

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MONROE COUNTY HIGHWAY EMPLOYEES
LOCAL UNION NO. 2470, AFSCME**

and

MONROE COUNTY

Case 137
No. 56304
MA-10223

(Grievance of Keith Waege)

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Mr. Ken Kittleson, Personnel Director, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sparta, Wisconsin, on June 25, 1998. The hearing was not transcribed and both parties filed briefs that were received by July 27, 1998. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree to the issue, I have framed it as follows:

Did the County violate Article 6 of the contract when it failed to call in grievant Keith Waege to perform certain overtime work in Section 16 and, if so, what is the appropriate remedy?

DISCUSSION

Waege, a Patrolman, is assigned to Section 16. The November 20, 1990, job posting for Waege's job, (Joint Exhibit 4), stated in pertinent part:

Notice to Monroe County Highway Employees.

The Monroe County Highway Department will need a Section Leader for County Section 16. Truck for this Section will be stored at the Tomah shop.

Section 16 covers: CTH "E" from Hwy. 12 to CTH "N". CTH "E" from Hwy. 21 to Hwy. 12. CTH "M" from Hwy. 21 to Hwy. 16. CTH "M" from Hwy. 21 to Hwy. 12. CTH "C" from Hwy. 16 to CTH "M". CTH "N" from Hwy. 12 & 16 to Hwy. 21. CTH "T" from Hwy. 16 to CTH "A". CTH "PP" from Hwy. 12 & 16 to Hwy. 21.

...

The job description for said position (Joint Exhibit 5), states in pertinent part:

Basic Functions and Responsibilities: Under general supervision of the Patrol Superintendent, the Section Leader oversees one of 18 sections of highways assuring safe, smooth traffic flow in all seasons and weather.

Waege's normal hours run from 7:00 a.m. – 3:30 p.m. For storms, he works from 4:00 a.m. – 6:00 p.m. Waege testified that other employes from other sections who are already on duty sometimes work in his section and that he sometimes works in their sections if he is on duty.

Waege and employes Stephen Larson and Jon Pauli all testified that there is a past practice of calling in employes to work on their sections for snow and other winter maintenance work even if other available employes were already on duty.

Highway Commissioner Norbert W. Smith testified that employes in the last several years have not been called in and that any such work was assigned to employes already on duty; that it is not economical to call in an off-duty employe such as Waege in such circumstances to only perform a few minutes work; and that the County regularly cleans the road by the Veteran's Administration hospital in Sparta as a "courtesy". He also said that Waege was unable to perform the work in issue because his truck is not set up to spread salt.

The County on several occasions in 1997-1998 failed to call in Waege to perform overtime work on parts of Section 14 when other employes like Larson were already on duty and were in a position to do it themselves. Larson testified that he was told to work on Waege's section "When you get time."

POSITIONS OF THE PARTIES

The Union argues that it "is relying on 'past practice' relative to this issue" and that said practice involves a mandatory subject of bargaining because it involves overtime payment. It thus contends that "the section leader is responsible for all of the maintenance on the section", even if it occurs outside his regular workday, and that, he thus must "be called first to perform those duties" pursuant to a "20-year past practice that was always followed before "this Commissioner was hired. . ." As a remedy, the Union requests that Waege be made whole and that the County henceforth be ordered to comply with the "past practice".

The County, by contrast, asserts that the grievance must be denied because it has the management right under Article 3 of the contract to assign overtime as it sees fit and because there is nothing in Article 6, the contractual overtime provision, that requires the County to call in employes to perform overtime work that can more easily be performed by other employes already on duty.

DISCUSSION

The County is correct, the Union is wrong.

Thus, the County has broad discretion to manage its operations under Article 3 of the contract, entitled "Management Rights", which states:

The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, train, promote, transfer, schedule and assign employees to positions within the County;

D. To suspend, discharge and take other disciplinary action against employees for just cause;

E. To relieve employees from their duties because of lack of work or any other legitimate reason;

F. To maintain efficiency of county government operations;

G. To take whatever action is necessary to comply with state and federal law;

H. To introduce new or improved methods or facilities;

I. To change existing methods or facilities;

J. To determine the kind and amount of service to be performed as pertains to county government operations; and the number and kinds of classifications to perform such services. In case of the creation of a new position or classification, or a change in the content of an existing position or classification, the parties shall negotiate wages for the position or classification.

K. To contract out for goods and services, provided that such contracting out for goods and services shall not result in layoffs of present employees.

L. To determine the methods, means and personnel by which county operations are to be conducted. (Emphasis added).

These underlined phrases – particularly the last one that enables the County to “determine the methods, means and personnel by which County operations are to be conducted” – clearly give the County the right to assign work to whomever it wants, provided only that said assignments do not violate any other parts of the contract.

The only possible such contractual limitation is Article 6, entitled “Overtime”, which states:

Section 1: Overtime will not be expected except in emergencies, and any other overtime will not be approved for pay except when approved by the Highway Commissioner; the Highway Commissioner has the right to set overtime schedules in the manner most advantageous to the County and consistent with the requirements of municipal employment and the public interest.

...

Section 3: All overtime shall be distributed as evenly as possible among all employees, but the final decision shall be up to the management subject to grievance procedure.

There is nothing in any of this language, obviously, that requires the County to assign overtime work to off-duty employees when said work also can be performed by bargaining unit employees who are already on duty and who therefore can be directed by the County under Article 3 to perform said work.

Absent any contractual limitation on the County's right to thus assign work as it sees fit, the Union's claim thus rests entirely on its argument that a binding past practice has developed on this issue.

Any such practice, however, must be considered alongside the very specific language in Article 3 that expressly gives the County the right to "determine the methods, means and personnel by which County operations are to be conducted. . ." That language controls because the mere non-use of an express management right does not render it useless.

Arbitrator Harry Shulman explained this point in *FORD MOTOR CORP.*, 19 LA 237, 241-242, (1952), wherein he ruled:

"A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.

But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at that time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion.

. . .But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.

A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.”

That is the very case here because the prior assignment of overtime happened through mere “happenstance” and/or “convenient methods at that time.” The County therefore has the right to change it because – absent any express contract language providing otherwise – Article 3 preserves its managerial freedom to do so.

In light of the above, it is my

AWARD

That the County did not violate Article 6 of the contract when it failed to call in grievant Keith Waege to perform certain overtime work in Section 16; the grievance is therefore denied.

Dated at the City of Madison, Wisconsin this 31st day of August, 1998.

Amedeo Greco /s/

Amedeo Greco, Arbitrator