

BEFORE THE ARBITRATOR

:

In the Matter of the Arbitration :

of a Dispute Between :

:

:Case 77

THE SOUTH MILWAUKEE PROFESSIONAL :No. 48713

POLICEMEN'S ASSOCIATION :MA-7686

:

and :

:

THE CITY OF SOUTH MILWAUKEE :

:

:

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, and Mr. Kevin W. Naylor, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appeared on behalf of the Association.
Mr. Joseph G. Murphy, Attorney at Law, Murphy & Brennan, 2013 14th Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53172-0308, appeared on behalf of the City.

ARBITRATION AWARD

On February 3, 1993, the Wisconsin Employment Relations Commission received a request from the South Milwaukee Professional Policemen's Association, and the City of South Milwaukee to have William C. Houlihan, a member of the Commission's staff, appointed to hear and decide a grievance pending between the parties. On February 15, 1993, Mr. Houlihan was appointed to hear this matter. A hearing was scheduled for April 1, 1993 and postponed to May 27, 1993. On May 27, 1993, a hearing was conducted in South Milwaukee, Wisconsin. The proceedings were not transcribed. The Association filed a post-hearing brief which was received on July 2, 1993. The City filed a reply brief which was received July 14, 1993. The Association waived its right to file any subsequent brief by letter received July 14, 1993.

This Award addresses what, if any, obligation the City is under to replace a patrol officer who calls in sick with another patrol officer.

BACKGROUND AND FACTS

The South Milwaukee Police Department prepares and posts work schedules in advance. Posted schedules indicate which bargaining unit members (including Sergeants and patrol officers) work which shifts. In approximately August of 1992, the Department caused the following memo to be issued:

SOUTH MILWAUKEE POLICE DEPARTMENT

DATE: August 27, 1992
MEMO TO: All Personnel
FROM: Lt. Anger/Sgt. Olson
**SUBJECT: Bulletin 92-27 -
Officer in Charge - Early Shift**

In the event of the absence of a supervisor on the Early Shift, the job of Officer In Charge will be filled by the following officers in the order they are listed:

1. P.O. Darrell Mussatti
2. P.O. Todd Berggren

If neither officer is working on the date the supervisor is absent, a supervisor will designate the OIC for the shift.

On September 15, 1992, Lieutenant Donald Anger returned from a day-long schooling and discovered that neither Mussatti nor Berggren would be working that night. Further, Anger understood that both he and shift sergeant Terry Olson, would be off that evening.

This situation arose because patrol officer Todd Berggren, who was scheduled to work from 4:00 p.m. to midnight, called in sick. Officer Berggren's call came in less than 48 hours from the start of his regularly-scheduled shift. The Department maintains two overtime call-in lists, one list for patrol officers and a second list for sergeants. On the overtime call-in list for patrol officers, the grievant, Thomas Citko, would have been the next eligible patrol officer to work overtime. Citko has been with the Police Department for 25 years and has served as an Officer In Charge. Citko had not worked the vacant shift nor had he supervised the patrol officers scheduled to work. Rather than call Citko, Lieutenant Anger determined that a sergeant was needed and called in Sergeant Gossett to work the overtime on September 15, 1992 from 4:00 p.m. until midnight. The City paid Sergeant Glenn Gossett eight hours of overtime at the rate of time and one-half.

ISSUE

The parties stipulated to the following issue:

Did the City of South Milwaukee violate the

expressed and implied terms of the collective bargaining agreement when it did not offer the grievant eight hours of overtime on September 15, 1992?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE VII - EXTRA HOURS

. . .

Section 7.07: Call in less than 48 hours: Overtime which occurs with less than forty-eight (48) hours notice shall be handled as follows. When a vacancy occurs for a patrol officer, the Shift Commander shall fill the vacancy by asking for volunteers off of the patrol officer's list on a rotating basis. Only patrol officers shall replace patrol officers and if no patrol officer volunteers for the vacant assignment, the Shift Commander shall assign the least senior patrol officer to the vacancy. The least senior officer available may turn down the assignment for cause with the approval of the Shift Commander. The assignment shall then go to the next employee with the least amount of seniority. If a need for a sergeant occurs, the Shift Commander shall attempt to fill the overtime by utilizing a sergeant's list on a rotating basis.

. . .

ARTICLE XIV - GRIEVANCE PROCEDURE

. . .

Section 14.03 - Final and Binding Arbitration: If the grievance is not satisfactorily settled under Step III, it may be submitted to arbitration by either party serving written notice on the other within ten (10) days after the decision of the Wages, Salaries and Welfare Committee of the Common Council.

The parties shall use a staff arbitrator from the Wisconsin Employment Relations Commission (WERC), and either party may, on a

case by case basis, request the use of a panel of names from the WERC. In the event either party desires a panel, both parties shall select three names from a list of examiners working with the WERC, the parties shall have one of the names withdrawn at random to reduce the number to five and the remaining five names shall comprise a panel. The parties shall flip a coin to determine who goes first and ultimately strike names until one is left.

The parties shall then mutually request the WERC to appoint the remaining name as an arbitrator. The Association shall pay the filing fee if any.

The function and jurisdiction of the arbitrator shall be limited to the interpretation, application and enforcement of the provisions of this Agreement. The Arbitrator shall have no power to alter, add to or delete from the terms of this Agreement, or to change methods of operation or working rules of the Municipality which are not inconsistent with this Agreement. Any matter presented contrary to the functions and jurisdiction of the arbitrator as herein defined shall be returned to the parties without decision or recommendation.

The arbitrator shall be empowered to convene, to hear the evidence pursuant to such rules and procedures as he may adopt and to make a written decision which shall be binding on both parties. The parties shall bear equally the fees of the arbitrator and of the record, but each shall bear the cost of its own witnesses, exhibits, and counsel.

