BEFORE THE ARBITRATOR

In the Matter of the

Arbitration of a Dispute Between

CITY OF CEDARBURG

and

CEDARBURG POLICE OFFICER'S ASSOCIATION LOCAL 223, THE LABOR ASSOCIATION OF WISCONSIN, INC.

Case 38
No. 54950
MA-9838

Appearances

Mr. Kevin W. Naylor, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of the Cedarburg Police Officer's Association.

Ms. Kaye K. Vance, City Attorney, City of Cedarburg, Cook & Franke, S.C., 660 East Mason Street, Milwaukee, Wisconsin 53202-3877, appearing on behalf of the City of Cedarburg.

ARBITRATION AWARD

City of Cedarburg, hereinafter referred to as the City, and Cedarburg Police Officer's Association, Local 223, the Labor Association of Wisconsin, Inc., hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the overtime pay of an employe. Hearing on the matter was held in Cedarburg, Wisconsin on July 1, 1997. Post-hearing arguments and reply briefs were received by the undersigned by August 11, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

"Did the employer violate the collective bargaining agreement by denying Officer Biliskov's December 16, 1996 overtime request?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

5.01 - Workweek Defined. The standard workweek for all employees shall continue as follows: Forty (40) hours per week on the basis of eight (8) hours per day. The workweek will then consist of five (5) days worked in succession followed by two (2) days off in succession, then four (4) days worked in succession followed by two (2) days off in succession.

5.02 - Compensatory Time Off and Overtime. All hours worked in excess of eight and one-quarter (8 1/4) hours on a regular workday and all hours worked on an off day, including court time and training shall be compensated in pay or compensatory time off on a time and one-half basis. Employees called in for duty outside of their scheduled workweek shall be credited with at least two (2) hours each time they are called in for duty, regardless of the time worked. The maximum accumulation of compensatory time off for any employee at any time shall be forty (40) hours, except that the Police Chief or designee may exercise discretion to allow an accumulation in excess of forty (40) hours. Such requests shall be in writing and the Police Chief or designee shall have the right to deny any request for compensatory time off, however, in no instance may an employee be allowed to take compensatory time off on a day which does not leave at least seven (7) employees on the schedule. Employees shall be allowed to carry over up to twenty-four (24) hours of compensatory time left on the books at the end of the year provided that any time carried over may only be taken as off-time and cannot be cashed out.

. . .

5.04 - Work Schedules. The Police Chief or his designee shall continue to establish regular work schedules; provided, however, no employee shall be required to change his shift without having a twenty-four (24) hour notice of the change. Any changes that occur with less than twenty-four (24) hour notice shall result in the employee being paid an additional one-half (1/2) hour for each hour worked outside of his normally assigned shift, unless the change is necessitated by illness.

. . .

BACKGROUND

Among its various government operations the City operates a Police Department where it employs Patrolman Joseph Biliskov, hereinafter referred to as the grievant. At the commencement of the hearing in the above-referenced matter the parties agreed upon the following twenty-four (24) stipulations:

1. There is a Collective Bargaining Agreement in full force and effect between the City of Cedarburg and the Cedarburg Police Officer's Association, Local 223 of the Labor Association of Wisconsin, Inc. at all times material to this dispute.

2. That the Grievant, Patrolman Joseph Biliskov is a member of the Association and is covered by the Collective Bargaining Agreement.

3. That Police Officers holding the rank of Sergeant are included in the bargaining unit and are covered by the Collective Bargaining Agreement.

4. That on December 16, 1996, Officer Biliskov was assigned to work his regularly scheduled 11:00 p.m. to 7:00 a.m. shift.

5. That Patrol Officers Richard J. Leach and Scott A. Miller were also scheduled to work the 11:00 p.m. to 7:00 a.m. shift on December 16, 1996.

6. That Patrol Officers Timothy A. Buege, Joseph B. Kell and Sergeant Glen Lindberg were originally scheduled to work the 3:00 p.m. to 11:00 p.m. shift on December 16, 1996.

7. That Sergeant Glen Lindberg called in sick at 11:47 a.m. on December 16 1996.

8. That after Sergeant Lindberg called in sick the Dispatcher asked Sergeant Paul Jacobs to look over the schedule for December 16, 1996.

9. That at approximately 1:00 p.m. on December 16, 1996, Sergeant Jacobs called Patrolman Biliskov and notified him that his regularly scheduled 11:00 p.m. to 7:00 a.m. shift on December 16 was being changed to begin at 7:00 p.m. and end at 3:00 a.m. because Sergeant Lindberg called in sick.

