow emergency on a Saturday or Sunday, City pays overtime to Street Department employees.
17. If called into work at 2 am on a weekday, for a snow emergency, City pays regular time to Street Department employees for the first 8 hours. Any time worked over 8 hours is paid at the overtime rate.
18. If a Street Department employee leaves work after 8 hours, the employee is not paid time and one-half for the hours he was called in to work prior to the start of his scheduled shift.
19. The clean-up of snow usually occurs during the overnight hours of the night following the initial snow emergency and not during a regular daytime shift.
20. "Snow emergency" is not defined in the Snow Operations Plan, but depends upon many factors, such as wind patterns. At no time is a declared "snow emergency" lifted by City.
21. Further facts will be developed as necessary, in the Analysis below.

## ANALYSIS

The rights and obligations of parties to a contract are determined solely by the contract language, which must be construed according to the plain meaning of its terms. Contract interpretation is a question of law.

Yarcheski v. Reiner, 2003 SD 108, ¶24, 669 NW2d 487 (internal citations omitted).

Petitioner has filed a grievance under SDCL §3-18-1.1, which reads:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

SDCL §3-18-1.1.

The City asserts that City does not have to pay call-in pay for snow removal work done by the Street Department because they contend that they declared a snow emergency and their reading of Article 12, Section 12.1 allows City to change the work schedule without the required two week notice. The Union disagrees. The Union argues that City did not properly declare a snow emergency and that every South Dakota snow event is not a true emergency as contemplated in Section 12.1. Furthermore, the Union argues that the snow emergencies are not intended to carry over to "clean-up" for the day following a snow emergency.

The Statement of Grievance below is as follows:

On January 27, 2011, as a result of a telephone discussion with an employee questioning if employees called into work one-hour prior to their regular shift should receive a guaranteed two hours of overtime pay per Article 15, Section 15.0, it was discovered that Street Department / Transfer Station/ Sanitation/Airport employees involved with snow removal are not always receiving over-time pay for hours worked outside of their regularly schedule workdays. After meeting and discussing the situation with the immediate supervisor on January 27 and 28, 2011 he confirmed this was in fact how the situation is being handled. The majority of these employees are scheduled to work Monday through Friday, 7:00 a.m. to 3:30 p.m., with one-half hour for lunch. Employees who are being in to work outside of their regular hours or

being told to report for work at a time outside of their regular workday (Monday-Friday) for snow removal, in most cases, are only being paid overtime wages for hours worked in excess of 8 hours per day. However, if called into do snow removal on Saturday or Sunday, employees are being paid over-time wages for all hours worked. AFSCME Local 3968, City of Yankton Employees Union, believes that ALL hours worked outside of the regular scheduled workday should be paid at over-time rates.

Union began to look into this situation when a question was asked by a Street Department employee who was called into work for sanding the streets, one hour prior to his scheduled shift (not during a snow emergency). He informally inquired to his supervisor and co-workers whether or not he would be paid two hours of overtime pay for being called into work early. To find out how it was handled, the supervisor called the City Finance Department and asked the local union president who also worked in the Finance Department. The employee only marked down one hour of overtime pay on his time card because he worked his full 8-hour shift afterwards. He and the Union questioned whether under the CBA , Article 15.0, he should have marked down two hours of overtime pay as he was called in prior to the beginning of his scheduled shift. He was only paid for the one-hour of overtime, but this grievance resulted from the past actions of City as the practice was not to pay two hours of overtime, but only that time past 8 hours.

After an investigation by the Union, they found that some employees in other departments were being paid at least two hours of overtime if called into work earlier than their scheduled shift. The City was not paying Street Department and other employees overtime if called in early on a weekday, but did pay overtime if called in on a Saturday or Sunday. If a Street Department employee was unexpectedly called in for an overnight shift to plow snow, he was not paid overtime if he only worked eight hours. There was testimony that on at least one occasion, employees left work at their regular time and were called that evening to report to work at 2 am to remove the projected build-up of snow.

City argues that snow removal is the result of an emergency snow event being called and that City may change schedules without two-week notice in the event of an emergency. City's goal is to plow and remove snow curb-to-curb within 14 hours after the snow emergency is called. Snow emergencies are called by the City after two inches of snow fall. The declaration of emergency also depends on the wind factors and other conditions such as ice build-up. City argues that the snow emergency exists until the clean-up outlined in the Snow Operations Plan is completed.

It is not a "violation, misinterpretation, or inequitable application of any existing agreements" for the City Manager to assign the task of declaring a snow emergency to Mr. Laden. The Snow Operations Plan indicates that the City Manager has the power to declare a snow emergency and to request assistance, as is necessary. The City Manager,

Doug Russell has given this power to declare snow emergencies to the Public Service Manager, Dave Laden.

Mr. Laden is in charge of the Street Department, central garage, solid waste collection, transfer station, and airport. Mr. Laden reports to Kevin Kuhl, the Director of Public Services, who in turn reports to Mr. Russell. Mr. Laden schedules the employees, in his departments, who work the snow removal during snow emergencies. He does not schedule the employees in the departments for which he is not in charge. Neither Mr. Laden, nor the City Manager ever “lift” a snow emergency or declare the emergency period over. Mr. Laden testified that the clean-up portion of the Snow Operations Plan is not necessarily an emergency, but that the employees are called to work off schedule for practical purposes.

The Negotiated Agreement is clear. When an employee is called into work, non-emergency, prior to his shift, the hours must be paid at an overtime rate and for a minimum of two hours. This is a specific provision in the Negotiated Agreement (Article 15) and should be followed by all City Departments. If the call-in time then overlaps with the employee’s regular shift, the employee may work his regular shift. (Section 15.1).

The City may define and call a snow emergency, as needed. The crews are called out when there is a snow event which has over two inches (2”) of snow. When a snow emergency is called by Mr. Laden, he may call in employees without having to pay overtime for the emergency event. Section 12.1 allows City to declare an emergency and reschedule employees without having to pay overtime for the first 8 hours the employee is called into work.

The testimony and facts indicate that the clean-up portion of the Snow Operations Plan is not an “emergency”. The employees who are called into work outside their regularly scheduled hours during the clean-up period after a snow emergency, are entitled to overtime pay, if the schedule was changed less than two weeks prior. So after the projected 14-hour curb-to-curb effort is completed, the unscheduled call-in of the employees is paid as call-in pay.

#### PRAYER FOR RELIEF

The Grievance does not set out a specific monetary prayer for relief for past occurrences. Union was not specific in which employees were underpaid or when the incidents occurred in which the employees may have been entitled to overtime pay. For that reason, there is no order that past hours of employees be paid overtime.

This Decision affects only future practice of City for payment of overtime or call-in pay.

The evidence supports a grievance by the AFSCME against City for violations of the Negotiated Agreement regarding Article 15, Call-In Pay. The evidence does not support a grievance against the City for emergency schedule changes, Article 12.1. The evidence does not support any general violation of Article 17. The evidence does not support a grievance against the City for violation of the Snow Operations Plan where the City Manager has delegated his authority to declare a snow emergency to the Public Service Manager.

City violated, misinterpreted, and inequitably applied the CBA, Article 15, during the snow emergencies in the Winter of 2010 / 2011. AFSCME's petition of grievance is granted in part and denied in part.

AFSCME and City shall submit Findings of Fact and Conclusions of Law and an Order, consistent with this Decision, as well as Proposed Findings of Fact and Conclusions of Law within 10 days from the date of receipt of this Decision. The parties will then have 10 days to make written objections to the opposing parties Proposed Findings and Conclusions. The parties may stipulate to waiver of Findings of Fact and Conclusions of Law and if they do so, the parties will submit such Stipulation, along with an Order in accordance with this Decision.

Dated this   24th   day of October, 2011.

          /s/            
Catherine Duenwald  
Administrative Law Judge  
Department of Labor & Regulation  
Division of Labor & Management