POSITIONS OF THE PARTIES

The Association points to Article 14, Section 14.03 and reminds me that my task is to apply, but not to modify the terms of the collective bargaining agreement. The Association goes on to cite considerable authority that it is my task to apply that which the parties have written. That said, the Association goes on to note that in Section 7.07, the parties have agreed that, "Only patrol officers shall replace patrol officers. . ." It is the view of the Association that this is an easy case, and that my task is simple. I am to apply the clear, unambiguous words of the Agreement.

The Association notes that the call to Sergeant Gossett came

from Lieutenant Anger. The Association points out that Lieutenant Anger was off duty and thus not responsible for staffing any of the shifts. Anger was not the shift commander and thus in no position to make a determination as to whether or not a sergeant was needed. The Association points out that Berggren was scheduled to be the shift commander. The Employer had thus already made the determination that the shift was going to function without a sergeant from 4:00 p.m. to midnight. Citko, a 25-year veteran of the Department, had on numerous previous occasions served as a shift commander and performed those duties. Citko has more seniority and tenure in the Department than did Berggren. The Association contends that the City simply made a mistake in failing to call in a patrol officer. It is the Association's view that the Employer is now seeking to cover up that mistake by declaring the need for a sergeant at the last minute.

The Association further points to the testimony of Association President Miksa, who indicated that a number of grievances on this same issue had previously been filed, and resolved in accordance with the position of the Association.

The City argues that the collective bargaining agreement is intended to be a reasonable document subject to reasonable construction by reasonable people. Nothing in the contract limits the Employer's ability to determine its staffing and manning levels except the prohibition against replacing patrol officers when there is no need for a sergeant. When Lieutenant Anger determined that the shift required additional supervision, he was exercising a legitimate management right, and one reserved to him by contract. Anger was the sole management representative positioned to make an assessment of the staffing needs of the Department that evening. He did so.

The fact that Citko was at the top of the call-in list and was experienced ignores the right of the Employer to determine the needs of the shift. If, as the Union suggests, Anger should have reviewed the patrol officer call-in list to see if the officer at the top of the list was experienced, and thereafter base his decision on who to call in upon his review of that list, then, by that same logic, Anger can determine that the patrol officer on the top of the list does not have sufficient experience and that a sergeant is needed. The Employer believes the Union has gutted its argument to the contrary. Lieutenant Anger testified that despite his many years of experience, Officer Citko was not familiar with the abilities of the three patrol officers on the second shift that evening and that was the basis upon which he, Anger, decided a sergeant was needed. If that discretion does not lie with a management officer, then any given shift could end up supervised by an officer with totally inadequate skills. That, in the eyes of the City, is an absurd result.

DISCUSSION

The parties have gone to considerable length to define my role in this matter. As noted by the Union, Article XIV directs me to confine my analysis to the provisions of the Agreement. I "have no power to alter, add to, or delete from the terms of this Agreement. . ." This contract goes so far as to advise me that these limitations are intended as jurisdictional.

It is undisputed that Officer Berggren called in sick less than 48 hours before the start of the shift. It is further undisputed that Sergeant Gossett was called in, worked, and was paid at an overtime rate. Article VII, Sec. 7.07 governs the allocation of overtime generated by less than 48 hours notice. That clause directs that "when a vacancy occurs for a patrol officer. . ." it be filled from the patrol officer's list. The Union argues that a patrol officer vacancy was created by a patrol officer's absence and that vacancy is to be filled by a patrol officer. The City is of the opinion that it retains the authority to exercise judgment as to what the nature of shift supervision should be and until such time as that judgment is exercised, no vacancy exists. Here, there was a perceived need for a Sergeant and so no patrol vacancy existed. Section 7.07 goes on to direct that "only patrol officers shall replace patrol officers. . ." The Association seeks literal enforcement. The City points to the last sentence of Section 7.07 and asserts that there existed a "need for a Sergeant. . ." which was satisfied.

Lieutenant Anger felt that a Sergeant was needed in the absence of Berggren. The City contends that the language of the contract must be read in a fashion to accommodate qualitative supervisory decisions of this type. The essence of the City's claim is that it retains the inherent right 1/ to manage the Department. Someone must make decisions as to who is and who is not to supervise and direct the work force under different circumstances. That task necessarily falls to management and was executed by Lieutenant Anger, the command officer who was positioned to make the call.

The City's argument searches for the application of reason to fit the circumstances of the events. However, the contract speaks in clear, unambiguous terms. The City ignores the contractual command that "only patrol officers shall replace patrol officers". For purposes of implementing Section 7.07, the City draws a distinction between patrol officers; i.e., Berggren is a suitable officer in charge, Citko is not. Whatever the logic of that distinction, it is one not made by the collective bargaining agreement. The contract treats patrol vacancies and Sergeant vacancies separately. The contract requires separate lists. The

1/ The City points to no contractual provision, and my review of the contract indicates that there is no Management Rights clause.

contract distributes overtime on a rotating basis. I feel compelled to apply the contractual terms as written.

The Association contends that the Employer determines the complement of the work force in the initial posting of the shifts. Once posted, a patrol officer may only be replaced by a patrol officer. The Association's interpretation of the agreement gives meaning to all provisions of Section 7.07. The construction urged by the City requires me to ignore the sentence mandating that "only patrol officers shall replace patrol officers".

AWARD

The grievance is sustained.

REMEDY

The City is directed to pay Thomas Citko, the grievant, eight (8) hours of pay, at time and one-half the rate of pay in effect for Citko as of September 15, 1992.

Dated at Madison, Wisconsin this 21st day of October, 1993.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator