

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION
OF THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION,
for and on behalf of its affiliate local, the
KEWAUNEE COUNTY PROFESSIONAL POLICE ASSOCIATION**

and

KEWAUNEE COUNTY BOARD OF SUPERVISORS

Case 53
No. 57480
MA-10648

(Bruce Cochart Grievance)

Appearances:

Mr. Richard Thal, WPPA General Counsel, 340 Coyier Lane, Madison, Wisconsin 53713, for Law Enforcement Employee Relations Division of the Wisconsin Professional Police Association, for and on behalf of its affiliate local, the Kewaunee County Professional Police Association, referred to below as the Association.

Ms. Elma E. Anderson, Corporation Counsel, Kewaunee County, 613 Dodge Street, Kewaunee, Wisconsin 54216, for the Kewaunee County Board of Supervisors, referred to below as the Employer, or as the County.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of Bruce Cochart, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on July 28, 1999, in Kewaunee, Wisconsin. The hearing was not transcribed. The parties filed briefs and a waiver of reply briefs by October 8, 1999.

ISSUES

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

Did the County violate the Collective Bargaining Agreement when it required the Grievant to work outside of his scheduled shift on August 19, 20 and 21 of 1998?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3: HOURS OF WORK

A. WORK CYCLE

The regular work cycle that employees shall work is as follows:

WORK six (6) consecutive days, then OFF three (3) consecutive days, then WORK six (6) consecutive days, then OFF three (3) consecutive days, then, the entire above cycle is repeated.

B. WORK DAY

A work day shall consist of eight (8) consecutive hours.

C. SHIFT SCHEDULE

Shift schedule shall be as follows:

JAIL DIVISION

7:00 a.m. – 3:00 p.m.
10:00 a.m. – 6:00 p.m.
3:00 p.m. – 11:00 p.m.
7:00 p.m. – 3:00 a.m.
11:00 p.m. – 7:00 a.m.

PATROL DIVISION

8:00 a.m. – 4:00 p.m.
10:00 a.m. – 6:00 p.m.
4:00 p.m. – 12:00 midnight
7:00 p.m. – 3:00 a.m.
12:00 midnight – 8:00 a.m.

D. OVERTIME

All hours worked in excess of an eight (8) hour work day, on a day off, or outside of the sixth (6th) consecutive work day, except for attendance at nonmandatory (sic) schools or training, shall be paid at the rate of time and one-half (1 ½) without pyramiding.

E. CALL-IN

Whenever an employee is called to work outside of his/her scheduled shift, he/she shall be guaranteed a minimum of two (2) hours at time and one-half (1 ½).

. . .

K. SHIFT SELECTION

All shifts and slots shall be open for bidding among full-time employees in December of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority.

When the filling of a permanent vacancy in any job description has been approved, according to the procedures outlined under the Kewaunee County Personnel Policy, full-time employees may bid, in order of seniority, for any open slot or shift at that time. No employee shall be forced to move out of his or her current slot or shift.

When the Department Head or his designee has notice, at least 24 hours in advance of an unscheduled open shift, all full-time employees scheduled to work on that calendar day in that classification, shall be given the opportunity to move into that open shift according to seniority. When there is less than 24 hours advance notice, or when all full-time employees scheduled to work on that

calendar day in that classification have refused the shift, full time employees, in that classification, who are on scheduled days off, will then be offered the chance to fill the open shift. Then, full time employees in any other classification shall be offered the work. Thereafter, the shift will be offered to regular part-time personnel. Under this section, an offer of work shall require only a single telephone contact at the employee's residence. An employee who cannot be contacted personally in this manner shall be deemed to have rejected the offer.

...

ARTICLE 18: VESTED RIGHT OF MANAGEMENT

A. GENERALLY. Except as otherwise provided in this Agreement:

...

The Board shall have the exclusive right to determine the hours of employment and the length of the workweek and to make changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Sheriff Department, and the Association and the members agree to cooperate with the Board and/or its representatives in all respects to promote the efficient operation of the Sheriff Department.

BACKGROUND

The parties do not dispute the facts underlying the grievance. In 1998 (references to dates will be to 1998, unless otherwise noted), the County created the full-time position of Court Security Officer within the Jail Division of the Sheriff's Department. The Court Security Officer handles security for judicial and quasi-judicial functions. The County and the Union negotiated the conditions of employment for this position, and stated them in a side-letter executed in late-March. The side letter states:

...

