

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**ST. CROIX COUNTY LAW ENFORCEMENT
EMPLOYEES ASSOCIATION, LOCAL 108**

and

ST. CROIX COUNTY

Case 158
No. 55072
MA-9881

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Association.

Mr. Stephen L. Weld, Weld, Riley, Prenz & Ricci, S.C., appearing on behalf of the County.

ARBITRATION AWARD

St. Croix County Law Enforcement Association, Local 108, hereinafter referred to as the Association, and St. Croix 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 parties jointly requested that the Wisconsin Employment Relations Commission designate a staff member to act as an arbitrator to hear and decide two grievances over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Hudson, Wisconsin on July 28, 1997. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on September 4, 1997. The parties reserved the right to file reply briefs, if needed, no later than ten (10) days after receipt of the opposing party's brief. On September 11, 1997, the parties indicated that no reply briefs would be filed and the record was closed.

BACKGROUND

This case involves the assignment of overtime at the County's jail. The grievants are correction officers who work a 6 - 3 schedule. Captain Karen Humphrey has been developing the monthly work schedule since about 1988. She generally posted a working draft of the next month's schedule about the 15th of the month. Where there are vacancies in the schedule due to vacations, school or other unavailability, these vacancies are filled

by Staff Filler positions, i.e. a certain number of corrections officers who fill in for vacant shifts. If there are not sufficient “fillers” to cover all the vacancies, then off-duty officers can agree to work overtime filling the vacant shift on the basis of rotating seniority. If there are still vacancies that need to be filled, then employes are held over from a preceding shift four hours and employes from the next shift are required to come in early four hours prior to the start of their shift. These are forced extensions. Overtime is designated by an asterisk after the shift designation in the employe’s schedule. Prior to forcing an employe to stay an extra four hours or come in early four hours, the Captain looked to see if anyone volunteered to come in early and/or stay later and volunteers would be assigned before anyone would be forced. The employes forced would be rotated by seniority each month starting with the most senior. In November, 1996, Captain Humphrey assigned Sergeant Mark Klandermann to do the work schedules. Sergeant Klandermann posted the working draft of the December, 1996 schedule around November 20, 1996. Klandermann had placed an asterisk after Officer Klatt’s shift for December 3, 1996 and an asterisk for Officer Mikla’s shift on December 4, 1996, meaning that each was being forced to come in four hours early those days and each would get four hours overtime. 1/ After the draft schedule was posted, Officer Fayerweather volunteered to work early on December 3 and 4, 1996. No fillers were available and no off-duty officers signed up for these days, so someone had to be forced unless there was a volunteer. When the final schedule was posted on or about November 26, 1996, Klatt and Mikla had no asterisk for December 3 and 4, respectively and Fayerweather did. 2/ Fayerweather has less seniority than Klatt or Mikla. Klatt and Mikla filed grievances on December 6, 1996 claiming that as they were senior to Fayerweather, they should have been given the overtime on December 3 and 4, 1996 respectively. The grievances were denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the Employer violate the provisions of the collective bargaining agreement when they failed to call in the grievants for available overtime on December 3 and 4, 1996?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 6 - WORK WEEK - CALL-IN PAY - OVERTIME

Section 4: For the duration of this contract, the County agrees to utilize bargaining unit members when filling vacancies for entire regular, full-time shifts. If the County chooses to fill a vacant shift or part thereof, it shall utilize people in the classification in which the vacancy occurs.

This shall be done on a rotating seniority basis for employees who are available. The County shall make a good faith effort to reach employees to offer the assignment; this shall constitute a telephone call to the residence of the employee. If the County cannot find an employee within the classification who volunteers for the assignment, it may go outside the bargaining unit to fill the position. Nothing in this Section abrogates the County's prerogative to determine whether or not to fill the shift. Nothing contained herein shall preclude the County from calling an employee early or extending an employee's shift to cover a vacant regular full-time shift or part thereof.

ASSOCIATION'S POSITION

The Association contends that the County violated the specific and implied provisions of the contract. The Association notes that the parties stipulated that Fayerweather was the least senior employe available to fill the vacancies on December 3 and 4, 1996 and there were no "filler" or off-duty personnel to work the entire shift, so the County had to extend an employe on overtime on both the 3rd and 4th. It asserts that Klatt and Mikla were the senior available employes on those dates. The Union argues that Klatt and Mikla should have gotten the overtime because the past practice is that if the County puts an asterisk by your name, it is assumed that you would work overtime. It claims that the past practice is that an asterisk has always implied that the senior employe will work the overtime unless the employe advises the County otherwise. It insists that there was no reason to assign the overtime to a less senior employe except to avoid paying a higher overtime rate. The Association states that Article 6, Section 4 provides that overtime shall be filled on a rotating seniority basis for employes who are available. It submits that Klatt and Mikla were the senior available employes and should have been called in early.

The Association recognizes that exceptions such as emergencies or the need for special skills permits the County to deviate from normal procedures but in this case, no exceptions were present. It claims that the County's reference to the use of less senior employes all related to an emergency.

It points out that once the asterisk is placed next to the most senior employe's name that employe agrees to work the overtime unless the employe notifies the County otherwise. The Association cites arbitral authorities upholding the practice of basing overtime opportunities upon seniority. It points out the contract requires overtime be assigned on a rotating seniority basis for employes who are available. It concludes that the County clearly violated the contract.

The Association reiterates that the grievants were placed on notice that they were to work overtime on December 3 and 4, 1996 and when this was changed, the County was obligated to check with them to determine whether they still wanted the overtime. The County did not and ignored their seniority thereby violating the contract and the

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call-in procedure. The Union alleges that the County cannot apply seniority in one instance and deny it in another. It states that Article 6, Section 4 requires calling in employes by

seniority and when it asterisked their names, the grievants knew that by reason of seniority they were going to get the overtime work and by later assigning it to a less senior employe, the County violated the contract. The Association claims that the grievances should be upheld and the grievants each given four (4) hours of pay at the overtime rate for December 3 and 4, 1996 respectively.

COUNTY'S POSITION

The County contends that it did not violate the contract when it followed past practice and assigned a volunteer to work overtime rather than forcing a more senior employe to work it. It points out that the procedure for filling anticipated shift vacancies is to use volunteers before forcing a shift extension. The County maintains that Fayerweather was the only volunteer and was properly assigned the overtime. The County argues that the asterisk was placed after Klatt's and Mikla's names in the preliminary schedule or "working draft" which was accompanied by an overtime sheet on which employes could indicate any dates they were willing to stay late or come in early. It refers to County Ex. 3, (November, 1993) where Klatt had made such a notation. It submits that forced extensions are by seniority but are used as a last resort. The County observes that this procedure goes back at least to October, 1989 as County Ex. 2 demonstrates. The County refers to County Ex. 4 showing Klatt volunteered to extend his shift on December 24, 1993 and County Ex. 5 shows that Opel was assigned a shift extension that he volunteered for on November 28, 1996. Also the County points to County Ex. 6 which shows that Klatt volunteered to come in early or stay late except for the V shift on April 7, 1997.

The County admits that the preliminary draft for the December, 1996 schedule had an asterisk after the grievants' names, but many changes occur between the "working" draft and the final, yet Klatt and Mikla chose to not sign the overtime sheet and didn't check to see if anyone else volunteered, so they could be "bumped" by a volunteer just like Klatt had done on numerous occasions. The County concludes that because neither Klatt nor Mikla volunteered for the overtime and Fayerweather did, it was properly assigned to a volunteer rather than forcing an involuntary assignment.

The County asserts that the final schedule was posted sometime after November 26 but before December 1, 1996 and the grievants could see that the forced extension had been taken off and they still could have indicated that they wanted the assignments and the County would have given it to them. Klatt, according to the County, acknowledged he saw the final version of the work schedule but did not make any request to work it so there was a waiver of the overtime opportunity. The County cites arbitral authority for the proposition that employes who relinquish overtime cannot later claim their seniority rights were violated. The County insists that it gave the grievants ample opportunity to volunteer for the overtime and when another officer volunteered, consistent with past practice and the contract language, the forced extensions were rescinded.

The County contends that its procedure for filling shift vacancies is consistent with

the collective bargaining agreement. The County reviewed Article 6, Section 4, line by line and argued that none of the seven sentences were violated. The County asks that the grievances be dismissed in their entirety.

DISCUSSION

Article 6, Section 4 of the parties' collective bargaining agreement provides the framework for filling shift vacancies. The County has a certain number of employees designated as "fillers" who are assigned to vacant shifts due to vacations, schools, leaves of absence, etc. If there are still vacant shifts after the "fillers" are assigned, then off duty officers can accept the shift on overtime by circling their name on the overtime sheet or decline it by crossing their names off. Overtime is assigned by rotating seniority with the most senior getting the first opportunity to work overtime each month. This much is not in dispute and on December 3 and 4, 1996, there was a vacant shift each day and there were no "fillers" and no off duty personnel available. The last sentence of Article 6, Section 4 provides that the County may call in an employee early or extend an employee's shift to cover a vacant shift. In other words, the County can force employees to work the shift on overtime by splitting it and keeping an employee over four hours and calling in the oncoming employee four hours early.

The evidence establishes a past practice that employees can volunteer for such extensions and call-ins by signing up for these just like overtime. Officer Klatt has done this on a number of occasions. 3/ Others have also indicated they would volunteer to extend their shifts. 4/ The County selects the most senior volunteer on a rotating basis before it forces anyone. Contrary to the Union's arguments, there was no evidence offered that if there were no volunteers and someone is forced to come in early, that person can reject the order to come in early or that the least senior or most senior is forced first. The Union's assertion that the County must force the most senior even where there is a volunteer available makes no sense because it would eliminate any need for volunteers and very senior employees would be forced to work the overtime. Inasmuch as there have been volunteers including grievant Klatt who have been assigned without regard to seniority, the Union's claim of not recognizing the past practice is not persuasive.

The Union relies on another past practice and that is where the County places an asterisk by the person's name for a shift, then the employee gets the overtime unless the employee informs the County otherwise. The facts do not support this conclusion. The asterisks were placed on the draft copy which was dated November 20, 1996. 5/ There are no asterisks on the final posted schedule for Klatt and Mikla but there is for

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Fayerweather. Had there been asterisks on the final posted schedule, then the Union's argument would be more persuasive but a preliminary draft is subject to change and the County cannot be held bound by it because a draft by its terms is just that, a draft subject to change. Fayerweather was assigned the overtime on December 3 and 4, 1996 because he volunteered. Klatt and Mikla could have volunteered but did not. The County argues that Klatt and Mikla could have volunteered after the final schedule was posted and have gotten

the overtime, although no evidence was presented as to what the practice is when the final schedule is posted and then a volunteer comes forward. Can the forced assignee in the final posted schedule be bumped by a senior employe who later wants to volunteer?

The asterisks in the preliminary draft merely indicated that the County was contemplating forcing Klatt and Mikla to work overtime whether they agreed or not. After Fayerweather volunteered, Klatt and Mikla were not forced, and in accordance with past practice, there was no violation of Article 6, Section 4. Klatt and Mikla may have been happy not to have been forced in and if they felt otherwise, they should have made that fact known before December 3 and 4, 1996. Because they didn't volunteer to work overtime, it must be assumed that they did not want to be forced and a volunteer could be assigned to work the overtime. All they had to do is make their wishes known. In any event, there were no asterisks on the final schedule for Klatt and Mikla and the County was within its rights to use a volunteer and there was no violation of Article 6, Section 4.

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

AWARD

The County did not violate the provisions of the collective bargaining agreement when it failed to call in the grievants for overtime on December 3 and 4, 1996, and therefore, the grievances are dismissed.

Dated at Madison, Wisconsin, this 13th day of October, 1997.

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

ENDNOTES

1/ Jt. Ex. 6.

2/ County Ex. 1.

3/County Exs. 3, 4 and 7.

4/ Country Exs. 5 and 7.

5/ Jt. Ex. 6.