

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

THE WISCONSIN PROFESSIONAL POLICE
ASSOCIATION

and

THE VILLAGE OF McFARLAND

Case 9
No. 52395
MA-8948

Appearances:

Mr. Howard Goldberg, Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law,
433 West Washington Avenue, Suite 100, P.O. Box 990, Madison, Wisconsin
53701-0990, appeared on behalf of the Village.

Mr. Richard Thal, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll
Street, Madison, Wisconsin 53703, appeared on behalf of the Association.

ARBITRATION AWARD

On March 17, 1995, the Wisconsin Employment Relations Commission received a joint request from the Wisconsin Professional Police Association and the Village of McFarland to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Mr. Houlihan was appointed to hear this matter on April 24, 1995. An evidentiary hearing was conducted on June 7, 1995 in McFarland, Wisconsin. Briefs and reply briefs were filed and exchanged by July 28, 1995.

At hearing, the parties stipulated to the following issue:

Did the Village violate the collective bargaining agreement when, beginning August 25, 1994, it failed to offer bargaining unit employees open-scheduled shifts?

If so, what is the appropriate remedy?

BACKGROUND AND FACTS

This dispute concerns the fundamental agreement entered into by these parties in their negotiations leading to a 1994-1995 collective bargaining agreement. The parties exchanged proposals for a 1994-1995 labor agreement on September 15, 1993. As negotiations progressed, the central issue in dispute was wages. A petition for interest-arbitration was filed on October 6 and the parties subsequently went through the mediation process. Ultimately, the Union's

proposed wage increases proved unacceptable to the Village. In an effort to avoid a dispute and interest-arbitration over the matter, the Union subsequently proposed that the Village offer full-time bargaining unit police officers overtime which was, at the time, being awarded to part-time non-bargaining unit officers. Negotiations thereafter focused on that proposal. As a part of the Village's consideration of this proposal, Michael Larson, Chief of Police, prepared and supplied the following memo to Doris Hanson, Village President:

September 24, 1993

TO: Doris Hanson, Village President

FROM: Michael Larson, Chief of Police

Per your request I am supplying you with the number of part-time hours and full-time hours used during vacant shifts during 1993. The 1993 hours go up to September 1, 1993. I have also supplied you with the figures from 1990, 1991 and 1992 for comparison. In calculating the cost per hour figures I used 1993 wages for all the years involved for comparison. The \$9.62 is the current wage rate for part-time officers and the \$19.30 is the time and one-half wage for the average officer wage. If you need any further information please contact me.

	1990	1991	1992	1993 to 9/1
Part-time				
Hours	960	976	1428	912
x \$9.62	\$9,235	\$9,369	\$13,737	\$8,773
Full-time				
Hours	336	643	400	60
x \$19.30	\$6,484	\$12,409	\$7,720	\$1,158

The record is unclear as to precisely how the Union came to have a copy of the memo, but is clear that the Union possessed and relied upon this memo as its informational background during the course of the negotiations.

The Union was represented in bargaining by Mr. James Kluss, Executive Director of the WPPA. During the course of negotiations, Kluss indicated to the Village that his prior experience with overtime provisions similar to the one proposed was that officers would initially seek out considerable amounts of overtime but over time their desire for such overtime would be tempered and would slack off. Kluss predicted that initially the proposal would be expensive, but would

thereafter diminish.

As the negotiations, and mediation, proceeded the parties made proposals and counter-proposals. One such proposal came in the form of a letter dated March 7, from Mr. Howard Goldberg, attorney for the Village. That proposal is set forth in its entirety:

Dear Mr. Kluss:

I have passed onto Doris Hanson the offers that you made (in the alternative) to settle the police contract in the above community. Specifically, I passed on that the Union was willing to accept our final offer if the sunset provision regarding the allocation of overtime is eliminated. In the alternative, I told her that the Union was willing to accept our sunset provision if the wages were increased from 2% 2%, 2% and 2% to 3%, 3%, 3% and 3%. As I predicted to you, my client is not willing to accept either counter offer.

She again urged me to pass on to you (and hopefully the employees) that the Village is unable to calculate the cost of the overtime provision that you have proposed. She feels that if the cost is as low as you have predicted, then there will be no problem in putting that provision into the next contract again. I told her what you said about the City of Columbus officers not wanting as much overtime as was available to them. In response, she stated that, if that situation occurred here, then there should not be any real problem. All the Village is asking for is an opportunity to cost out the impact of this change. Since overtime varies, year to year, it cannot really be projected with any kind of accuracy.

In my mind, it would be silly to go to arbitration over this single point of difference. Let the Village test the waters and see what is involved. Please get back to me.

Very truly yours,

Howard Goldberg /s/
Howard Goldberg

The Union made a counter-proposal to the March 7 offer, which proposal was itself greeted by

another written offer from the Village, dated April 22 and set forth below:

Dear Mr. Kluss:

I am in receipt of the Union's final offer in the above matter. When you called me at home, you asked if the Village would be willing to increase its wage offer in exchange for the Union accepting the sunset provision on the overtime provision. You felt that a small increase in the wage offer would be all that it would take to get the employees to accept our sunset provision. I told you that I doubted that the Village would pay any more, but I was willing to talk to Doris Hanson about this.

In the meantime, I did receive an amended final offer from you in which the Union has agreed to accept the overtime provision as proposed with a sunset clause along with a change in wages from 2% 2%, 2%, 2% to 2%, 3%, 2%, 3%. I feel that it was good that you were able to convince your troops to accept the sunset clause which, to me, demonstrates a basic trust between the employees and the Village. I have passed all of this on to Doris Hanson, and she has authorized me to modify our wage provision to 2%, 2%, 2%, 3%. It seems to me that, by this amendment to our wage offer, you have obtained the commitment from the Village that you were seeking. I urge you to take this offer to your members and get this deal done. I am sending a copy of this letter to Dennis McGilligan; however, if the employees are not willing to accept this latest change, then we will be rethinking our entire final offer.

Very truly yours,

Howard Goldberg /s/
Howard Goldberg

Ultimately, the parties resolved their dispute by including the following provision in Article XII of the collective bargaining agreement:

All scheduled hours shall be first offered to the bargaining unit employees prior to offering the scheduled hours to non-bargaining unit employees or part-time employees. This provision shall

automatically terminate at 11:59 p.m. on December 31, 1995, unless prior to this date a request is made to continue during the hiatus period until a successor agreement is reached.

The language proved to be expensive. In August of 1994, Larson lacked the funds to cover the cost of the overtime. His response to that circumstance was to issue a memo, dated August 25, 1994, the impact of which was essentially to leave certain shifts open. That is, certain shifts were not filled. As a consequence, there was little or no overtime generated. This was accomplished in a number of ways. Certain shifts (particularly the power shift) were not filled. Certain patrol shifts were filled by sergeants (bargaining unit members) whose vacated shifts were left unfilled. Chief Larson testified that each of these approaches had occurred in the past. The record supports a conclusion that these scheduling approaches had been used prior to 1994, but not in the systematic fashion, nor with the frequency employed beginning August 25, 1994. Officer Michael Klemetz, testified that historically it was rare for a shift to go unfilled. His testimony and that of Chief Larson are compatible and easily reconciled. It appears to me that historically certain shifts were periodically left unfilled. It further appears to me that Larson's action of systematically leaving scheduled shifts unfilled to avoid overtime was unprecedented.

Beginning in August, vacant scheduled shifts were left unfilled in order to avoid the payment of overtime. A grievance was filed on September 6, 1994 contending that the Chief's actions of August 25 violated the agreement between the parties. In September of 1994, Chief Larson had his overtime budget supplemented by \$7,000 to continue the ongoing cost of overtime.

Mr. Kluss testified as to the history of the bargain giving rise to this provision. It was Mr. Kluss' testimony that the Village committed that officers would receive the overtime. It was his understanding that the commitment was that all scheduled shifts would be staffed, consistent with understanding as to the status quo. He indicated that it was never his understanding that the employer would simply stop filling shifts. Kluss indicated that the agreement reflected a "basic trust" between the parties. Kluss acknowledged that the Village indicated a need to know the cost of the provision. It was his testimony that the purpose of the sunset provision, proposed by the Village, was to permit the Village to gain experience with the clause and take action after a year's time, if necessary.

There is no indication in the record that the Employer scheduled part-timers or other non-bargaining unit employees into shifts ahead of bargaining unit employees.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

. . .

ARTICLE II - MANAGEMENT RIGHTS

Section 2.01

The Village has the sole right to plan, direct and control the working force, to schedule and assign duties to employees, to determine the means, methods, and schedules of operation, to establish standards and to maintain the efficiency of its employees. The Village also has the sole right to assign temporarily department personnel to duties at such times as emergencies vital to the delivery of municipal services arise. The Village shall use discretion and reason in making such assignments. The Village has the right to discipline or discharge for just cause.

...

