

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SOUTH MILWAUKEE PROFESSIONAL
POLICEMEN'S ASSOCIATION**

and

CITY OF SOUTH OF MILWAUKEE

Case 97
No. 56092
MA-10173

Appearances:

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of the Association.

Mr. Joseph G. Murphy, Attorney at Law, 2013 14th Avenue, P.O. Box 308, South Milwaukee, Wisconsin 53172-0308, appearing on behalf of the City.

ARBITRATION AWARD

South Milwaukee Professional Policemen's Association, hereafter the Association, and the City of South Milwaukee, hereafter the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. On February 9, 1998, the Association requested, and the City concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. An arbitration hearing was scheduled for April 9, 1998, and subsequently postponed until October 27, 1998. The hearing was held in South Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on January 13, 1999, upon receipt of post-hearing written argument.

ISSUE

The parties were able to stipulate to the following statement of the issue:

Did the Employer violate the express and implied terms of the collective bargaining agreement when it failed to compensate the three sergeants' shift commander pay in accordance with the provisions of the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VIII - WAGES

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Section 8.03 - Shift Commander Pay: When members of the bargaining unit are assigned to act in a higher classification for one (1) or more hours, the employee shall be entitled to the salary applicable to the duties of the classification being performed.

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ARTICLE XIV-GRIEVANCE PROCEDURE

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Section 14.03 - Final and Binding Arbitration: If the grievance is not satisfactorily settled under Step III, it may be submitted to arbitration by either party serving written notice on the other within ten (10) days after the decision of the Human Resources Committee of the Common Council.

...

The function and jurisdiction of the arbitrator shall be limited to the interpretation, application and enforcement of the provisions of this Agreement. The arbitrator shall have no power to alter, add to or delete from the terms of this Agreement, or to change the methods of operation or working rules of the Municipality which are not inconsistent with this Agreement. Any matter presented contrary to the functions and jurisdiction of the arbitrator as herein defined shall be returned to the parties without decision or recommendation.

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BACKGROUND

On December 8, 1997, the Association filed a grievance alleging that the City had violated the collective bargaining agreement by failing to provide Sec. 8.03 out-of-classification pay to Patrol Sergeants who acted as a Lieutenant in the Lieutenant's absence. The Police Lieutenant is the Shift Commander. The Shift Commander is also referred to as the Watch Commander.

The grievance requested that Sergeants James Ehardt, Glenn Gossett and Dwight Olson be compensated for all lost wages (including, but not limited to, regular pay, overtime pay and holiday pay wherever applicable) during the life of the 1995-97 collective bargaining agreement. The grievance was denied and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Association

The limitations imposed upon the arbitrator under Sec. 14.03 reconciles with the universally accepted principle that arbitrators should give clear and unequivocal contract language no meaning other than that expressed within the four corners of the collective bargaining agreement. This principle has been affirmed by the Courts and by Arbitrator Houlihan in a prior arbitration involving the parties.

Where there is a conflict between past practice and clear contract language, the clear contract language must prevail. Additionally, the City was placed on notice that the alleged past practice was being terminated as of the filing of Grievance 97-98 on December 8, 1997.

Prior to 1982, the contract stated that if a patrolman is required to act as shift commander for four or more hours, then the patrolman would be compensated at a rate of pay equal to the Police Sergeant. Since 1983, the contract has contained the language found in Sec. 8.03.

The change in the contract language establishes that the right to out-of-classification pay is not limited to patrolman, but rather, extends to all bargaining unit personnel. This change also establishes that out-of-classification pay is not limited to the sergeant's pay, but rather, is the "salary applicable to the duties of the classification being performed."

Neither the language of Sec. 8.03, nor any other contract language, limits the application of Sec. 8.03 to "higher" classifications within the bargaining unit. The fact that the City requires sergeants to assume shift commander duties in their absence does not allow

the City to ignore contractually agreed-upon conditions of employment. To conclude otherwise would allow the City to rewrite all job descriptions to circumvent the out-of-classification pay requirements of Sec. 8.03. The grievance should be upheld.

City

Section 8.03 does not define the term “classification.” As used, the term could mean pay grade, rank, or assignment, within the bargaining unit or the police department as a whole.

Read in context, “classification” means a position or job assignment that requires the employe to perform duties beyond those normally required to be performed in the employe’s position. Thus, it is only when the employe performs duties of some other “classification” that payment may be required.

The terms “Shift Commander” and “Watch Commander” are interchangeable. Performing as “Shift Commander” has always been one of the regular duties of a Patrol Sergeant. In the fifteen years since the parties adopted the language of Sec. 8.03, no sergeant has claimed that he/she has been performing duties beyond the scope of his/her position.

Evidence of past practice may be used to construe ambiguous contract language. The evidence of the parties’ past practices demonstrates that patrol officers who function as shift commander have received the sergeant’s rate of pay. Sergeants have not requested, nor have they been paid, any additional pay for performing as “Shift Commander.”

The grievance is without merit and should be dismissed. In the event that the grievance is sustained, any award of back pay cannot extend past November 18, 1997.

DISCUSSION

Commencing with the 1983-85 collective bargaining agreement, Sec. 8.03 has stated as follows:

When members of the bargaining unit are assigned to act in a higher classification for one (1) or more hours, the employee shall be entitled to the salary applicable to the duties of the classification being performed.

In order to determine whether or not an employe is entitled to Sec. 8.03 pay, it is necessary to determine if the employe has been assigned to “act in a higher classification.” To that end, one must determine whether the duties being performed are those of the employe’s classification, or of a higher classification.

Inasmuch as Sec. 8.03 does not identify which duties belong to which classification, the language is not clear and unambiguous. Accordingly, evidence of bargaining history and the parties' past practices may be considered.

Prior to the 1983-85 collective bargaining agreement, the collective bargaining agreement contained the following language:

3. If a patrolman is required to act as shift commander for one (1) or more hours, he shall be compensated at a rate of pay equal to that of Police Sergeant.

A comparison of the old language to the existing language reveals that the parties deleted the reference to patrolman and Police Sergeant and replaced them with terms that are more expansive. Thus, the changes in the contract language support the Association's argument that the parties intended out-of-classification pay to be available to classifications other than Patrol Officer and that out-of-classification pay is not limited to the sergeant's pay. However, the changes in the language, *per se*, do not reflect that the parties had any understanding with respect to what constitutes "acting" in a higher classification.

For more than twenty years, the written job description of the Patrol Sergeant has included the following duty: "In the absence of the watch commander, a patrol sergeant is required to assume the duties and responsibilities of the watch commander." The position description, on its face, supports the conclusion that acting as a shift commander, in the absence of the shift commander, is work of the Patrol Sergeant classification.

Following the adoption of the current Sec. 8.03, Patrol Sergeants regularly acted as shift commander for one or more hours, in the absence of the shift commander, and were compensated at the sergeant's pay rate. It is unlikely that such a well-established practice would go unnoticed by the Association. It is reasonable to conclude, therefore, that the Association has acquiesced in this pay practice. Thus, the evidence of the Patrol Sergeant pay practices indicates that the parties have mutually agreed that the assumption of the duties and responsibilities of the shift commander, in the absence of the shift commander, is work of the Patrol Sergeant classification.

Following the adoption of the current Sec. 8.03, Patrol Officers received Sec. 8.03 pay for assuming the duties and responsibilities of the shift commander for one or more hours, in the absence of the shift commander. Patrol Officers who received this Sec. 8.03 pay have been paid at the higher classification of Patrol Sergeant, as have Investigators and Detectives who have assumed these duties and responsibilities.

As with the Patrol Sergeant pay practice, it is unlikely that the Patrol Officer, Investigator and Detective pay practices would go unnoticed by the Association. It is

reasonable to conclude, therefore, that the Association has acquiesced in these pay practices. Thus, the evidence of the Patrol Officer, Investigator and Detective pay practices indicates that the parties have mutually agreed that the assumption of the duties and responsibilities of the shift commander, in the absence of the shift commander, is work of the Patrol Sergeant classification.

In summary, the language of the Patrol Sergeant position description, as well as the evidence of the parties' pay practices, persuades the undersigned that the assumption of the duties and responsibilities of the shift commander, in the absence of the shift commander, is a duty of the Patrol Sergeant classification. Inasmuch as Patrol Sergeants who are assigned such duties and responsibilities are not acting in a higher classification, the performance of such duties does not entitle the Patrol Sergeants to the out-of-classification pay set forth in Sec. 8.03.

Contrary to the argument of the Association, such a conclusion does not mean that the City may circumvent the requirements of Sec. 8.03 by rewriting other position descriptions, such as the Patrol Officer, to include acting as shift commander. The reason being that this award does not rest solely upon the language of the position description, but rather, also gives effect to the well-established and mutually accepted practices of the parties.

The arbitrator has relied upon past practices to interpret ambiguous contract language. Neither party can unilaterally repudiate this type of past practice. Contrary, to the argument of the Association, the grievance filed on December 8, 1997 is not sufficient to repudiate the past practices relied upon by the arbitrator in interpreting Sec. 8.03 of the parties' 1995-97 collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the express and implied terms of the collective bargaining agreement when it failed to compensate the three sergeants shift commander pay under Sec. 8.03 of the collective bargaining agreement.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 20th day of April, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator