

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 GERMANTOWN PROFESSIONAL POLICEMEN'S :
 ASSOCIATION : Case 32
 : No. 49892
 and : MA-8091
 :
 VILLAGE OF GERMANTOWN :
 :

Appearances:

Mr. Patrick J. Corragio, Labor Consultants Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, WI 53222, appearing on behalf of the Association.

Mr. James R. Korom, von Briesen & Purtell, S.C., Attorneys at Law, Suite 700, 4

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' applicable collective bargaining agreement (herein Agreement).

The parties waived hearing and submitted their evidence by means of a Stipulation received by the Arbitrator on September 29, 1993. Post-hearing briefs were exchanged through the Arbitrator on November 16, 1994, marking the close of the record.

ISSUES

Based on the parties' Stipulation and briefs, the Arbitrator finds that the issue for determination in this case can be stated as follows:

What is the appropriate remedy for the Village's admitted violation of the third step of the Agreement Sec. 5.07 Officer Staffing Procedure, that occurred when Sgt. Henning inadvertently failed to offer Grievant Donald Olander three hours of overtime (from midnight to 3:00 AM on or about April 18, 1993) that were eventually offered to and worked by a less senior employe?

FACTUAL BACKGROUND

The parties' Stipulation summarizes the facts of this case, in pertinent part, as follows:

1. The Germantown Police Department uses a staffing procedure for filling vacancies pursuant to [Agreement] Article 5.07. . . .
2. On April 18, 1993, there was a manpower shortage for the 12:00 midnight to 3:00 a.m. shift, created when Officer Hoell called in sick for that

shift.

3. Sergeant Henning was responsible for finding a replacement for Officer Hoell.

4. Sergeant Henning followed the contractual staffing procedures properly until Step 3 of the procedure.

5. While completing Step 3 of the staffing procedure, Sergeant Henning was supposed to call, in order, Officer Showalter, then Officer Olander, then other off-duty personnel with less seniority than Officer Olander.

6. Sergeant Henning did call Officer Showalter, but only reached Officer Showalter's answering machine. Sergeant Henning was then interrupted in these efforts by his regular supervisory duties on the shift. Upon returning to his desk, he tried to call Officer Olander, but accidentally dialed Officer Showalter's telephone number. Sergeant Henning then left a message on Officer Showalter's answering machine, thinking it was Officer Olander's answering machine. Sergeant Henning then proceeded to call less senior off-duty officers than Officer Olander. Sergeant Henning called in Officer Jay German who worked the overtime and received three hours overtime compensation.

7. Both Officer Showalter and Officer Olander had voice messages on their phone recorders in their own voices.

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PORTIONS OF THE AGREEMENT

This AGREEMENT is made and entered into . . . covering only the full-time employees of the Employer's Police Department, in the classification of Patrolman, Policewoman, and Detective, hereinafter referred to as the "Employees."

. . .

ARTICLE V
OVERTIME

Section 5.07 - Officer Staffing Procedure:
Officer staffing problems shall be resolved by the supervisor on duty by following these sequential steps:

1. Assign the relief-shift officer next scheduled to work with a practicable change of reporting time.

2. Assign an officer not scheduled to work but normally scheduled during the hours which require a replacement on a seniority basis.

3. Assign on a seniority basis the officers not scheduled to work.

4. Assign extended hours either or both to an officer on duty and to an officer next scheduled to work on a seniority basis.

The parties agree that any alleged violations of the above procedure will be processed through the grievance procedure up to and including arbitration if necessary. Furthermore, the parties agree that if a bargaining unit employee, or other non-supervisory employee, makes an error in judgment which could be in conflict with the above procedures, the employer will not be held responsible for this infraction.

Finally, the parties agree that no employee will be allowed to volunteer or be assigned to work overtime on both of his two (2) consecutive days off if the shifts on both days are eight and one-half (8-1/2) hours or longer. This does not preclude an officer from working eight and one-half (8-1/2) hours on one of his off days and then working overtime on his following off day provided that the overtime assignment is less than eight and one-half (8-1/2) hours in duration.

This procedure can be circumvented in an emergency. For purposes of this paragraph, an emergency is defined as some sudden and unforeseen event which takes place without prior notice and utilizing the list would be impractical. Except in cases of an emergency, a Sergeant will not be assigned to replace a police

officer when there are two or less police officers assigned and available to work a shift, and the period of 4:00 P.M. to 3:00 A.M. shall have three or less police officers assigned and available before a Sergeant is assigned.

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ARTICLE XVII
GRIEVANCE PROCEDURE

. . .

Section 17.05: The arbitrator shall neither add to, detract from nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for final and binding arbitration. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the

Employer, nor shall such right be limited or modified in any respect excepting only to the extent that this agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right. The decision of the arbitrator within the limits of his authority shall be final and binding on the parties.

. . .

POSITION OF THE UNION

The Arbitrator should order the City to compensate Grievant for three hours at the time and one-half rate.

Section 5.07 expressly relieves the Village of responsibility for overtime assignment errors if those errors are made by "a bargaining unit employee, or other non-supervisory employee." Here the error was made by a supervisory employe, Sgt. Henning, such that Sec. 5.07 expressly provides that the Village will "be held responsible for this infraction." Given the limitations on his authority in Sec. 17.05, the Arbitrator must hold the Village responsible for Sgt. Henning's error, even though the error was inadvertent and the Village may assert that holding it responsible is unduly harsh. Officers are expected to follow Department rules and are held accountable when they fail to do so. It is only reasonable that the Village be held to the same standards.

Ordering only a make-up remedy would not hold the Village responsible for the admitted infraction and would only compound a problem for which there is a simple answer. Some arbitrators have held that requiring the employer to pay rather than merely make up the improperly denied overtime is the one sure way of putting an end to supervisors' inadvertent errors and that offering an opportunity to make up is inadequate because the employe was entitled to work the overtime when it became available and not at some other time that might be less convenient for the employe. Other arbitrators have found make-up remedies appropriate in reallocating overtime within an equalization group, but not where, as here, the language of 5.07(2) and (3) involve offering the overtime "on a seniority basis." Offering Grievant the next overtime opportunity would make Grievant bear the brunt of Sgt. Henning's failure to listen more carefully to the answering machine he reached by mistake. Grievant might not be able to work that overtime, which would not fairly make him whole for the loss he experienced. Even if he could take advantage of the next overtime opportunity when it arose, his doing so would deprive some employe of that opportunity, generating additional potential grievance disputes for the Association to bear the burden of trying to resolve.

In contrast, requiring the Village to compensate Grievant for the time he lost makes him whole and restores order to what should be a straight forward application of the carefully-negotiated staffing procedure.

POSITION OF THE EMPLOYER

The Arbitrator should order the Village to grant Grievant priority for all future overtime work until he has received three hours of overtime work or, alternatively, order the Village to offer future overtime assignments of Officer German to Officer Olander first, until he receives his three hours of overtime back.

Giving Grievant an opportunity to make-up the overtime would fully compensate him for the Village's unintentional error by giving him what he

lost, the opportunity to work overtime and receive overtime pay for performing that work. Ordering the Village to pay Grievant would inequitably grant Grievant an unjustified windfall in the form of premium pay for time not worked. It would also unnecessarily double the Village's premium payment for the three hours of work in question in the face of the current societal emphasis on trimming municipal budgets and limiting public sector labor costs. There is no claim that the Village makes such errors frequently, so that there is no need to punish the Village by awarding Grievant monetary damages.

Arbitrators have awarded make up overtime rather than back pay where, as here, the employer made a good faith effort to abide by the agreement when it made the overtime assignment error, the agreement contained no specific provision for penalizing the employer, the union did not allege that the employer regularly violated the overtime provision of the agreement, and the admitted error did not result in intentional harm to the grievant. For that reason, a make-up order should be used unless the union can demonstrate that it would be impractical or unfair. Citing, Charleston Naval Shipyard, 84 LA 8, 10 (Nolan, 1984). Where, as here, the employer did not act intentionally in denying the grievant overtime and the grievant could receive priority in the assignment of upcoming overtime without unfairly harming other employes, a make-up order is fair and practical.

For all of those reasons, the Arbitrator should reject the Association's request for monetary relief and limit the remedy to a make-up opportunity as proposed above.

DISCUSSION

Consistent with the parties' Sec. 17.05 directives, this DISCUSSION is limited only to those "observations or declarations of opinion which are . . . directly essential in reaching the determination" regarding "the precise issue(s) submitted for arbitration."

Determination of the ISSUE submitted turns on whether the Grievant shall be granted monetary relief or limited to some form of an opportunity to make up the overtime he lost in the future.

Elkouri and Elkouri describe the general body of published arbitration awards on the subject as follows:

Unquestionably the most frequently utilized remedy where an employee's contractual right to overtime work has been violated is a monetary award (generally at the overtime rate) for the overtime in question. . . . In some cases, however, the arbitrator has considered make-up overtime within a reasonable time to be the appropriate remedy. . . ."

How Arbitration Works, (BNA, 4 ed, 1985) at 536. Hill and Sinicropi offer the following analysis:

A review of published decisions indicates that arbitrators have been on both sides of the issue with respect to awarding monetary compensation to employees who have been improperly denied overtime assignments. Arbitrator Howard Block aptly noted that the various opinions in this area, however diverse, do contain consistent elements:

Decisions as to the proper remedy generally turn

on analysis of, among other things, the particular provisions of the contract, past practice of the parties, the nature of the breach, and the availability of makeup work. [The Kalamazoo Spice Co., 73-2 ARB Par. 8444 (H. Block, 1973)]

Absent contractual language specifying the exact remedy to be applied, the predominate view expressed by arbitrators is to award back pay at overtime rates where overtime assignments are to be allocated according to seniority. In those cases where seniority opportunities have been lost under an equalization allocative scheme, the decisions are split. The better weight of authority holds that if equalization is still possible within the time frame for equalizing assignments, the employee is not really damaged and an order to permit the grievant to make up lost overtime before the equalization period expires is an appropriate remedy. If, on the other hand, the overtime is forever lost, either as a result of an assignment outside of the equalization unit or because the period of equalization has expired, a monetary award may be appropriate.

Remedies in Arbitration (BNA, 1981) at 129.

The Arbitrator also finds useful the following additional observation: "While the many decisions in this field cannot be easily harmonized, the central theme of all the decisions is to make the employee whole to the extent that this can be done without affecting the rights of other employees. Aetna Portland Cement Co., 41 LA 219, 223 (Hebert, 1964).

The language of Sec. 5.07 does not specify the appropriate remedy for an overtime assignment error. However, the provision relieving the Village of responsibility for infractions of that procedure by "bargaining unit employee, or other non-supervisory employee" implies that the parties mutually expect the Village to be held responsible for infractions in which, as here, a Village supervisory employee makes the "error in judgment." While not conclusive, that language tends to support the Association's proposed form of relief because an award of back pay would adversely impact only the Village and would have no potential adverse impact on the Grievant or any other employee.

The "on a seniority basis" language contained in the language describing the second, third and fourth sequential steps of the Sec. 5.07 procedure brings the facts of this case within the ambit of those in which overtime assignments are to be allocated by seniority and in which arbitrators have predominately granted back pay relief. In the context of those provisions and the balance of Sec. 5.07, to offer Grievant priority for all future overtime work until he has received three hours of overtime work would either deprive another officer of overtime to which that officer is otherwise entitled under Sec. 5.07, or it would grant Grievant overtime opportunities that he would otherwise have enjoyed anyway. To offer Officer German's future overtime assignments first to Grievant until Grievant receives his three hours of overtime back might not compensate Grievant within a reasonable time or at all given the order in which those two were to have been called for the overtime at issue in this case. In other words, while there would likely be timely and plentiful overtime opportunities that could be offered to Grievant, it does not appear that Grievant could reliably be made whole without unfairly interfering with the rights and legitimate expectations of others regarding the proper application

of the Sec. 5.07 procedure.

There is nothing in the parties' Stipulation regarding the parties' past practice regarding remedying overtime assignment errors. Hence there is nothing relating to past practice in the evidentiary record in this case that would support or undercut either party's proposed remedy.

The nature of the breach in this case is clearly one of a good faith mistake which has not been claimed or shown to have been intentional or part of a pattern of such inadvertent errors. Therefore, the nature of the breach, looked at in isolation, lends support to the Village's proposed remedial approach.

However, the innocent nature of the breach is not sufficient, even when coupled with the other equitable considerations noted by the Village, to overcome the above noted unfairness to Grievant and/or others that would arise from limiting Grievant's relief to a make up opportunity, given the nature of the Agreement Sec. 5.07 procedure.

The Arbitrator has therefore ordered that Grievant be compensated for the loss of three hours at the time and one-half rate. The Arbitrator intends that Grievant be allowed whatever options he would have had in April of 1993 to take it as cash or compensatory time.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUE noted above that:

The appropriate remedy for the Village's above noted admitted violation of the third step of the Agreement Sec. 5.07 Officer Staffing Procedure shall be as follows: the Village shall immediately compensate Grievant Donald Olander in cash and/or compensatory time equal to that which he would have received had he worked the three overtime hours from midnight to 3:00 AM on the April, 1993 date in question.

Dated at Shorewood, Wisconsin this 3rd day of February, 1994.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator