

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CITY OF VANCOUVER

(the "Employer")

AND:

THE VANCOUVER FIRE FIGHTERS' UNION, LOCAL 18

(the "Union")

(Ditchburn Overtime Grievance)

A W A R D

Dates and Place of Hearing:	April 3 and 4, 2006 Vancouver, B.C.
Board of Arbitration:	Robert Diebolt, Q.C.
Counsel for the Employer:	Charles Harrison
Counsel for the Union:	Allan Black, Q.C.
Date of Award:	April 19, 2006

This arbitration concerns a dispute about the interpretation and application of certain overtime provisions in the Collective Agreement between the parties. The parties agreed that I am a properly constituted board of arbitration with jurisdiction to hear and determine the matters in dispute.

The overtime provisions appear in Article 6. It reads in its relevant part:

Effective 2004 February 12:

- (a) Except for Fire Prevention Inspectors and Fire Prevention Officers, an employee who is required to work overtime of fifteen (15) minutes or more in excess of and immediately preceding or following the completion of the employee's regular shift shall be paid at 1 1/2 (one and one-half) times the hourly rate of the employee computed on the basis of the employee's normal working hours.

...

- (c) When computing the payment of overtime under this clause 6, all time worked by an employee from the time the employee completes their regular shift until the employee has been relieved of further duties, shall be deemed to be overtime. Where an employee's duties require them to leave their regular place of work, the employee shall not be deemed to be relieved of their duties until they return to their place of work, e.g. the Fire Hall at which they are stationed.

These provisions in the same, or substantially similar, language have been in the parties' collective agreements for approximately thirty-five years.

Moving to the factual background, at the hearing there was a dispute about the admissibility of certain evidence of bargaining history. The Employer sought to adduce that evidence and the Union resisted, asserting that the circumstances in which bargaining was conducted rendered the evidence inadmissible. I published a preliminary ruling dated April 4, 2006 in which I ruled that the proffered evidence was inadmissible because of an agreement made between the parties during bargaining. There is no need to repeat here the background and reasoning underlying that ruling.

There was considerable controversy about the background pertaining to the bargaining history issue. But the factual background leading up to and surrounding the filing of the grievance itself was relatively straightforward and, for the most part, free of dispute. The Union's only witness was the grievor, Mr. Gord Ditchburn. Following is a summary of his evidence.

The grievor is a fire fighter whose home Fire Hall is Hall Number 3, located at 2801 Quebec Street, Vancouver, B.C. There are two shifts at that hall, a ten hour day shift commencing at 8:00 a.m. and ending at 6:00 p.m., and a fourteen hour night shift commencing at 6:00 p.m. and ending at 8:00 a.m.

The grievor commenced a night shift at 6:00 p.m. on January 1, 2005. That was his last of four scheduled shifts in his rotation, following which he was to begin four days off. At approximately 6:15 a.m. on the morning of January 2, Hall Number 3 received a call to attend a fire at 537 East Broadway. There were then eight persons on duty, four fire fighters and two officers, one a Lieutenant and one a Captain, Mr. Mark Kennedy. Two vehicles attended the fire, a ladder truck and an engine. The grievor's role at that time was to drive the engine, which, in addition to him, carried the captain and two fire fighters in the rear.

The captain was initially the person in charge at the fire scene. He assessed the situation and directed the grievor to place his engine in the rear alley. A hose was connected to a hydrant and the grievor drove the engine to the alley, where he made preparations to pump. Fire fighters entered the building with a hand line and proceeded up to the apartment where the fire was located. The grievor, as was his primary duty, remained with the engine, to monitor it and ensure a supply of water.

The captain entered the alley and asked the grievor to open a door to the building. The grievor obtained gloves and a bar from the engine and pried the door open. In so doing, he disfigured some metal on the door and injured his hand on the metal. Because he was wearing gloves, the grievor did not immediately notice the injury. He went back to his engine, returned the bar to its place and checked the pump.

By this time additional fire fighting vehicles had arrived, and Battalion Chief Mr. Kirk Lucas was on the scene in the alley. As Battalion Chief, Lucas was the ranking officer at the scene. The grievor removed his gloves and discovered his injury. Lucas also noticed it. The grievor said he could participate in cleanup, but Lucas directed him to an ambulance at the scene, to have his hand treated.

The grievor testified that he took Lucas' direction as an order and followed it. The ambulance attendants took his history, treated his hand and produced a surgical glove which the grievor put on his injured hand. The attendants advised him he would need stitches and should attend at a hospital for that purpose. The grievor responded that he would go on his own time after his shift was over. He signed a form recording that he declined to go to a hospital at that point in time.

The grievor then returned to his engine. By this time the fire had been suppressed and cleanup activities were about to begin. As previously noted, the grievor planned to complete his shift and then obtain stitches on his own time after his regular shift was over. However, Lucas enquired about the grievor's hand on his return to the engine. The grievor reported that stitches would be required and related his intention to complete his shift and then obtain treatment.

Lucas did not agree. To use the grievor's words, Lucas' response was, "No. You will go now. Go back to the ambulance and tell them." The grievor told Lucas he

could not leave his engine unattended, and Lucas replied that he would take care of matters. The grievor said there was no yelling or screaming, but he took Lucas' statements as an order.

The grievor returned to the ambulance, saying to the attendants he had been directed to obtain stitches. The ambulance conveyed him to Vancouver General Hospital shortly after 7:00 a.m. He was admitted to emergency and waited his turn for treatment. He was still there at 8:00 a.m. when his regular shift ended.

The grievor had suffered a one inch cut that required three stitches. After receiving treatment, the grievor telephoned the dispatcher at Hall Number 3, saying his treatment was finished and that he needed a ride to the Fire Hall. He was still wearing his fire fighting gear, and his personal vehicle was at the hall. A vehicle was dispatched, which collected and conveyed him to the Fire Hall. In cross-examination, the grievor said he arrived at the hall after 10:00 a.m.

By this time there had been a shift changeover. Captain Kennedy and his crew had left and C shift had started. The grievor spoke with the C shift captain, Mr. Dave Seggie, relating what had happened. Seggie asked the grievor to fill out a WCB form, which he then did. He subsequently shed his fire fighting gear, cleaned up and left the Fire Hall at approximately 11:00 a.m.

In cross-examination, the grievor was asked what he would have done respecting the WCB form had things turned out differently. He said that had he returned to the hall prior to the end of his regular shift, he would probably have completed the form. Even if the shift had ended, he said he would stayed the required five or ten minutes to complete it.

Returning to the chronology, the grievor took his scheduled four days off and missed an additional four shifts as a result of the injury. A few weeks later, the grievor encountered Lucas, who advised him that he had submitted an overtime claim for the grievor. Normally, said the grievor, his Captain would have submitted such a claim. The grievor subsequently learned the claim had not been paid, and a grievance was filed.

More generally, in direct examination, the grievor was questioned about expectations when directions are given. The grievor's evidence was that he would take them as orders and, barring safety issues, follow them. Specifically, he said he took Lucas' direction to obtain treatment to be an order and Seggie's request to fill out the WCB claim to be an order.

The Employer called one witness, Ms. Wendy Gigliotti, a Payroll Supervisor for Fire and Rescue Services. An employee in the department for twenty-five years, she has served as supervisor for the past six years. Before that she was a payroll clerk. Besides Gigliotti, there is one other person who processes the payroll for the department, a Payroll Clerk II.

Gigliotti testified about the procedure she follows to process and pay overtime claims. Overtime claims are normally submitted by a Battalion Chief on a form that contains a space for a description of the nature of the claim. She said that if she or the payroll clerk notice anything on the form they consider to be questionable, or something which they do not understand, they consult a Deputy Chief.

