BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION, LOCAL 662	Case 41 No. 44317 MA-6254
and	
TAYLOR COUNTY	

Appearances:
Mr. James J. Newell, President, General Teamsters Union, Local 662, appear
Mr. Charles A. Rude, Personnel Director, Taylor County, appearing on behalf of the County.

ARBITRATION AWARD

General Teamsters Union, Local 662, hereinafter referred to as the Union, and Taylor County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an Arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Medford, Wisconsin on October 2, 1990. The hearing was not transcribed, and the parties submitted post-hearing briefs which were exchanged on November 15, 1990.

BACKGROUND:

The Grievant has been employed by the County in the Sheriff's Department for the past 13 years and is currently classified as an Assistant Investigator. On November 29, 1989, an overtime assignment involving the transportation of a prisoner requiring 7 1/2 hours of work was given to an off-duty Deputy with less seniority than the Grievant, who was also off-duty that day. On December 10, 1989, a Deputy assigned to the Communication Center called in sick and overtime was assigned to an off-duty Deputy who was junior to the Grievant, who was also off-duty that day. On December 12, 1989, the Grievant filed two grievances, one for each of the overtime opportunities set out above. On December 14, 1989, the County's Chief Deputy answered both grievances. The County denied the grievance as to the November 29, 1989 overtime on the basis that the equalization of overtime required it to call in a more senior employe than the Grievant, and although it failed to do so, no grievance from that employe was filed. The County also indicated that the employe who was actually called in had less overtime than the Grievant and was therefore entitled to the assignment of overtime before the Grievant. With respect to the December 10, 1989 overtime, the County asserted that the Grievant did not have the necessary certification to be assigned to an entire shift in the Communication Center and also denied that grievance. Both grievances were then appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Did the Employer violate the collective bargaining agreement, specifically Article 8, Section 3, by failing to offer overtime to the Grievant on November 29, 1989 and December 10, 1989?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISION:

ARTICLE 8 - OVERTIME AND HOLIDAYS

. . .

> Section 3. Overtime within the department shall be offered starting with the most senior qualified employee within the department on a rotating basis. In the event an employee refuses or is unavailable to work offered overtime, it shall be considered as worked, for rotation purposes.

UNION'S POSITION:

The Union contends that Article 8, Section 3 of the contract requires overtime to be offered to the most senior qualified employee on a rotating basis. It points out that this Section contains no modifying provisions such as "as far as practicable", or "as equally as possible" and therefore Article 8, Section 3 must be given its plain meaning. The Union submits that the County offered no proper justification under Section 3 for its failure to offer the Grievant the November 29th overtime. With respect to the December 10, 1989 overtime, the Union concedes that the Grievant might have some trouble with the Time system and 911 procedures but the County had, on at least one occasion, utilized an employe for the Communication Center who had less qualifications than the Grievant. It claims that the Grievant could have performed all the functions with minimal basic indoctrination noting that the Grievant previously had 4 1/2 years of basic dispatch experience and he was therefore qualified for the position despite the County's arguments that he was not fully qualified for it.

The Union maintains that the County has advanced only one basic argument and that was that the Grievant had accumulated more overtime pay than junior employes and this is why it bypassed him for these overtime assignments. The Union asserts that this is simply not in accord with the language of the agreement. It notes that the County admitted that there was no accurate record of past refusals or unavailability to work which would count for overtime rotation purposes. It also alleges that the difference in overtime accumulation based on overtime earnings does not take into account differences in wage rates. The Union asks that the grievances be sustained and the Grievant be made whole for all lost overtime wages attributable to the November 29th and December 10th instances.

COUNTY'S POSITION:

The County contends that although the language of Article 8, Section 3 appears straightforward, in actual practice, perhaps dating back to when the staff was one-half the present size, overtime was offered to those who were off-duty even though this is not mentioned in the language of the agreement. It notes that the Grievant had the greatest amount of overtime already worked during the year. It argues that with respect to the December 10, 1989 instance, the Grievant was not qualified for the assignment because he is not regularly assigned this duty and would need eight to sixteen hours of orientation to be qualified.

With respect to the November 29, 1989 occurrence, the County claims a more senior officer should have been assigned the overtime and not the Grievant but the more senior employe never grieved it. The County asserts that the Department was trying to keep overtime on a reasonably equal basis and rightly offered the overtime to employes who had less overtime hours than the Grievant. It sumbits that the grievances are without merit and should be denied.

DISCUSSION:

Article 8, Section 3 of the agreement requires overtime be offered to the most senior qualified employe on a rotating basis and a refusal or unavailability to work offered overtime is considered as overtime worked for rotation purposes. In the instant cases, the County simply attempted to equalize overtime, that is, it tried to distribute overtime based on the amount of overtime worked. In the past, it had kept records of refusals and unavailability but recently it did not consider and did not keep records on refusals or unavailability to work overtime as overtime worked for rotation purposes. In short, the County simply looked at who had the least amount of overtime paid and then called that person first. Referring to the November 29, 1989 overtime opportunity, the County found that four deputies were off-duty and available for overtime. Deputy Malchow had worked 45 hours of overtime during the year, the least of the four. The Chief Deputy called Malchow but received no answer to his phone call. Malchow was not charged with any overtime for rotation purposes. The next on the list was Officer Filas, who is senior to the Grievant, with 113.5 hours, but he was not called. Next was Officer Krueger with 210.75 hours. Officer Krueger was offered the overtime and accepted it. The Grievant had 292.25 hours and, although senior to Krueger, was not contacted. The Grievant contended that Filas had been offered overtime in the near past and should have been rotated to the bottom and the

Grievant should have been selected over Krueger because of his greater seniority.

The undersigned finds that the County's interpretation of Article 8, Section 3 runs counter to the clear language of the agreement. It is conceded that the County, contrary to its past actions, recently had not kept track of refusals or unavailability to work which makes its overtime records out of conformity with the last sentence of Section 3. The other deputies could have refused to work overtime on numerous occasions and yet this would not have been counted, but if it were counted, then the Grievant may have had the least amount of overtime. The County's failure to keep proper records on overtime makes its overtime assignments suspect. Its assertion that Filas should have been offered the overtime first and his failure to grieve this does not relieve the County of liability as it called Krueger over the Grievant based on a system at odds with the express contract terms. Besides, Filas may have recently worked overtime or would have refused it and rotated down below the Grievant and therefore had no basis to file a grievance. The Grievant's greater seniority than Krueger leads to the presumption that he should have been assigned the overtime. The evidence failed to show that the Grievant had rotated to the bottom or that he had been offered overtime before Krueger, who was junior to him in seniority. Therefore, it must be concluded that the County violated Article 8, Section 3 by not offering the Grievant overtime on November 29, 1989, because he had greater seniority and the evidence failed to prove he had rotated down below Krueger.

With respect to the December 10, 1989 overtime assignment, the County claimed that the Grievant was not qualified to handle the complete shift in the Communications Center when a backup was not readily available. The evidence supports the County's assertion that the Grievant needed some orientation to be able to handle the Center for a complete shift with no readily available backup. The Grievant admitted he needed orientation on the 911 and the new fire systems. The Grievant pointed out that another officer with no experience had worked a shift in the Communications Center so the County's reliance on the term "qualified" to exclude him was improper. The County admitted this employe was not qualified but asserted that the circumstances where the other unqualified employe worked were not shown to be the same as the December 10, 1989 assignment and that this type of assignment was not common practice. The other officer who also was not qualified did not work the overtime on December 10, 1989, otherwise the result would have been different. The undersigned finds that evidence established that the Grievant was not qualified for the Communications Center overtime on December 10, 1989. Therefore, the County did not violate Article 8, Section 3 when it failed to give overtime to the Grievant in the Communications Center on December 10, 1989.

With respect to the remedy, the undersigned finds that the Grievant is entitled to the number of hours of overtime worked by Krueger on November 29, 1989 times 1 1/2 the Grievant's rate which must be paid in cash. This remedy recognizes that merely placing the Grievant atop the rotation list would not appropriately remedy the County's error in not taking into account the refusals and unavailability to work overtime of other employes for rotation purposes.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The County violated Article 8, Section 3 of the parties' collective bargaining agreement by its failure to offer the Grievant overtime on November 29, 1989, and the County shall make the Grievant whole by paying him a sum in cash equal to the number of hours Krueger worked that day times 1 1/2 the Grievant's regular hourly rate.

2. The County did not violate Article 8, Section 3 of the parties' collective bargaining agreement by its failure to offer the Grievant overtime on December 10, 1989, and this grievance is denied.

Dated at Madison, Wisconsin this 29th day of November, 1990.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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