BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY (SHERIFF'S DEPARTMENT)

and

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

Case 349
No. 57594
MA-10684

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, on behalf of the Union.

Mr. Steven Rollins, Corporation Counsel, Manitowoc County, 1110 South Ninth Street, Manitowoc, Wisconsin 54220, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1998-99 collective bargaining agreement between the County Personnel Committee of the Manitowoc County Board of Supervisors (County) and Manitowoc County Sheriff's Department employes represented by WPPA (Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as an impartial arbitrator of a dispute between them regarding whether the Sheriff's Department is required to split an eight-hour overtime shift and offer it in four-hour blocks of time to certain bargaining unit employes. Hearing was scheduled and held on July 20, 1999, at Manitowoc, Wisconsin. A stenographic transcript of the proceedings was made and received on July 28, 1999. The parties filed their written briefs by September 3, 1999, which were exchanged thereafter by the undersigned. The parties waived the right to file reply briefs.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to an issue or issues for determination herein. However, the parties stipulated that the arbitrator could frame the issue based upon the parties' suggested issues and the relevant evidence and argument presented.

The Union's suggested issue was as follows:

> Did the County violate Article 23, Section H, of the collective bargaining agreement when, on March 5, 1999, it failed to offer bargaining unit overtime to all qualified bargaining unit employes? If so, what is the appropriate remedy?

The County suggested the following issue for determination:

> Did the County violate Article 23, Section H, of the collective bargaining agreement when, on March 5, 1999, it offered eight hours of overtime to non-bargaining unit employes after bargaining unit employes had been offered and refused the eight hours of overtime as a block? If so, what is the appropriate remedy?

Based upon the parties' suggestions, as well as the relevant evidence and argument in this case, I find that the County's issues reasonably state the dispute between the parties and they shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE 23 – OVERTIME – COMPENSATORY TIME – HOLIDAY PAY

. . .

H. The employees and Association acknowledge that reasonable overtime which is assigned must be accepted. It is further understood and agreed that overtime shall be distributed as follows:

1. The last position vacated on each shift will be filled first.

2. Bargaining unit positions will be first offered to bargaining unit employees and management positions will first be offered to management employees.

3. Bargaining unit overtime will first be offered to bargaining unit employees of the same classification by seniority as the vacated position on the same shift, secondly on the following shift, thirdly on the prior shift, and then to all other qualified bargaining unit employees.

4. Once overtime for bargaining unit employees has been offered to and refused by all bargaining unit employees, it may be offered to and accepted by non-bargaining unit employees. Subsequently, once non-bargaining unit overtime has been offered to and refused by all non-bargaining unit employees, it may then be offered to and accepted by bargaining unit employees.

5. Except for unusual circumstances, and for Scuba, SWAT, Boat Patrol, Snowmobile Patrol, and Emergency Government when scheduling overtime to be worked, employees will not be allowed to work more than eight (8) consecutive workdays.

. . .

BACKGROUND

The County and the Union have had a collective bargaining relationship for many years. The Union essentially represents non-supervisory employes who have the power of arrest. The department operates overlapping shifts as well as regular shifts. The regular shifts are from 4 a.m. to 12 p.m.; 12 p.m. to 8 p.m.; and 8 p.m. to 4 a.m. The overlapping shifts are from 7 a.m. to 3 p.m.; 10 a.m. to 6 p.m.; and 6 p.m. to 2 a.m. An officer who works an overlapping shift cannot work that shift and also work the four hours necessary for a split shift.

During the late 1980s, there was significantly more overtime offered to bargaining unit employes. This was true in part because the County had a policy of filling all vacancies and it had a higher minimum manning level on certain shifts, such as the afternoon shift, than is currently the case. Prior to the inclusion of Article 23 (H) into the collective bargaining agreement, the County had a policy that overtime was to be offered so that it would be equally distributed among bargaining unit employes, but this was only done at the discretion of the supervisor. Thus, if several days of overtime became available, the supervisor would have the option to pick the days that he/she wanted to work and then offer the rest of the overtime to bargaining unit employes. The Union felt that this was unfair as supervisors were selecting the best days and leaving less desirable days (such as weekends) for bargaining unit employes. The Union therefore proposed the language of Article 23 (H) so that the eight-hour blocks of overtime would be offered to bargaining unit employes by seniority to equalize overtime hours and to verify who should be called and in what order. These proposals were accepted by the

County and Article 23 (H) was placed in the 1989-90 contract. Although some minor modifications have been made over the years since the provision was placed in the agreement, those modifications have not changed the substance of the operative provision of Article 23 (H).

At a later time, the Union and the County discussed splitting overtime shifts during contract negotiations. The Union proposed that the County offer bargaining unit employes four-hour blocks of overtime, thus splitting the shifts. The County resisted this proposal and it was ultimately dropped by the Union.

Since Article 23 (H) became a part of the contract, the County has consistently followed the following procedure to fill the vacant shifts. When a shift becomes vacant, the shift supervisor calls bargaining unit employes on that shift that are off work that day, by seniority, and offers them eight hours of overtime; if those employes refuse the overtime or cannot be reached, the supervisor then calls all bargaining unit employes on the next shift who happen to be off-duty that day to offer them the eight hours of overtime; if all those employes refuse the overtime or cannot be reached, the supervisor then calls all bargaining unit employes by seniority on the shift prior to the vacancy to offer them the eight hours of overtime. If all those employes refuse the overtime or cannot be reached, the County may then offer the eight hours of overtime to non-bargaining unit employes. If both bargaining unit and non-bargaining unit employes refuse the eight hours of overtime, the supervisor can then decide whether he/she will split the shift into four-hour portions and offer it to the oncoming and off-going bargaining unit employes working the shifts surrounding the vacancy. It is the supervisor's discretion to decide to split the shift, to fill a vacancy or to only fill a portion of the vacancy. After the decision is made by the supervisor to split the shift, the supervisor offers bargaining unit employes on the oncoming and off-going shifts, by seniority, four hours of overtime. 1/

1/ Also, according to practice, employes can arrange with their fellow workers to receive time off by splitting their own shift with the oncoming and off-going employes into four hour increments. However, this must be done with prior approval of management and without incurring overtime liability.

FACTS

On March 5, 1999, Officer Tisler called in sick for his 8 p.m. to 4 a.m. shift. Tisler's supervisor then contacted all bargaining unit officers, by seniority, as described in Article 23 (H), to see if they would take the eight-hour shift. The supervisor decided not to split the shift. Ultimately, a non-unit employe, Sargent Schetter was offered and worked the eight hours of overtime created by Tisler's absence on March 5, 1999, because all bargaining unit employes had refused the eight hours of overtime. It is undisputed that the supervisor, in his discretion, could have split the shift vacated by Officer Tisler, and that the supervisor chose not to split the shift.

In May 1999, it appears that there were split shifts worked by various officers on May 29 and May 30, 1999. On June 7, 25, and 26, 1999, shifts were also split by the decision of the supervisor involved. On June 25 and 26 those split shifts were worked by bargaining unit employes, while non-bargaining unit employes worked the split shifts available on June 7, 1999.

POSTIONS OF THE PARTIES

Union

The Union argued that the contract requires the County to offer overtime opportunities to bargaining unit employes before it offers these to non-bargaining unit supervisors. Full compliance with the contract, therefore, requires the County to split shifts to fill the time with bargaining unit employes rather than non-bargaining employes, in the Union's view. The Union argued that bargaining history and past practice can not be admitted to change the clear and unambiguous language of Article 23 (H). In this regard, the Union asserted that the general language of Article 3 Management Rights is superceded by the express and more specific language of Article 23 (H).

The fact that in the past, non-bargaining unit employes have taken bargaining unit work does not constitute a waiver of the clear language of Article 23 (H). The Union asserted that although the County has followed portions of Article 23 (H), it has not offered overtime to "all other qualified bargaining unit employees" as the final step before offering overtime to non-unit employes. Because the County has willingly split shifts in the past, bargaining unit employes working the shifts before and after the eight-hour overtime opening on March 5th should have been offered four hours of overtime once the supervisor decided to fill the overtime shift. If the County had done this, the Union argued, the contract would have been fulfilled by having bargaining unit employes receive overtime before any offer is made to non-unit employes. Thus, the Union contended that the County should split shifts even if it is inconvenient for them to do so. Because the Union never agreed to the practice used by the County to offer overtime as demonstrated in this case, the Union asserted that the evidence of past practice should be disregarded in this case.