2. Hours of work are 8:00 a.m. to 4:30 p.m., Monday through Friday, with a one half hour break for lunch, and such other times as the Circuit Court or Family Court Commissioner shall be in session.
3. Overtime shall be paid at the rate of time and one-half for all hours in excess of eight (8) per day and forty (40) per week.

4. The biweekly wage rate shall be at eighty (80) hours multiplied by the current hourly rate received by the employee.
5. The Court Security Officer shall be eligible to accept overtime hours in the Kewaunee County Sheriffs (sic) Department, which he or she is otherwise qualified to perform, at the discretion of the department head, or his/her designee.
6. The Court Security Officer shall receive holiday and vacation pay as specified in the collective bargaining agreement.
7. The Court Security Officer position shall be open for bidding among all full time members of the bargaining unit in December of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority.

John Cmeyla has been the County's Chief Deputy at all times relevant to the grievance. Among his duties is scheduling work. Because the County employs one full-time Court Security Officer, some adjustment of schedules is required to address that employee's absences due to sickness, vacation or other causes. Cmeyla estimated that he had to substitute other deputies into the Court Security Officer position perhaps two to three shifts per month in 1998. This grievance is the first objection of a Radio Operator/Jailer to assignment to fill-in for the Court Security Officer.

In August, the then-incumbent Court Security Officer, Mark Jandrin, took a scheduled vacation. Cmeyla was aware of the vacation request, and published a work schedule in which the Grievant filled in as Court Security Officer on three days of Jandrin's vacation while other deputies filled in for the remaining two days. Cmeyla covered the Grievant's normal shift with a second shift deputy, covered the second shift opening with a third shift deputy and filled the third shift vacancy with a part-time or reserve deputy. By doing so, Cmeyla hoped to permit the County to cover Jandrin's vacation without the unnecessary use of overtime.

The Grievant noticed this scheduling change when the schedule was posted. He responded to the change in a memo to Cmeyla, dated August 4, 1998, which states:

I am writing this to you because I am on my off days and I want to give you a little more time to schedule somebody else. If you want to discuss this with me, I will be back to work on Friday.

I don't want to work as Court Security Officer on the dates you have me listed to work it in August. I will work it if I get overtime from 1500 to 1630 hrs. My scheduled shift according to the contract is 0700 hrs to 1500 hrs. I know the Marks (sic) . . . hours are from 0800 hrs to 1630 hrs but that is currently his full time position and he knows those are his hours and that's his choice. Its is (sic) not my choice. If you order me to work those hours I guess I don't have a choice, but my next step would be to file a grievance.

I don't want you to take this as a threatening letter, its (sic) just my feelings about it and I wanted to give you advance notice.

Cmeyla confirmed the assignment in a memo dated August 5, which states:

You are temporarily assigned to the Court Security duties for the following days: August 19, 20, and 21, 1998. Your work hours are 0800 to 1630 hrs as the position requires on these days.

The Grievant responded by filing a grievance form dated August 18, which states:

BASIS OF GRIEVANCE: Violation of Article 3 – Hours of Work – Section K – Shift Selection

REQUESTED REMEDY: Compensate grievant for 1 hour of overtime which will arise when grievant works his selected shift hours, plus the additional time required of court security officer on said dates.

DESCRIBE THE GRIEVANCE:

ISSUE:

The grievant selected to work the 7AM to 3PM shift as a radio operator jailer during shift bidding in late 1997 and did not choose to post for the Court Security Officer. On August 5, 1998, the grievant was ordered to work the Court Security Position as a temporary assignment on August 19, 20 and 21, 1998 and was told his work hours would be 0800 to 1630 hours. Grievant asserts that his selected shift is 7AM to 3PM and does not wish to fill a vacancy in the Court Security Officer position unless he is fully compensated for the work time between his start time of 0700 hours and 1630 hours. The employer had more than 24 hours advance notice of the vacancy and did not give the opportunity for other full time employees to move into the open shifts according to seniority, prior to assigning the shifts to the grievant.