ARTICLE XII - OVERTIME

Section 12.01

All hours worked in excess of the employee's normal eight (8) hour shift shall be compensated as overtime at a rate of one and one-half (1 1/2) times the normal rate of pay, or by mutual agreement taken as compensatory time off at a rate equal to one and one-half (1 1/2) times the hours worked. In no instance will any employee be permitted to accumulate more than eighty (80) hours compensatory time.

All scheduled hours shall be first offered to the bargaining unit employees prior to offering the scheduled hours to non-bargaining unit employees or part-time employees. This provision shall automatically terminate at 11:59 p.m. on December 31, 1995, unless prior to this date a request is made to continue during the hiatus period until a successor agreement is reached.

...

POSITIONS OF THE PARTIES

The Association notes that the parties worked off a common document, in their negotiations leading to this Agreement. Both parties knew that the new allocation of overtime would result in approximately 200 overtime shift opportunities per year for bargaining unit employees. Chief Larson's memo to the Village President demonstrated an average of 1,581 hours per year available for such assignment. The Association contends that the Village did not honor

the commitment to fill these open shifts to bargaining unit officers. During the final four months of 1994, the Village eliminated approximately 47 scheduled shifts, depriving officers of their right to work overtime. The Association, pointing to the testimony of Mr. Kluss, contends that the parties' bargaining history shows that when they bargained Section 12.01 it was their intent that the Village would fill all open shifts and would fill them by first offering the open shifts to bargaining unit employees. Therefore, Chief Larson's unilateral elimination of 47 open shifts violated the collective bargaining agreement. The Association cites arbitral precedent for the proposition that the intent of the parties in bargaining overrides an employer's general right to schedule work, found elsewhere in the agreement. Part and parcel of the new language of 12.01 was a commitment, and an obligation, to offer all open shifts to bargaining unit employees.

The Village expressed a need for "an opportunity to cost out the impact" of a new allocation of overtime. That is the purpose of the sunset provision. Obviously, if the parties' intent had been that the Village could eliminate open shifts, the Village would have had no reasonable budgetary concerns and thus no need for the sunset provision. Chief Larson's August 25, 1994 memo eliminating overtime opportunities was motivated by budget constraints. There was no reduced manpower need, but solely a budgetary concern. Indeed, starting in January, 1995, the Department returned to its practice of filling all open shifts, thereby acknowledging that the sole reason for the temporary discontinuance of the practice of filling all open shifts was budgetary. The Association contends that "budgeted monies are precisely those monies the Village promised to pay its officers in the 1994-95 negotiations." In its reply brief, the Association contends that a part of the parties' agreement in 12.01 was an obligation to offer all open shifts to bargaining unit employees. The agreement to offer all open shifts to bargaining unit employees is a hollow agreement where the Village subsequently eliminates those very shifts.

The Village cites arbitral authority for the proposition that management typically has a right to determine if vacancies are to be filled, to suspend normal operations, and to do so even where the sole motivation is to avoid overtime. The Employer contends that no contractual restriction exists on its ability to do so.

The Village contends that there exists no provision in this Agreement obligating the Village to schedule overtime work. Nothing in the record suggests that any employee was cut back in his or her regular eight-hour shift nor is there a contention that the Village offered overtime opportunities to non-bargaining unit employees ahead of bargaining unit employees. Section 12.01 does not obligate the Village to schedule work, nor does it obligate the Village to fill vacant shifts if it chooses to leave such shifts vacant. Section 12.01 only specifies that the Village must first offer work that it elects to be performed to bargaining unit employees before offering such work to others.

The Employer contends that the provisions of Section 12.01 are not ambiguous. Nothing in the history of the bargain suggests that the Employer gave up its right to schedule work. Rather, argues the Village, the decision to schedule work and assign employees to perform that work is solely retained by the Village. Both the language of the Agreement and the prior practice of operating without a fourth shift at times support that conclusion. Section 2.01 of the Agreement

vests in the Village the sole right to plan, direct and control the workforce.

Finally, the Village contends that the Chief has historically left shifts open, and that this constitutes a past practice. A Village exhibit demonstrates that in calendar 1993, the Chief had not scheduled employees to work open shifts on more than twenty separate occasions. In its reply brief, the Village contends that the Union is essentially claiming that the Village guaranteed that all shifts would continue to be scheduled and filled for each and every day of the contract term. Nothing in the labor agreement supports this contention. The Village contends that as a practical matter, the Union's prediction that the employees would soon grow tired of working extra hours was completely inaccurate. As costs mounted beyond expectations, the Village responded with cost containment measures expressly reserved to it under the terms of the labor agreement.