10. That schedule changes must be approved by Chief Rees or his designee.

11. Sergeant Paul Jacobs is a member of the Association and is covered by the Collective Bargaining Agreement.

12. That Sergeants have the authority to make schedule changes and have done so in the past.

13. That on December 16, 1996, Chief Rees returned after lunch and sometime thereafter notified Sergeant Jacobs that there was no need for Patrolman Biliskov to change shifts.

14. That at approximately 3:00 p.m. Sergeant Jacobs called Patrolman Biliskov and told him he did not have to report to work at 7:00 p.m. and could report to his usual shift.

15. That Patolman Biliskov worked his regular 11:00 p.m. to 7:00 a.m. shift on December 16, 1996.

16. That on December 16 no third shift officer called in sick.

17. That on December 17, 1996, Patrolman Biliskov submitted an overtime report requesting two hours of overtime pay.

18. That this request was subsequently denied and the present grievance was filed as a result.

19. That at approximately 4:22 p.m. on October 29, 1991, Patrolman Richard Leach was called in to change from an 11:00 p.m. to 7:00 a.m. shift.

20. That Patrolman Leach was later called and notified that he would be put back on his normal shift, 11:00 p.m. to 7:00 a.m.

21. That on October 30, 1991 Patrolman Leach submitted an overtime request for two hours of overtime pay.

22. That Patrolman Leach's request for overtime was originally denied by Sergeant John Stroik.

23. That Lieutenant Caldwell reversed Sergeant Stroik's denial and approved Patrolman Leach's overtime request.

24. That the present grievance was filed and processed through the grievance procedure in a timely manner, and that neither party is raising the question of arbitrability.

Dated this 1 day of June, 1997.

CEDARBURG POLICE OFFICER'S
ASSOCIATION, LOCAL 223

By
Kevin Naylor, Labor Consultant

CITY OF CEDARBURG

By
Kaye K. Vance, City Attorney

The record also demonstrates that in 1991 when Patrolman Leach's shift was originally changed it was due to a vacation request by another employe.

Union's Position

The Union contends the City is required to pay the grievant overtime in a manner which is consistent with the language of Article V, Hours of Work, and the Leach grievance which was settled in 1991. The Union argues the City is attempting to gain through arbitration what it should seek at the bargaining table. The Union also asserts the City's claim that the Leach matter was not a grievance is not supported by the facts and that the City's payment to Leach of overtime was not a mistake but compliance with the clear meaning of Article V.

The Union contends the undersigned must not allow either the Union or the City to circumvent clear-cut language. If there is more than one interpretation the Union stresses the arbitrator should than apply the language that fulfills the intent of the parties who negotiated the language in question. When interpreting the language, arbitrators routinely consider the bargaining history, intended purpose and any previous grievance settlements. The Union asserts the language of Article V speaks for itself. The Union argues the intent of the parties was to reduce the frequent schedule changes that occurred prior to the 1990-91 collective bargaining agreement. The Union contends that management retains the right to change an employe's shift

provided the employe receives a twenty-four (24) hour notice. The Union asserts the intended

purpose of the language was to limit the City's ability to change an employe's shift without providing ample notice or extra compensation. The Union also asserts that to give the City the right to reschedule an employe's shift time and again with little or no notice so long as the employe works his originally scheduled hours leads to an absurd result and flies in the face of the intent of the parties.

The Union also asserts that the issue before the undersigned was voluntarily resolved by the parties when they resolved the Leach grievance in 1991. The Union argues who better than the parties themselves to determine the intent and purpose of the language in question. The Union contends the Leach grievance is identical to the instant matter. The Union argues the fact the grievance was resolved just four (4) months after the parties reached agreement on the current language supports its position. The Union points out that Leach received compensation despite the fact he did not work outside his "normally assigned shift". The Union contends the City claim the Leach settlement was a mistake can only be viewed as an attempt to undermine the grievance procedure and circumvent their duty to bargain. The Union stresses the original decision to deny Leach compensation was made by a fellow bargaining unit member and this decision was overturned by the City. The Union also asserts that the City's claim that Leach's grievance was not a grievance but a mere "discussion" is without merit. The Union further asserts that the City has failed to demonstrate a changed circumstance which would support their new interpretation of Article V. The Union also asserts that the instant matter is not similar to canceled court time. The Union also argues the inconvenience to the grievant is not minor or the Union would not have found it important to negotiate language to cover the matter.

