

BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN
OSHKOSH PROFESSIONAL POLICE OFFICERS ASSOCIATION

and

CITY OF OSHKOSH
(Sergeant Tony Duff)

Case 276 No. 55090 MA-9896

APPEARANCES

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Suite 261, PO Box 1015, Green Bay, Wisconsin, 54305.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, PO Box 1278, Oshkosh, Wisconsin, 54902-1278.

ISSUE

The Union stated the issue: “Did management violate Directive 116 by reassigning a second shift sergeant to a third shift temporarily? If so, what is the appropriate remedy?”

The City stated the issue: “Did the City violate the long-standing practice of filling a short-term vacancy among lieutenants by assigning other sergeants or non-bargaining unit supervisors to fill the vacancy instead of following Directive No. 116, Overtime Work. If so, what is the appropriate remedy?”

Arbitrator statement of the issue: “Did the City violate the collective bargaining agreement and Directive 116 by assigning a sergeant from the second shift to fill an anticipated shift shortage on the third shift? If so, what is the appropriate remedy?”

THE RELATIVE CONTRACT PROVISIONS

Article I, Management Rights

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

Article X, Previous Benefits

The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours, and conditions of employment not specifically referred to or altered by this Agreement.

Article XIII, Rules & Evaluation Reports

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective dates.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

Article XX, Recognition & Unit of Representation

The City hereby recognizes the Association as the sole and exclusive bargaining agent with respect to hours, wages and conditions of employment for the positions of patrolman, detective and sergeant excluding the positions of Chief, inspector, captain, and all other employees of the Oshkosh Police Department.

POLICE DIRECTIVE 116

#116 - Overtime Work

Effective Date: 01/29/96

Objective: Standardization of procedures for overtime assignments

Definitions:

Unanticipated Shift Shortage - A staffing shortage that occurs within 24 hours of the start of the affected shift.

Anticipated Shift Shortage - A staffing shortage that is known more than 24 hours in advance of the affected shift.

Emergency - An emergency is an unanticipated circumstance which requires immediate police action to quell a disturbance or preserve the public peace or safety.

Scheduled event - A known, pre-arranged activity such as EAA Traffic assignments.

BACKGROUND

This grievance arbitration involves the City of Oshkosh, Wisconsin, Police Department. The grievance is one of contract interpretation and the interpretation of Police Department Directive 116. (Joint Exhibit 4.) Directive 116 provides for a procedure for overtime assignments in the event of anticipated and unanticipated shift shortages. The grievant in this matter is Patrol Sergeant Tony Duff.

The City of Oshkosh Police Department operates three shifts. Each shift is manned by three supervisors, a lieutenant, and two sergeants. This dispute centers on the assignment of a sergeant regularly scheduled for the second shift to fill in for a shortage of a supervisor on the third shift on March 19, 20, and 21, 1997. (Joint Exhibits 2, 3, and 4.) On the third shift for March 19, 20, and 21, 1997, neither the lieutenant or either of the two sergeants normally assigned to supervise the shift were available. The City assigned Sergeant David Gomoll, who is normally assigned to the second shift, to act as the third shift supervisor for the dates in question. Sergeant Gomoll was already assigned to work the second shift on those dates. His transfer did not result in overtime.

Police Department Directive 116 deals with the situation of an anticipated shift shortage and sets forth a procedure for filling a shift shortage and offering the overtime to off-duty Police officers. Under the Union's position, March 19, 20, and 21 were anticipated shift shortages and, therefore, Directive 116 should have applied. This would require the City to offer the shift and subsequent overtime first to officers of the same shift that were off duty and then to off-duty officers by seniority from the Patrol Division. Sergeant Duff, the grievant, was one of the officers that the Union claims should have been offered the opportunity to work the third shift on March 19, 20, and 21, thereby

giving him the opportunity to work overtime. When the City transferred Sergeant Gomoll from the second shift to act as Sergeant on the third shift on the three days in question, the Union filed the instant grievance on behalf of Sergeant Duff. There is no dispute between the parties that the shortage of a supervisor (lieutenants or sergeants) on March 19, 20, and 21, was an anticipated shift shortage. The dispute centers on whether the City had the right to transfer a sergeant from the second shift to act as the supervising sergeant on the third shift or whether the City was required to offer the work to off-duty officers under Directive 116, thereby creating an overtime situation.

The parties were unable to resolve the grievance and made a request for grievance arbitration to the WERC on April 15, 1997. A hearing in this matter was held by the arbitrator on June 19, 1997, in the City of Oshkosh. The hearing was closed at 12:00 p.m. The hearing was transcribed, and the transcript was received on June 30, 1997. The parties were given the opportunity to file briefs and reply briefs which were received on August 4 and August 18.

POSITION OF THE PARTIES

Union:

It is the Union position that management does not have a unilateral right to transfer employees in an anticipated shift shortage situation; Police Department Directive 116 clearly and unambiguously requires the City in the situation of an anticipated shift shortage to follow the Directive and offer the shift to an off-duty officer. (Joint Exhibit 4.) The Union argues that management does not have the right to assign officers from another shift in order to avoid the requirements of Directive 116. Sergeant Duff in this case was an off-duty officer who by seniority should have been offered the opportunity to work the third shift on March 19, 20, and 21, thereby giving him the opportunity to earn overtime under the Directive. By failing to offer Sergeant Duff the opportunity to work on the pertinent dates, the City violated Directive 116 and the collective bargaining agreement. The Union argues that the City is adding a provision to the Directive that is not there, allowing the City to first fill the shift shortage by transfer of an officer from another shift.

The Union argues that the language of the old Directive 116 that was in effect prior to the current Directive is not applicable to this situation because that Directive did not provide for a procedure assigning officers in the event of a shift shortage that was anticipated; the earlier version of 116 (City Exhibit 9) only covered unanticipated shift shortages. The Union further argues that there has not been any long-standing past practice of the City transferring or assigning officers from other shifts to fill in for shift shortages and the City offered no proof to the contrary. Lastly, the Union argues that under Article X of the labor agreement, benefits can only be enhanced and that the Union would have grieved the new Directive if in fact it had understood it to mean that the City

could unilaterally transfer employees from other shifts to fill shortages in anticipated shift shortage situations. The Union states that because Sergeant Duff was never offered the opportunity to work on March 19, 20, and 21, he lost the opportunity to work 24 hours of overtime, and that the grievance should be sustained and Sergeant Duff paid 24 hours of overtime.

City:

The City's position is that under the Management Rights clause and long-standing past practice, the City has the right to determine whether a short shift situation will be filled by transferring an officer from another shift or by proceeding under Directive 116. The City argues that it has been its consistent practice, as proven by the unchallenged testimony of the Chief of Police, that the Chief, or his representatives, have always filled shifts, when they are able, by transferring officers from another shift rather than incurring overtime under Directive 116. The City argues that overtime is not guaranteed under the collective bargaining agreement or under Directive 116, and Directive 116 is only initiated when it's determined by the City that overtime is necessary by filling the shift with off-duty officers. Otherwise, the City argues, it would be required to grant overtime in every situation of an anticipated shift shortage, even when, by transferring other supervisors or patrol officers, the City could fill the short shift without incurring overtime. The City argues that the version of Directive 116 in place before the current Directive 116 is relevant because anticipated shift shortages were covered in the same manner as under the current Directive even though there was no language in the previous Directive 116. The City argues that nothing has changed in so far as the practice between the parties in filling shift shortages either first by the City transferring officers to the short shift or following Directive 116 and offering overtime to off-duty officers. The City requests that the arbitrator deny the grievance in its entirety.

DISCUSSION

The facts in this case are not in dispute. What is in dispute is whether Police Department Directive 116 must be applied immediately in a shift shortage situation or whether the City has the right to first try and fill the shift by transfer of another on-duty officer to work the shift. In this case, the City filled a shortage of a supervisor on the third shift by assigning an on-duty sergeant from the second shift to fill what both parties agree was an anticipated third shift shortage. The Union argues that there is no exception to 116 and, in an anticipated shift shortage, 116 must be used providing a potential overtime opportunity for off-duty officers. The City argues that it has the right to determine whether overtime will be worked, and 116 only comes into play if the City determines that it cannot fill the shift by transfer of other on-duty officers. Neither party offered evidence as to how the Directive was related to the collective bargaining agreement or what the parties' original intent was when the Directive was first promulgated and later amended.

The previous version of 116 to the one in dispute did not cover anticipated shift shortages. 1/

Standing by itself, 116 is persuasive that when there is an anticipated shift shortage the shortage must be filled by offering the hours to off-duty officers. However, 116 cannot stand alone but must be considered in light of the parties' labor agreement and the practice of the parties. The Management Rights clause is broad and can only be specifically modified. That article without modification gives the City the right to assign officers to shifts as it wishes. Management would also have the right to determine the number of supervisors per shift. Thus, without 116, Management would have the right to determine how it was going to fill a shift shortage.

There is no issue that once the City decides to fill a shift shortage with off-duty officers 116 applies. The Directive clearly defines who and how the off-duty officers will be given the opportunity to work . Directive 116 was modified and became effective on January 29, 1996. This revision added language controlling the filling of a shift shortage in an anticipated situation where the previous 116 only covered emergency and unanticipated situations. 2/ The Union argues in its brief that under Articles X and XIII of the labor contract, it would have filed a grievance if it had thought it was giving up the right to have off-duty officers called in under the revised 116 that added the language about anticipated shift shortages. 3/ There is, however, no evidence as to the Union's understanding of 116 other than the instant grievance. The Union did not offer any evidence that the City always filled shift shortages under 116 and never transferred officers to fill a shift shortage so the City would not have to incur overtime. The Union concedes that the City can do as it wishes when lieutenants fill in for other lieutenants. 4/ The Union further argues both at the hearing and in its brief that there is no need to consider what went before the current 116 because it is only since the current 116 that anticipated shift shortages were covered. 5/

The City's argument, as stated above, is that nothing changed with the revision of 116 to add anticipated shift shortage language; the City transferred officers to fill a shift to avoid the payment of overtime before current 116 and has continued to do so since. The City's position is bolstered by the uncontradicted and credible testimony of the Chief of Police. The Chief testified that there has been a long-standing practice to cover a vacancy or shift shortage by changing the shifts of supervisors as it did in this case. 6/ The Chief also testified that adding the anticipated language to 116 has changed nothing and had no impact on changing the shifts of sergeants to fill short shifts. 7/ The City offered three examples of where an anticipated shortage of a sergeant on the first shift was filled, not by Directive 116, but by assigning an on-duty sergeant to fill the shift. A sergeant from the planning and research division was assigned on August 12, 1996, to fill the anticipated shift shortage in the patrol division. The same sergeant also filled a patrol division shortage on July 5, 1996, and on September 23, 1996, a training sergeant filled in for a patrol sergeant, again on the first shift. 8/ The Union argues that those examples were merely extensions of the shifts of the three officers who took the short shifts; extensions

are an exception under 116. The arbitrator finds that while these examples did not involve transferring a sergeant to another shift, they are occurrences that potentially were subject to 116 because the officers were from divisions other than patrol. The Union could have made the same argument in these three occasions as it did in the case of the grievant. Directive 116 does not exempt situations where the City shifts officers from different divisions on the same shift. In fact, when 116 does apply, the hours of the short shift must first be offered to off-duty officers on the same shift and then from the same division. These examples support the Chief's testimony that the practice of first filling a short shift by a transfer of on-duty officers continued even after the reference to anticipated shortages added to the revised 116.

To rule in favor of the Union's interpretation in this case would mean that in every situation where there was a shift shortage, the City would be obligated to incur overtime. The record does not support this interpretation. The contract itself gives the City discretion as to how it will fill shift shortages. The evidence of practice establishes that the City generally exercised that discretion by transferring officers to avoid overtime. In this context, it is unreasonable to conclude that in a unilaterally promulgated directive, the City would give up its discretion to avoid overtime obligations where possible. If it did give up its right, it is the Union's burden to prove that it did, and the Union failed to do so.

Directive 116 states as its objective "Standardization of procedures for overtime assignments." The word assignment is critical. It implies that first there has to be an assignment. The Management Rights clause absent a specific exception gives management that right; the Union, in this case, did not offer evidence or argument otherwise. The arbitrator finds that without more it is just too large a leap to say that the City is required in every shift shortage situation to assign overtime. The more persuasive result, based on the record, is that the City can fill shift shortages by transferring on duty officers to another shift, but when that is not possible and it is necessary to call in off-duty officers to an overtime situation, then the procedures of Directive 116 apply. The arbitrator has considered the record and briefs in this matter with the exception of City Exhibit 10. 9/ The arbitrator finds that the grievance of the Union cannot be sustained.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of September 1997.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

ENDNOTES

1/ City Exhibit 9, Directive 116 - Overtime Work (revised) effective: 2-21-94.

2/ Joint Exhibit 4, Directive 116 Overtime Work Effective Date: 01/29/96; City Exhibit 9, Directive 116 - Overtime Work (revised) effective: 2-21-94.

3/ The Union has the right under Article XIII to challenge directives of management through the grievance procedure. Article X is essentially a maintenance of benefits or standards article.

4/ Union Brief in Chief, page 5.

5/ Union Brief in Chief, page 5.

6/ Transcript pages 26 and 27.

7/ Transcript page 34.

8/ Transcript pages 13 through 16, City Exhibits 6, 7, and 8, Daily Shift Schedules for August 12, 1996, July 5, 1996, and September 23, 1996.

9/ The arbitrator advised the City when it introduced City Exhibit 10 into the record that the arbitrator was not disposed to consider it, and it was not reviewed or considered. Grievances are seldom settled without a non-precedential agreement, and even if one could not be found in the City's file, it would have been appropriate to advise the Union before the hearing that the City intended to introduce a previous grievance settlement. Introduction of grievance settlements in other litigation can inhibit settlement in the future and should not be used unless the parties clearly agree a settlement is precedential.

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