The Grievant worked the scheduled hours to fill in for Jandrin. It is undisputed that deputies sometimes voluntarily switch hours to accommodate personal needs, and that such switches may obviate the need for overtime. It is also undisputed that although this was the first time the County assigned the Grievant to serve in Kewaunee County as Court Security Officer, he has

volunteered to work as Court Security Officer for two out-of-County jury trials. These trials forced him to work outside of his shift, but also afforded him overtime for working scheduled off-days, and for working in excess of eight hours per day. Cmeyla testified that he did not seek volunteers to fill-in for Jandrin's August absence.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Association's Brief

The Association states the issues for decision thus:

Did the County violate the Collective Bargaining Agreement when it required the grievant to work outside of his scheduled shift? If so, what is the appropriate remedy?

After a review of the evidence, the Association argues that the County "has violated specific hours of work provisions set forth in Article 3 of the contract." More specifically, the Association contends the County violated Sections B, C and K of Article 3.

Noting that it is undisputed that the Grievant "selected the 7:00 a.m. to 3:00 p.m. shift as his regular hours of work," and that the County required him to work as Court Security Officer for hours between 8:00 a.m. and 4:30 p.m., the Association concludes that "the County is obligated to compensate (the Grievant) for working outside his scheduled shift." Arbitral precedent will not support the County's assertion of its general management rights, since those rights "are superceded by the specific terms set forth in Article 3." The assertion of the general terms of the management rights clause ignores that those terms have been specified by Article 3.

The specific violation is the County's requirement that the Grievant "work one and a half hours past his normal quitting time." Article 3, Section E, according to the Association, demands the County pay the Grievant "one hour additional pay for each day that he was called in." Since he worked as Court Security Officer for three days, "he should receive an additional three hours pay."

The County's Brief

At hearing, the County stated its view of the issue for decision thus: "Is the Grievant entitled to overtime pay for working outside of his regularly scheduled shift?" After a review of the evidence, the County contends that the Grievant is attempting to establish that "he cannot be required to work at any other time" than his selected shift and that if "he is compelled to work during any other shift" then "he is entitled to be paid overtime."

The County contends that the collective bargaining agreement will not support a request for overtime unless an employe works in excess of eight hours in a day or beyond six consecutive work days. The evidence will not support the assertion that the Grievant met either of these contingencies. Even if Article 3, Section K applied to the grievance, the Grievant would not be entitled to overtime pay.

Nor will the evidence support the Grievant's desire not "to work any other hours than those he had selected." Article 3, Section K does not address how to fill a vacant shift for which no officer has volunteered. That provision cannot, however, "affect whether the Sheriff or his Chief Deputy has the authority to order an officer to duty when the officer does not want to work." Against this background, Article 18 governs the grievance.

Since the Court Security Position is within the Jail Division of the Sheriff's Department, and since the Grievant "is regularly assigned to work the 7-3 shift in the Jail Division," it follows, according to the County, that the Sheriff can assign the Grievant "to do any work within that division, including the Court Security Officer duties." The Sheriff's right to assign under Article 18 extends to "any shift where a vacancy occurs, regardless of (an employe's) regular schedule."

The County concludes that the evidence establishes that "there is no violation of the collective bargaining agreement and no remedy is necessary."

DISCUSSION

The parties' conflicting statements of the issue for decision reflect two distinct views of the grievance. The County's view is better rooted in the grievance form filed on August 18, which presumes that the Grievant's work schedule cannot be altered, but would be extended by one and one-half hours by extending his own shift to cover that of the Court Security Officer. The evidence indicates, however, that the Grievant did work the scheduled hours of the Court Security Officer for three days. Against this background, the Association's broader statement of the issue is more appropriate, and is, essentially, the issue I have adopted as appropriate to this record. However, I have restricted the issue to the facts posed here to avoid expanding my conclusion beyond the parties' arguments. My statement of the issue presumes that the County's view is addressed as a necessary part of addressing the Association's broader view.

The County persuasively argues that the collective bargaining agreement does not support the assertion that the Grievant cannot be assigned to work outside of the shift he selected under Article 3, Section K. Sections A, B, C, E and K underscore that the labor agreement establishes scheduled shifts which are to be as stable as possible. Sections A, B, C and E use "shall" to describe the "regular" work schedule, the shifts that comprise it and the implications of calling

an employe in “outside of his/her scheduled shift.” The final sentence of the second paragraph of Section K affirms the stability of selected shifts during the “filling of a permanent vacancy.” The grievance form builds on this to assert the Grievant cannot be called in outside of his scheduled shift.