The Union would have the undersigned sustain the grievance and direct the City to make the grievant whole by paying him two hours pay at time and one half.

City's Position

The City asserts no violation of the collective bargaining agreement occurred when Chief of Police Rees directed Sergeant Jacobs to inform the grievant to report for duty at his regular starting time. The City contends that Article V has three (3) prerequisites which must be met before premium pay is earned. The first, a change in the normally assigned shift that occurs with less than twenty-four hours (24) notice, was not met because the grievant worked his normally assigned shift. The second, additional pay for each hour worked outside the normally assigned shift, was not met because the grievant worked his normally assigned shift. The third, the change was not necessitated by illness, was not met because the first call to the grievant was due to the illness of Patrolman Lindberg.

The City asserts the Union's case is not consistent with the language of the agreement

because the because the call to the grievant informing him he would be working his normally assigned shift is not a work schedule change and is not covered by any provision of the

agreement. The City argues there is no past practice which supports pay for not working. The City also asserts the Leach single incident is seven (7) years old and distinguishable from the instant matter. The City points out that Leach was waiting to be picked up outside his home, was in uniform when the call came in stating he would have no shift change, and the necessitation for the change was not for an illness. The City argues there was no grievance and no past practice established when it paid Leach two hours. The City contends the Union is attempting to achieve a reporting pay clause and no such clause currently exist in the agreement. The City argues it had the right to determine how many officers were needed to be on duty and it acted to not add the grievant to a shift.

The City also points out that Article V provides for call in pay to compensate an employe for making a special trip into work. It requires an appearance by the employe. The City concludes this provision does not apply to the instant matter.

The City would have the undersigned deny the instant grievance.

DISCUSSION

The fundamental facts in the instant matter are not in dispute. The grievant was called at home and informed his work schedule was being changed. Instead of reporting for work at his regular schedule, 11:00 p.m., he was to report at 7:00 p.m. for duty. The change was made as a result of illness to another employe. In accord with Article V, the grievant was not eligible for any additional pay for this change. The grievant was then called and told to report at 11:00 p.m., his original scheduled starting time. The grievant reported to work as directed and then submitted a request for overtime pay which was denied. The Union has argued that the failure by the City to pay overtime violates the parties collective bargaining agreement and a previous grievance settlement.

The undersigned finds the 1991 Leach matter is distinguishable from the instant matter. Therein the initial change was due to another employe's vacation request and the employe was in the act of reporting to work when the second change was made (the employe was in uniform waiting outside to be picked up when the second call came in). Herein the initial change was due to another employe's illness and the employe was informed several hours prior to the change to report at his normal starting time. While the Union is correct in that the grievant may have been inconvenienced by the City's actions, the two matters are not identical and are distinguishable from each other. As they are distinguishable, the fact the City paid Leach two (2) hours pay is not binding on the City in the instant matter. Thus the undersigned finds this is the first time since the parties agreed to the language set forth in Article V, Section 5.04 that the City has changed an employes work shift, then reassigned the employe back to his normal work shift when an illness has occurred.

Section 5.02 of the collective bargaining agreement states an employe is to receive a minimum of two hours of pay if the employe is called into work outside the employe's scheduled work week. While the first call to the grievant would have directed him to come into work outside of his normal work week, Section 5.04 provides the employe is not to receive additional compensation for a schedule change if the change was due to illness. There is no dispute the first call to the grievant would have changed his shift due to an illness. Therefore, while the grievant was directed to report to duty at a work schedule outside his normal work week it was due to an illness and Section 5.02 does not apply. The record also demonstrates, as the City pointed out, the grievant did not perform any duties outside of his normally assigned shift or work week because of the second call. Therefore, Section 5.02 and Section 5.04 do not apply to the instant matter. The undersigned concludes that because the grievant did not perform any work outside of his normal work week or work schedule the City did not violate Article V of the collective bargaining agreement when it denied him overtime compensation.

Having found that the 1991 Leach matter is not precedential to the instant matter and having found that the City's actions did not violate Article V of the collective bargaining agreement the undersigned concludes, based upon the above and foregoing and the evidence, testimony and arguments presented that the City did not violate the collective bargaining agreement when it denied the grievant's December 16, 1996 overtime request. The grievance is denied.

AWARD

The City did not violate the collective bargaining agreement when it denied Officer Biliskov's December 16, 1996 overtime request.

Dated at Madison, Wisconsin, this 18th day of December, 1997.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

gjc
5606.WP1