DISCUSSION

In this dispute, the Union was attempting to bargain for a substantial wage gain. It agreed to take less than it regarded as appropriate for access to overtime previously awarded to part-timers. The agreement of the parties is reflected in the second paragraph of Article XII, Section 12.01. The first sentence of that paragraph, proposed by the Union is the entitlement provision. Read literally, that sentence obligates the employer to offer all scheduled hours to bargaining unit employees prior to offering those hours to non-bargaining unit employees or part-time employees. In essence, what the Village has done is to not offer those hours to anyone. Chief Larson's memo, used by both parties in the course of the negotiations, shows an average of part-time hours well in excess of 1,000 hours. This bank of hours was the object of the Union's proposal. I believe this document formed the factual basis of the parties' bargain.

The Union anticipated access to all of that overtime. I also believe that the Union believed that while it would have access to those hours, as time passed as a practical matter, officers' desire for all of those hours would dissipate, and that as a practical matter, not all of those hours would be filled on an overtime basis.

The Village had and expressed a concern over the cost of this provision. Filling these hours with a full-time officer at overtime pay is more than twice as expensive as filling them with part-time employees. By all accounts, the sunset clause was the potential escape from a potentially unaffordable overtime provision. Goldberg's two letters make explicit reference to that fact. It appears that a part of the negotiation included a tradeoff of wage dollars for inclusion of the sunset provision.

I also get a sense that there was a certain experimental dimension to this agreement. By the very nature of this type of agreement, i.e., entitlement to overtime opportunities, neither party could fully know the cost and/or staffing consequences of this proposal. Kluss' testimony and Goldberg's letter expressed a belief in a basic trust underpinning this agreement.

The Village introduced an exhibit which I believe demonstrates that in calendar 1993 a number of shifts were left open. It appears to me that prior to January 1, 1994 the Chief both had and exercised the authority to leave scheduled shifts unfilled. Whether that was for budget or staffing reasons is not clear from this record. What is clear is that a part of the factual underpinning of this bargain is that prior to 1994, shifts were left open.

The Union contends that the practice of leaving scheduled shifts unfilled is a part of what the parties agreed to eliminate as a part of this agreement. If so, it is not apparent from the language used. I do not read Article XII to require that all hours scheduled must be offered to bargaining unit employees. Rather, it is my reading of the Article that the Village must offer scheduled hours to bargaining unit employees prior to offering those hours to others.

The construction urged by the Association would result in a benefit that exceeds the levels of hours set forth in the document prepared by Chief Larson, and used by the parties. That document sets forth vacant shift hours filled by part-time and by full-time employees during the time period 1990 through 9-1-93. As I understand the document, it consists of the hours worked by part-time employees and the overtime hours worked by full-time employees. What is missing from this document, ostensibly because it did not involve a "cost", is scheduled shifts left unfilled. The record suggests that some number of those shifts existed prior to the parties' bargain. The essence of the Union's contention in this proceeding is that those hours must be offered.

I believe that the parties entered into this agreement in all good faith hoping that these details would work themselves out. I believe there was a sense that the department would be staffed and operated essentially as it had been historically and that overtime opportunities would be offered to full-time employees in preference to part-time employees. I believe the parties trusted that matters would sort themselves out over the term of the collective bargaining agreement and that this would either be a workable resolution or would result in the invocation of the sunset provision. Things did not work out to the satisfaction of the Village, and it took action.

This agreement was based upon certain assumptions that failed to materialize. Specifically, the Village assumed that the full-time officers' demand for overtime would diminish more rapidly than proved to be the case. The Association assumed that the Chief would not act to eliminate overtime opportunity by leaving vacant shifts unfilled as a budgetary measure. Ultimately, things could not be worked out. This resulting arbitration addresses who has rights as the parties fall back on the provisions of the labor agreement.

For me to sustain this grievance requires that I find that the Village is bound to actually staff its police protection at either the paper or actual level in existence in calendar 1993. I do not believe that Article XII can be read to bring this about. This is particularly so in the face of Article II's reservation to the Village of the right to "schedule and assign duties to employees", to "determine. . .schedules of operation".

All parties expressed trust in one another. A part of what the Union trusted in was that the Employer would not exercise its authority to diminish the benefit of this bargain. Prior to August 25, 1994, bargaining unit members had first access to overtime opportunities. I assume some level of financial benefit materialized from that opportunity. I believe that this Employer acted within its contractual right. Its action did serve to deny bargaining unit employees overtime opportunities. However, its action also served to deny the Village police protection previously enjoyed. If the bargain thus administered proves unsatisfactory to either or both of these parties, their remedy is at the bargaining table.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 31st day of January, 1996.

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