This assertion ignores that there is a considerable distance between establishing a “regular” work cycle, and mandating that a work cycle cannot be changed. The provisions of Article 18 make this distance unbridgeable. The flexibility granted the County in the final sentence of the first paragraph of Article 18 precludes reading Article 3 as inflexibly as the grievance form asserts. Nor does Section K of Article 3 ban assigning the Grievant to a shift other than his regular shift. It does establish a procedure regarding filling “an unscheduled open shift,” but that procedure falls short of banning County assignment of an employe to other than the employe’s regular shift. That the agreement specifies overtime payments at Sections D and E would indicate that such assignments can occur, but incur a cost when they do. Beyond this, it can be noted that the parties negotiated the work schedule of the Court Security Officer after the creation of Article 3, Section C, and after running the Section K selection process for 1998. This makes it unpersuasive to read the “day shift” set by Article 3, Section C to preclude assignment to the “day shift” set by the side letter. In sum, on the narrow issue of assignment posed by the facts of this grievance, the evidence affirms that Cmeyla, on behalf of the County Board, had the authority to assign the Grievant to a shift other than his regular shift.

The issue thus becomes what, if any, payment beyond the straight-time wage rate the County was obligated to make by assigning the Grievant to a shift outside of his regular shift. As the County asserts, the evidence will not support a conclusion that the Grievant is entitled to overtime under the terms of Section D of Article 3, since he did not work in excess of “an eight (8) hour work day, on a day off, or outside of the sixth (6th) consecutive work day.”

This focuses the grievance on the terms of Section E. That section mandates “a minimum of two (2) hours at time and one-half (1 ½) . . . (w)henver an employe is called to work outside of his/her scheduled shift.” The Association contends this clearly applies to the Grievant, since he was called to work outside of his regular 7:00 a.m. to 3:00 p.m. shift. The side letter establishes that the Court Security Officer position is bid separately from the Grievant’s position. Thus, it is impossible to read the hours set at Section 2 of the side letter as anything other than a “scheduled shift” separate from that stated for the Grievant’s Radio Operator/Jailer position at Article 3, Section C. Against this background, it is impossible to conclude that the County did not call him to work on the days he filled in for Jandrin “outside of his scheduled shift.” It is important to note that the evidence does not indicate Cmeyla sought volunteers under Section K of Article 3, even though he had “notice, at least 24 hours in advance” of Jandrin’s absence. If the reference to “scheduled shift” in Article 3, Section E is read to mean “any shift listed on a posted work schedule,” then the protections of Sections A, C, E and K of Article 3 are rendered meaningless.

The evidence indicates Cmeyla, prior to this grievance, assigned deputies to fill in for the Court Security Officer position without any grievance. Whether this was done after complying with Section K or without regard to Section K is not apparent. Thus, it is impossible on this record to determine if the reassignments occurred on a voluntary basis. On this record, it is apparent the Grievant did not volunteer, and it is apparent that he was “called to work outside of his scheduled shift.”

Reading Section E to afford call in pay reconciles the specific terms of Section E with the general terms of Article 18. Against this background, the County’s general rights under Article 18 must be applied without rendering the more specific duty of Article 3, Section E meaningless. Thus the County’s assignment of the Grievant to fill in for Jandrin was authorized by Article 18, but since the Grievant’s assignment did not fall within Article 3, Section K, it invokes call in pay under Article 3, Section E. This conclusion stops short of specifically interpreting Section K on this evidence. Rather, it affirms that Section K, on these facts, affords the County no defense to the payment sought by the Union.

The remedy awarded below needs no elaboration. As the Association details in its brief, the remedy affords the Grievant the minimum payment required by Article 3, Section E, by paying him six hours at straight time and two hours at time and one-half for the three days he filled in for Jandrin.

AWARD

The County did violate the Collective Bargaining Agreement when it required the Grievant to work outside of his scheduled shift on August 19, 20 and 21 of 1998.

As the remedy appropriate to the County’s violation of Article 3, Section E, the County shall compensate the Grievant by paying him the difference between the payment it made for his work on August 19, 20 and 21 of 1998 and the payment it would have made if it had paid him, for those days, six hours of straight time pay and two hours at time and one-half.

Dated at Madison, Wisconsin, this 3rd day of December, 1999.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator