

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY**

and

**LABOR ASSOCIATION OF WISCONSIN, INC.,  
PUBLIC SAFETY PROFESSIONAL DISPATCHERS' ASSOCIATION**

Case 285  
No. 55073  
MA-9882

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Appearances:

**Mr. Thomas A. Bauer**, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, for the Association.

**Mr. John A. Bodnar**, Corporation Counsel, Winnebago County, 448 Algoma Blvd., P.O. Box 2808, Oshkosh, WI 54903-2808, for the County.

**ARBITRATION AWARD**

Pursuant to a joint request by Labor Association of Wisconsin, Inc., Public Safety Professional Dispatchers' Association, herein the Association, and the subsequent concurrence by Winnebago County, herein the County, Dennis P. McGilligan was appointed Arbitrator by the Wisconsin Employment Relations Commission on April 24, 1997 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. The hearing was held in Oshkosh, Wisconsin, on July 15, 1997. The hearing was not transcribed, and the parties completed their briefing schedule on September 8, 1997.

After considering the entire record, I issue the following decision and Award.

**STIPULATED ISSUE**

Do the allegations as contained in the Association's grievance constitute a violation of the collective bargaining agreement by the County? If so, what is the appropriate remedy?

## **FACTUAL BACKGROUND**

### **Facts Leading to the Instant Dispute**

On November 11, 1996, Kathy Biggar, Chief Dispatcher for the County, called in Dispatcher David Schmitz at 12:00 noon for the purpose of working two hours overtime in order to move paper that had been delivered to the Dispatch Center and clean the storage room in which the paper was kept. Schmitz was assigned to work his regular shift at the complaint desk commencing at 2:00 p.m. to 10:15 p.m. He was paid overtime for the additional two hours that he was called into work on said date.

At or about 2:00 p.m., Schmitz finished the above work. However, since this was manual work, he was not wearing his dispatcher's uniform at the time and had become dirty from performing this work. Chief Dispatcher Biggar told Schmitz to go to the locker room and clean up and change clothes. She informed him that she would staff his station at the complaint desk until he was clean and dressed for work.

Dispatcher Arlene Erdman was working the 6:00 a.m. to 2:00 p.m. shift on November 11, 1996, and was the available senior dispatcher that could have been held over to work the complaint desk in the absence of Schmitz.

On November 19, 1996, Erdman filed a grievance over the matter. In the grievance, she alleged that Chief Dispatcher Biggar had performed job duties at the complaint desk on November 11, 1996 from 2:00 p.m. to 2:20 p.m. and the complaint desk duties "are, and have been, duties consistently performed by bargaining unit employees." She alleged in her grievance that this action was contrary to the provisions of Article 3 and Article 7 of the collective bargaining agreement and she requested that she be compensated for 20 minutes of overtime pay for the same time period that Chief Dispatcher Biggar performed bargaining unit work on November 11, 1996.

### **Past Practice**

Dispatcher Cinda Piotter, President of the Association, testified that City of Oshkosh employees, who are not members of the Association, regularly fill in for Association members for short periods of time when Association members are on lunch break, going to the bathroom, or attending to other personal business on a temporary basis. Piotter admitted that on at least one occasion the Chief Dispatcher filled in for a dispatcher and the Association did not file a grievance or "complain" about same.

Dispatcher Erdman, admitted on cross examination, that she was aware of at least

three occasions where supervisory personnel filled in for dispatchers for short time periods. She also admitted that non-Association employees filled in when bargaining unit

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personnel went to the bathroom or went to lunch. Finally, she stated that on one occasion a Sheriff's Department employee worked for a dispatcher for four hours without a grievance being filed.

County witnesses testified that non-Association employees, sometimes at the request of Association employees, had performed dispatcher duties on various occasions when a dispatcher was either late coming to work or wished to be relieved early. On one occasion, a non-Association employee from the Sheriff's Department filled in for a dispatcher when she wished to leave her position almost two hours early to attend a wedding.

Chief Dispatcher Biggar testified that she regularly performed dispatcher work for short periods of time (a few minutes or so) in different kinds of situations. For example, Biggar stated that she would relieve a dispatcher so that employee could go to the bathroom or take a lunch break or conduct some other personal business of a short duration. Biggar added that on one occasion she filled in during an emergency (a snowstorm) for about thirty minutes.

Dispatcher Piotter also testified that there have been two previous incidents where non-bargaining unit employees worked dispatch duties, and the Association grieved the practice: one, where Sheriff's Department clerical employees, belonging to a separate bargaining unit, worked the complaint desk in the past and the County discontinued using clerical employees on the complaint desk as a result of an Association grievance over the practice; and two, where a Sheriff's Department sergeant, who also belonged to a different bargaining unit, worked the radio in the Dispatch Center and the County discontinued same after the Association grieved the matter.

William J. Wagner, Director of Personnel for the County, testified that the Chief Dispatcher has always performed dispatcher duties normally performed by the bargaining unit. However, Wagner admitted that the Chief Dispatcher position was discontinued from about 1985 for approximately eleven years, and that Biggar had only recently been promoted to the Chief Dispatcher classification. Wagner added that he did receive one grievance over the Chief Dispatcher performing dispatcher work which he denied at the appropriate step of the grievance procedure, and that said grievance was not pursued any further.

## **PERTINENT CONTRACTUAL PROVISIONS**

### **ARTICLE 2**

### **RECOGNITION AND UNIT OF REPRESENTATION**

The Employer recognizes the Public Safety Professional Dispatchers' Association as the exclusive bargaining representative of all

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regular full-time employees and regular part-time employees of the Sheriff's Department engaged in dispatching work but excluding the position of Chief Dispatcher for the purposes of conferences and negotiations regarding wages, hours and other conditions of employment.

### ARTICLE 3 MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the management of the Communications Center and the direction of the work force including, but not limited to, the right to hire, to discipline and discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, together with the right to determine the methods, equipment, process and manner of performing work, are vested exclusively in the Employer.

Nothing contained herein shall divest the Association of any of its rights under Wisconsin Statute 111.70.

### ARTICLE 7 OVERTIME AND COMPENSATORY TIME

Time worked in excess of the regular workday or workweek shall be compensated for in the form of pay or compensatory time off at the rate of time and one-half at the option of the employee, however, compensatory time may be earned for overtime hours worked in excess of the normal workday but not for hours worked in excess of forty (40) hours within the normal workweek. Such hours worked in excess of forty (40) hours within the normal workweek shall be compensated in the form of pay at the rate of time and one-half. No compensatory time off may be accumulated in excess of thirty-three (33) hours at any one time.

### POSITIONS OF THE PARTIES

#### Association's Position

The Association first argues that the County has violated the specific and implied provisions of Article 7 - Overtime And Compensatory Time as well as the long-standing

overtime call-in procedure by not holding over the grievant to fill the complaint desk vacancy that occurred until a dispatcher returned from his previous clean up assignment.

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The Association next argues that the overtime available on November 11, 1996, did not constitute an emergency or require special skills to be performed. Because no emergency existed, and no employee with special skills was needed, the Association believes the County should have followed the existing overtime call-in procedure and offered the overtime in question to the grievant.

The Association rejects the County's claim that the Chief Dispatcher has been allowed to perform bargaining unit work in the past. In this regard, the Association points out that on cross-examination the County's Director of Personnel admitted that the Chief Dispatcher position had been discontinued since about 1985, and that Biggar has only recently been promoted to the position, and that previously the Dispatcher-in-Charge, a bargaining unit position, would relieve bargaining unit employees, i.e., a bargaining unit employee relieving bargaining unit employees.

The Association also argues that it has sought to protect this work as bargaining unit work in the past when it grieved similar violations of the County using non-bargaining unit employees to perform bargaining unit work. In this regard, the Association claims that non-bargaining unit employees have relieved bargaining unit employees only for minimal periods of time in the past without challenge. In contrast, there have been two previous incidents of a longer duration involving Sheriff's Department clerical employees from a different unit, and a Sheriff's Department sergeant also from a different unit, who worked the complaint desk and radio in the Dispatch Center respectively, where the Association grieved the practice and the County voluntarily discontinued same. The Association claims that this case is similar to the aforesaid incidents where the County attempted unsuccessfully to use non-bargaining unit employees to perform bargaining unit work.

In conclusion, the Association states the County has a clear obligation to follow the overtime call-in procedure, and that by its actions the County violated the specific and implied provisions of both the agreement and the established overtime call-in procedure. For a remedy, the Association asks that the grievance be sustained and that a total of \$6.98 be awarded the grievant for the 20 minutes that the Chief Dispatcher worked the complaint desk on the date in question. The Association feels that a monetary award is more appropriate than "make-up" overtime because the overtime that was improperly worked was "irretrievably lost" because it was assigned outside of the bargaining unit.

### **County's Position**

The County initially argues that the Chief Dispatcher has always engaged in dispatching work on at least a temporary basis when needed. In this regard, the County

points out that her job description recognizes same when it states that among the major duties of the Chief Dispatcher is “9. Serves as a temporary substitute dispatcher during partial shifts or emergencies as needed.” In addition, the County points to the fact that

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the parties excluded the Chief Dispatcher from the bargaining unit as proof that the Association recognized that the Chief Dispatcher was indeed “engaged in dispatching work.”

The County also argues that there has been a clear past practice of non-union members performing dispatcher’s work for limited periods of time. In support thereof, the County cites the testimony of the Association’s own witnesses who stated that City of Oshkosh employees, who are not members of the Association, regularly filled in for Association members on a daily basis when Association members were on lunch break, going to the bathroom, or attending to other business on a temporary basis. The County points out that many of these breaks were equal in length or greater than the 20 minute period in dispute herein. The County also cites the testimony of its witnesses who indicated that non-Association employees, sometimes at the request of Association employees, had performed dispatcher duties on various occasions when a dispatcher was either late coming to work or wished to be relieved early. In conclusion, the County claims that non-Association employees have frequently performed dispatcher duties for short periods of time, usually less than an hour in length, on an as needed basis. In contrast, “if an Association employee is absent from their position for an extended period of time, then other dispatchers are usually asked to work overtime.” The County adds that this practice has been acquiesced to for a long period of time by Association members, has been utilized reasonably by the County in the past and serves the needs of County and Association members.

The County further argues that if the Association’s grievance is upheld it would unduly restrict management’s rights, pursuant to Article 3, to “Determine the methods, equipment, process and manner of performing work. . . .” The County also notes that if the grievance is upheld it would limit the discretion of supervisors with regard to allowing Association members to leave early or to come in late in exigent circumstances because supervisors would be reluctant to pay another dispatcher overtime to perform the relieved dispatcher’s work.

In addition, the County argues that pursuant to Article 3 of the collective bargaining agreement it could subcontract the work out, and no bargaining unit member would be entitled to overtime pay as a result of such action on the County’s part.

Finally, in the event the Association prevails, the County argues that there is no proof that Erdman would have been the person entitled to be called in to perform the 20 minutes of work in question. Absent same, the County contends that she is not entitled to any award in relationship to this matter.

Based on all of the above, the County requests that the grievance be denied and the matter dismissed.

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### **DISCUSSION**

At issue is whether the County violated the parties' collective bargaining agreement when the Chief Dispatcher performed dispatcher bargaining unit work for 20 minutes on November 11, 1996.

The Association initially argues that the County violated the specific and implied provisions of Article 7 - Overtime and Compensatory Time as well as the applicable overtime call-in procedure by not holding over the grievant to fill the complaint desk vacancy that occurred until a dispatcher returned from his previous clean up assignment. The problem with this argument, however, is that Article 7 does not specifically and expressly require the County to fill the disputed overtime vacancy with a bargaining unit employee. Nor did the Association cite any persuasive arbitral authority in support of its position.

Since the contract language does not clearly support the Association's position, the Arbitrator turns to past practice to interpret the agreement. The record is clear that past practice supports the County's position. In this regard, the Arbitrator notes that both the Association's and the County's witnesses testified that non-bargaining unit employees, including supervisory personnel like the Chief Dispatcher, performed dispatcher work on an incidental basis for short periods of time while bargaining unit employees did personal business or were unable to do their work for a variety of reasons. In contrast, for longer periods of time only bargaining unit employees relieved bargaining unit employees when performing dispatch work.

The Association argues that it has successfully grieved similar violations of the County in the past where the County used non-bargaining unit employees to perform bargaining unit work. However, the examples cited by the Association in support thereof are distinguishable from the instant dispute. One such grievance involved Sheriff's Department clerical employees performing bargaining unit work on an ongoing basis while the other grievance involved a Sheriff's Department sergeant performing unit work for four hours (testimony of Association witness Erdman, and County witness G. Cottrell).

The Association also argues that since there was no emergency on the date in question there was no need to call in an employee with special skills to work the overtime, nor use a non-bargaining unit employee to fill the duties at the complaint desk; and, therefore, the County was obligated to offer the overtime to the grievant as required by the overtime call-in procedure. However, neither the agreement nor past practice require same so the Arbitrator

also rejects this argument of the Association.

It is true, as pointed out by the Association, that the Chief Dispatcher position was eliminated for about eleven years, and only recently filled by Biggar. However this does

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not detract from the testimony of several County and Association witnesses who testified that the Chief Dispatcher occasionally filled in for dispatchers for short periods of time without complaint or a successful grievance by the Association over same.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds it reasonable to conclude that the answer to the question as framed by the parties is NO, the allegations as contained in the Association's grievance do not constitute a violation of the collective bargaining agreement by the County since Chief Dispatcher Biggar performed dispatcher duties on the date in question on an incidental basis and for a de minimis amount of time consistent with past practice. Having reached this conclusion, it is unnecessary to address the other arguments raised by the County in support of its position. I am, therefore, denying Arlene Erdman's grievance submitted November 19, 1996, and dismissing same.

Dated at Madison, Wisconsin this 20th day of November, 1997.

Dennis P. McGilligan /s/

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Dennis P. McGilligan, Arbitrator



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