Finally, the Union urged that it is irrelevant that the Union attempted and failed ten years ago to get agreement from the County to split eight-hour overtime shifts into four-hour pieces. The Union noted that the County now splits shifts voluntarily for various reasons and that there is no good reason not to split shifts in the situation presented by this case and in future cases like it. Therefore, the Union sought an award stating that overtime should be offered in the future to all qualified bargaining unit employes, even if this requires that the County offer overtime to officers working the shift before and after the vacant shift. The Union sought no monetary remedy regarding the March 5, 1999, overtime shift opportunity.

County

The County noted, initially, that the contract does not require it to split eight-hour overtime shifts. In addition, the County noted that the right to fill vacant shifts or to split shifts is a management right expressly reserved to the employer. The County noted that the Union admitted that it is up to the supervisor to decide whether to split a shift or not and whether to fill a shift fully or to partially fill it. Thus, in the County's view, the employer cannot be compelled to split shifts. In this regard, the County noted that the Sheriff possesses a constitutionally protected right to manage the Sheriff's Department and that this power of the sheriff cannot be abridged by contract or an arbitration award. In any event, the County asserted that the method it used to fill the March 5th vacancy was based upon a long established past practice which is consistent with the collective bargaining agreement herein.

The remedy requested by the Union, in the County's view, would violate the express language of the contract. In this regard, the County noted that Article 23 (H) indicates that the County must offer the overtime opportunity to employes on the same shift, then the shift following, then to the shift prior to the vacancy and thereafter to all bargaining unit employes. The Union's requested remedy seeks that the County add another step to the process of filling the eight-hour vacancy which is not expressly described anywhere in the labor agreement.

In addition, the remedy sought by the Union was in fact rejected by the parties at the bargaining table approximately ten years ago. In this regard, the County noted that the Union attempted to have four-hour split shifts described in the procedures contained in the collective bargaining agreement but the County never agreed to this approach and no language was placed in the contract on this point. Thus, the County urged that the grievance be denied and dismissed in its entirety.

DISCUSSION

The Union has argued that the County's actions in offering the overtime available on March 5th violated the contractual phrase ". . . and then to all other qualified bargaining unit employees." I disagree. In my view, the record clearly shows that the County followed Article 23 (H) and past practice in filling the vacancy created by Officer Tisler's March 5, 1999 illness, by calling off-duty bargaining unit employes on Tisler's shift and then calling bargaining unit employes on the shift before and the shift after Tisler's. There is no dispute that the supervisor involved followed Article 23 (H) and failed to find any bargaining unit employe on the various shifts willing and able to fill the eight-hour vacancy. It is also clear that bargaining unit employes working on overlapping shifts could not have filled the eight-hour vacancy according to past practice which prohibits employes from working more than 12 hours without rest. Similarly, the contract does not require the County to offer the overtime opportunity to employes on leave or who are absent due to disability. Thus, the evidence was insufficient to show that the County's actions violated Article 23 (H)(3).

It is significant that the contract fails to require the County to split overtime shifts. Indeed, the admissions by witnesses herein support a conclusion that a shift supervisor has unfettered discretion, after unit employes on the listed shifts in the contract have refused the overtime shift available, to split the shift or to refuse to do so. In addition, Article 23 (H)(4) specifically states that non-unit employes may be offered unit overtime after unit employes have refused it. Thus, the contract language is clear on these points.

Evidence of bargaining history also fully supports the County's arguments herein. Thus, it is undisputed that the Union sought to insert language requiring the splitting of eight-hour shifts into four-hour shifts in the late 1980s and that the Union failed to gain this language in negotiations. Finally, the evidence of past practice shows that where overtime is concerned, the County has, for at least the last decade, used its discretion to split or not to split overtime shifts without drawing any complaints from the Union. The fact that employes are allowed to split their own shifts in order to get time off involves an issue not before this Arbitrator. However, I note that when such shift splitting is done, it must be with the prior approval of management and it cannot create overtime liability.

In all the circumstances of this case, the Union has failed to prove that a violation of the labor agreement or past practice occurred on March 5, 1999, when the County filled Officer Tisler's shift with Sargent Schetter. Based on the relevant evidence and arguments herein, I issue the following

AWARD

The County did not violate Article 23, Section H, of the collective bargaining agreement when, on March 5, 1999, it offered eight hours of overtime to non-bargaining unit employes after bargaining unit employes had been offered and refused the eight hours of overtime as a block. The grievance is, therefore, denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 24th day of September, 1999.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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