

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY PUBLIC SAFETY
PROFESSIONAL DISPATCHERS' ASSOCIATION**

and

**WINNEBAGO COUNTY
(SHERIFF'S DEPARTMENT)**

Case 293
No. 55431
MA-10015

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., on behalf of Winnebago County Public Safety Professional Dispatchers' Association.

Mr. John A. Bodnar, Corporation Counsel, on behalf of Winnebago County.

ARBITRATION AWARD

The Public Safety Professional Dispatchers' Association, hereinafter the Association, and Winnebago County, hereinafter the County, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on October 14, 1997, in Oshkosh, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by December 20, 1997. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Did the Employer violate the collective bargaining agreement when it failed to compensate the grievant for Dispatcher-In-Charge pay for the period 6:00 p.m. to 10:00 p.m. on May 14, 1997?

If so, what is the appropriate remedy?

At hearing, the parties also stipulated that the award in this case will resolve similar pending grievances (listed in Union Exhibits 7A-7C).

CONTRACT PROVISIONS

The following provisions of the parties' 1995-1997 Agreement have been cited:

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 22

PREMIUM PAY: DISPATCHER IN CHARGE

The Employer may designate personnel to serve in the capacity of Dispatcher-In-Charge on various shifts. Such assignments shall be at the discretion of the Employer and shall be for indefinite periods of time.

Persons serving in such capacity shall be eligible for premium pay at the rate of Seventy-five cents (\$0.75) per hour for each hour worked in such capacity.

BACKGROUND

As part of its Sheriff's Department, the County maintains and operates the 911 Center, which provides dispatch functions for the Sheriff's Department, several local police departments, a number of full-time fire departments and approximately 13 volunteer fire departments. The Assistant Chief Deputy, Gary Boyce, is responsible for supervising three divisions, including the 911 Center. The immediate supervisor of the dispatchers at the 911 Center is the Chief Dispatcher, Kathy Biggers. The Grievant, David Schmitz, has been employed by the Sheriff's Department as a Dispatcher for approximately eight years. The 911 Center runs on three shifts, including the second or afternoon shift which runs from 2:00 p.m. to 10:15 p.m. The Grievant works on the second shift.

For at least the past eight years, the Sheriff has designated a Dispatcher-In-Charge (DIC), as well as an Assistant Dispatcher-In-Charge (Assistant DIC), for each of the three shifts. While those assignments do not constitute separate positions and are not listed as such on the wage schedule in the Agreement, the Agreement does provide premium pay of seventy-five cents (\$.75) per hour for all hours worked as the DIC on a shift. Further, one must apply for the assignment and undergo an interview with the Chief Dispatcher, with management making the decision as to who will get the assignment. Janet Anderson is the DIC on the second shift and Schmitz was designated as the Assistant DIC on that shift beginning in February of 1997.

Also for at least the past eight years, the practice had been that when the DIC on a given shift was absent, the Assistant DIC on that shift would function as, and perform the duties of, the DIC and receive the DIC premium on that shift. The DIC's have distinct duties on a shift over and above their dispatcher duties, i.e., they make sure the shift is staffed, they make sure everyone is accounted for, they verify time sheets for the staff on that shift, and answer questions or pass them along to management if they cannot make a decision. The DIC's wear pins that indicate they are in charge. In 1996, the Sheriff varied from that practice on the second shift by designating all three of the dispatchers as DIC's, with them taking turns being the DIC on certain days, i.e., the first two days on after they have been off. That system was followed for approximately one to two months, and then discontinued, and the practice of having one DIC and one Assistant DIC on a given shift was reinstated on the second shift.

On April 24, 1997, Assistant Chief Deputy Boyce held a meeting among all of the DIC's and Assistant DIC's to announce a change in the practice in response to complaints that management had received from officers and others regarding confusion as to who was in charge on a particular shift when the regular DIC on that shift was absent. In the past if the regular DIC on a shift was absent, the Assistant DIC on that shift assumed the DIC duties and received the premium pay, even if a DIC from another shift was present and working overtime on that shift. The change in practice announced at the April 24th meeting was that if a DIC from another shift

was present on a shift on which the regular DIC was absent, the DIC from the other shift would assume the DIC duties for the shift and receive the premium pay, rather than

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the Assistant DIC on that shift. The change in practice was presented orally by Boyce and no written notice or communication has been issued to the DIC's, Assistant DIC's, or to the Association. The Association was not directly notified of the change in practice, nor was the change discussed with the Association prior to its implementation.

On May 14, 1997, the regular DIC on the second shift, Anderson, was absent, and Schmitz, as the Assistant DIC on that shift, assumed the DIC duties and received the premium pay for the first four hours of the shift, however, the DIC from the third shift, Rasmussen, was called in early to work from 6:00 p.m. to the end of the shift, and functioned as the DIC during those hours and received the premium pay for those hours. Schmitz filed the instant grievance alleging that the County had violated the Agreement by not having him function as the DIC and receive the premium pay for the entire shift consistent with the practice that had existed prior to April 24. Since that time, a number of similar grievances have arisen on the same issue and the parties have agreed that the Award resolving this grievance shall be applied to the pending grievances on the same issue. The parties proceeded to arbitration of their dispute on October 14, 1997 before the Arbitrator.

POSITIONS OF THE PARTIES

The Association

The Association first asserts that the County has violated both the specific and the implied intent of Article 22 - Premium Pay - Dispatcher-In-Charge, of the parties' Agreement. That provision specifically provides that the ". . .Employer may designate personnel to serve in the capacity of Dispatcher-In-Charge on various shifts. . ." The County designated Janet Anderson as the DIC and Schmitz as the Assistant DIC on the afternoon shift, in accord with Article 22. That provision also states, ". . .Such assignments shall be at the discretion of the Employer and shall be for indefinite periods of time. . ." Schmitz had never been informed that he had been removed from his assignment as Assistant DIC. He testified that his responsibilities in the position commence when the regular afternoon shift DIC is absent. Schmitz in fact received the DIC premium for the first four hours of the shift on May 14th when Anderson was on her regularly-scheduled day off. Both he and the Association's President, Cindy Piotter, testified that this has been the parties' long-standing past practice.

The argument that the County is not contractually required to continue the DIC and Assistant DIC classifications is neither true, nor germane to this dispute. Article 22 clearly

identifies the classification of DIC and the unrebutted testimony establishes that the Assistant DIC classification has existed as a "backup" to the regular shift DIC. Thus, the DIC classification is required by contract and the Assistant DIC classification is required by a past practice, which practice the County has never notified the Association it wished to eliminate.

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Also consistent with Article 22, the County has designated personnel to serve as DIC "on various shifts" and has established the practice of having one DIC and one Assistant DIC on each shift. By denying Schmitz Assistant DIC pay from 6:00 p.m. to 10:15 p.m. on May 14th, the County violated the specific and implied intent of Article 22, as well as the parties' long-standing practice.

Next, the Association asserts that the County did not properly notify the Association that it intended to change the long standing past practice. The evidence establishes that the parties' practice is clear and unequivocal, readily ascertainable over a reasonable period of time as a fixed, and established practice, accepted by both parties, and therefore, it meets the criteria for establishing a binding past practice. To clarify the practice further, the County even requires that the DIC and Assistant DIC wear insignia to clearly identify them to other employees. Boyce testified that such was the practice until he changed it due to complaints he had received regarding who was in charge on shifts in the absence of the regular shift DIC. Boyce could not, however, identify who had complained and had no written record of such complaints. Boyce testified that he notified the Association of the change in practice at a DIC meeting on April 24, 1997, and the County offered a copy of handwritten notes of the meeting by an attendee as evidence. The document was never sent to the Association's President, nor to its bargaining representative, nor has the County proposed such a change in the current on-going negotiations.

Boyce also conceded that he did not know if each of the attendees at the April 24th meeting understood and recorded the same information stated on the offered notes of that meeting, and admitted each could have had a different interpretation of what he said. The notation in the notes is "extremely misleading" and "vague" and gives no indication that the County is changing its practice of having the Assistant DIC take charge of the shift in the absence of the regular shift DIC. The notation clearly references the practice that the County will not pay two employees DIC pay when they are working at the same time, however, the Association is not attempting to change that practice. The notation does not provide notice that the County intended to "minimize the duties of the Assistant DIC on a shift". Boyce admitted he never clarified the alleged order beyond what was stated in the notation and did not reduce it to writing or provide written notice to any Association representative. Therefore, the County failed to properly notify the Association of the change in practice and the practice should be ordered reinstated.

Last, the Association argues that even if it is found that the County may unilaterally change

the existing practice, it is obligated to compensate employees for any losses sustained as a result. While arbitrators have given management wide authority to control methods of operation, including making changes, if those changes violate some contractual right of the employees, "the arbitrator can be expected to award compensation to the employees for the loss sustained, even if he does not take the further step of ordering management to revert to the prior practice." Elkouri and Elkouri, *How Arbitration Works*, (Fourth Ed.) p. 442. Schmitz and the

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grievants in the other consolidated grievances should be compensated for the DIC pay lost as a result of the County's actions. The Association requests that Schmitz and the other grievants be made whole and that the County be found to have violated Article 22 of the Agreement when it denied Schmitz the ability to be in charge from 6:00 p.m. to 10:15 p.m., on May 14, 1997.

The County

The County asserts that Article 3, Management Rights, of the Agreement exclusively vests in the County the authority to manage the Communications Center, direct the work force, make reasonable rules and regulations governing conduct, determine schedules of work, and to determine the methods, equipment, process and manner of performing work.

Article 22, Premium Pay: Dispatcher-In-Charge, of the Agreement, states that the County may designate personnel to serve as DIC on various shifts. It is a well-founded rule of statutory and contractual interpretation that the term "may" indicates discretionary authority. Thus, the County had no contractual duty to designate anyone to serve as DIC. Further, the language of Article 22 refers to "Dispatcher-In-Charge" as opposed to "Dispatchers-In-Charge". That language is clear that management has the discretion to appoint one DIC on various shifts.

Article 22 also states that, "Such assignments shall be at the discretion of the Employer and shall be for indefinite periods of time." It is again a well-founded rule of statutory and contractual construction that the term "shall" means something is required or mandatory. It is clear from that language that any assignment of DIC is "absolutely discretionary" with management and is for an "indefinite period of time."

The evidence establishes that there are three employees who function as DIC- one for each shift, and that there are three other employees - one for each shift, who have been trained to serve as a DIC in the absence of the DIC, i.e., the Assistant DIC's. In this case, the issue is whether Schmitz is entitled to DIC pay when a DIC from a previous shift continues, or a DIC from a succeeding shift is called in early, and has been designated by management as the DIC for that shift. It makes no sense to have two DIC's at the same time, as it raises an issue as to who is actually in charge on the shift. In this case, the County made a decision to designate the DIC who has been held over from the previous shift or called in early from a succeeding shift when the

regular DIC on Schmitz' shift was absent. Under the management rights language of Article 3 and the specific language of Article 22, the authority to do so was both generally and specifically reserved to the County under the parties' Agreement.

Lastly, the notes of the April 24, 1997 DIC meeting indicate that approximately 20 days prior to May 14th, the County's policy and procedure in this regard had been clearly explained to the DIC's and Assistant DIC's, including Schmitz.

The County requests that the grievance be denied.

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DISCUSSION

It is first noted from the testimony that there is essentially no dispute as to the facts, including as to what had been the practice in the past, the change in practice announced at the April 24, 1997 meeting (Schmitz testified they were told the DIC's from other shifts would cover in the absence of the regular DIC on the shift and receive the premium), and as to what occurred on May 14, 1997 and thereafter, resulting in the instant grievance and other similar grievances. The dispute is as to what management's rights are under Article 22 of the Agreement. That provision unambiguously provides that the Sheriff or his designee retains the discretion to decide whether there will be a DIC on a given shift and who will be so designated. The Association asserts that those designations have been made, i.e., that the DIC's and the Assistant DIC's have been designated for each shift and that while management retains the discretion to remove the designation from an individual employe, it has not done so, but has, rather, ignored the designations it has made and changed the long-standing practice of having the Assistant DIC on the shift be assigned the DIC duties for that shift in the absence of the DIC on that shift.

It must first be noted that it is recognized that not all "practices" are equal; some are binding upon management and others are not. Past practice is relevant and binding where the contract language is ambiguous and a long-standing, consistent practice provides clarification as to what the parties intended in situations where the contract does not clearly spell out their intent. On the other hand, where management has expressly reserved its discretion in a particular area and has exercised that managerial discretion in the same manner for some time, such does not constitute a binding past practice and does not require management to continue to exercise its discretion in that same fashion in the future. Elkouri and Elkouri, *How Arbitration Works*, (Fifth Ed.) p. 635-639. The language of Article 22 clearly reserves to management the discretion in making the DIC assignments and the instant case thus falls within the second type of situation where the "practice" has simply been the manner in which management has chosen to exercise its discretion. While the Association questions management's reasons for changing its practice in this regard, there has been no showing that the decision to make the change was arbitrary, capricious or made in bad faith.

Also, while the Association did not receive formal or written notification that management was altering its method of designating the DIC assignment, it did notify all of the DIC's and Assistant DIC's (including Schmitz) at the April 24, 1997 meeting, approximately three weeks before the time in question. It is also noted that management varied from this practice in 1996, at least as with regard to the second shift, when it tried the "Tri-DIC" arrangement of having the employees on that shift take turns being the DIC for the shift. There is no evidence in the record that the Association questioned or challenged the right of management to change the practice in that regard, at least tacitly recognizing that management was not bound to maintain the manner in which it made DIC assignments.

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For these reasons, it is concluded that the County did not violate the parties' Agreement when it altered the manner in which it had previously assigned DIC duties, as it did on May 14, 1997 and thereafter.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of March, 1998.

David E. Shaw /s/

David E. Shaw, Arbitrator

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