In direct examination, Gigliotti was asked whether in her entire experience she had ever processed and paid an overtime claim where the reason for the claim was a hospital attendance. Her answer was no. Asked why not, she said that as a matter of past practice it was not something they had done. She also said she had received

overtime claims of that sort over the years. Asked how many, she replied she was guessing, but she estimated that she had received perhaps five over the last three to four years and like amounts in the years before that.

In cross-examination, Gigliotti was questioned about her statement that she had not processed and paid overtime claims for hospital visits in circumstances where employees' regular shifts had ended. Asked if claims had been paid on a without prejudice basis to resolve grievances, she replied yes. She noted that overtime claims had also been paid in some cases unknowingly, as a result of human error. Asked whether there was a written policy respecting overtime claims for hospital visits, her answer was no.

Gigliotti was also cross-examined about her assertion of a past practice. Asked whether she simply refused hospital overtime claims without discussion, she said no; she would consult a Deputy Chief to discuss the matter further. She explained that she would not herself enquire about the specific circumstances of a claim, because it was not "her call". She would consult a Deputy Chief who might take the matter to the relevant Battalion Chief. Focusing on the grievor's claim, Gigliotti said she could not recall the circumstances surrounding his claim.

Gigliotti was then cross-examined about the Employer's position where a firefighter goes to a hospital during the employee's regular shift and returns to the Fire Hall before that shift ended. She said no pay is deducted in that circumstance, because it is "part of the regular shift". Asked whether an employee at the hospital in these circumstances is working, she said "no but it is part of the regular shift". Turning to WCB benefits, Gigliotti agreed that such benefits are not paid on the first day of an injury. She added that WCB benefits do not encompass overtime.

Further references are made to the evidence later in this Award, but I now turn to a consideration of the questions to be determined. The first essential question is whether the grievor was working within the meaning of that word as used in Article 6(a) and (c) when he was traveling to the hospital, at the hospital, and returning from the hospital to the Fire Hall. The answer to that question depends in part upon the meaning of the language in Article 6 and in part upon the facts of the case. In short, what must the parties be taken to have intended by the language used to express their agreement in Article 6 and do the facts of this case fall within its scope?

I begin with the Employer's assertion of a past practice, advanced as an interpretational aid. The Employer submitted that Gigliotti's evidence proved a past practice of not paying overtime for hospital treatment obtained after the end of a regular shift and that this practice assists in ascertaining the intent of Article 6. It is true that Gigliotti's evidence in chief established that she did not, of her own volition, have a practice of processing and paying such overtime claims when submitted to the payroll department. But Gigliotti's evidence did not end there.

On cross-examination, her evidence disclosed that the Employer does not advise the Union when it declines to process and pay individual overtime claims for hospital treatment. She also acknowledged that the Employer had paid such claims on a without prejudice basis, to settle grievances advanced by the Union. In sum, not only did the Union not acquiesce when it became aware of refusals to pay; it objected and filed grievances. Given these facts, I am unable to conclude a past practice disclosing a mutual intention was proved.

I return, therefore, to the interpretational issue respecting the meaning of the word working. Free of a specific factual context and construed in the abstract, it is not

obvious that an employee taken to a hospital, there waiting for and receiving medical treatment, and then returned to the work place is working. However, should the contractual context in which the word appears and the grievor's specific circumstances lead to the conclusion that he was working within the meaning of that word as used in Article 6?

The contract language contextualizes the word work. It appears in a provision that uses related expressions, such as "working hours" in paragraph (a), and more significantly, "relieved of further duties" and "relieved of their duties" in paragraph (c). In short, based on the contract language alone, an employee is working within the meaning of Article 6 if the person is on duty. In my view, this makes practical sense in the employment environment of a fire fighter. Therefore, was the grievor working, or on duty, during the disputed period? In my view, on the facts of this case, he was. My reasons follow.

It was not the grievor's choice to leave the fire scene to obtain hospital treatment. On the contrary, he expressed to the Battalion Chief, the ranking officer at the scene, a preference to complete his regular shift and then seek treatment. The Battalion Chief did not agree. For what must be regarded as sound medical reasons, he directed the grievor to leave the scene immediately, return to the ambulance and go to the hospital.

The Battalion Chief's direction can only be understood as a lawful order and the grievor took it as such. During the currency of the grievor's regular shift, therefore, he was given and obeyed a lawful order. During his regular shift and as directed, he left the scene in his firefighting gear and proceeded by ambulance directly to the hospital to receive stitches for a wounded hand. In those circumstances, the expectation must

have been that the grievor would return to the Fire Hall following treatment, and that is what he did. He telephoned the hall and spoke to the dispatcher, who sent a vehicle to collect and convey him to the hall.

In all of these circumstances, I have little difficulty in concluding that the grievor was working, or on duty, within the meaning of Article 6 up to the time he returned to the Fire Hall. I add this. I believe my interpretation of the contract language and application of it to the facts of this case are fortified by the fact that the Employer pays employees who obtain hospital treatment during the currency of their regular shifts.

The foregoing conclusion does not end the questions to be determined in this case. A remaining question, and in my view a more difficult issue, is whether it should be concluded that the grievor continued to work until he had completed the WCB form. In this regard, Article 6(c) "deems" that an employee shall not be relieved of duty until the employee returns to the Fire Hall at which the person is stationed. Must this language operate to relieve an employee of duty, and thus end the overtime, upon return to the hall, or can the employee's duties, and thus the overtime, continue beyond that point?

In my view, the deeming language should be construed to establish a minimum duration of the overtime period. But I do not construe it necessarily to impose a maximum duration. One can readily imagine situations in which an employee might be issued lawful directions such that the employee continues to work after returning to the Fire Hall. Is this such a case? The Union asserted that the grievor continued to work until he had completed the WCB form, whereas the Employer submitted the deeming language operated to relieve the grievor of his duties upon his return to the Fire Hall.

In my view, the outcome of this issue turns on the facts and their sequence. In cross-examination the grievor was asked whether it was possible he returned to the hall at 10:00 a.m. He replied it was after 10:00 a.m., but the precise time did not emerge in the evidence. Continuing with the facts, upon his return he explained what had happened to Captain Seggie, who asked him to fill out a WCB form. As previously noted, the grievor took this to be an order and complied. He then removed his fire fighting gear, cleaned up and left the hall at 11:00 a.m.

In these circumstances and after some reflection, I have come to the conclusion that the grievor continued on duty until he completed the WCB form. This is not a case in which the grievor had shed his fire fighting gear, showered, changed into his own clothes and was about to leave the hall when asked to fill out the form. Importantly, in my view, Seggie's direction was given at the time of the grievor's report upon his return to the hall, and while he was still in his firefighting gear.

When did the grievor finish the WCB form? The grievor's uncontradicted testimony was that he left the Fire Hall at 11:00 a.m. However, the evidence did not divulge the precise point in time when the form was completed. In this connection, it will be recalled that after completing the form the grievor shed his gear, cleaned up and donned his own clothes. Given the modest monetary sum potentially in dispute on this issue, I would hope that the parties could resolve this factual question without resorting to a further hearing.

I have concluded that the grievor was entitled to overtime, but I do not wish to be misunderstood about the intended scope of my ruling. It very much turns upon the particular facts of this case. Other factual scenarios might be distinguishable and lead to different outcomes, and I neither express nor imply any opinion about them in this

Award. For example, I express no opinion about a hypothetical situation, raised in argument, in which a seriously injured employee is taken to hospital during the currency of a regular shift and does not return to work for an extended period of time thereafter. That and other fact patterns will perhaps have to be decided sometime in the future.

In closing, the grievance succeeds to the extent indicated. I retain jurisdiction in the event the parties are unable to agree on the monetary sum payable to the grievor.

IT IS SO AWARDED.



Robert Diebolt, Q.C.