

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LINCOLN COUNTY PROFESSIONAL DEPUTIES' ASSOCIATION  
LOCAL 101, LABOR ASSOCIATION OF WISCONSIN, INC.**

and

**LINCOLN COUNTY**

Case 188  
No. 58055  
MA-10828

*(Randy Osness Grievance)*

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Appearances:

**Mr. Thomas Bauer**, Labor Consultant, Labor Association of Wisconsin, Inc., for the Union.

**Mr. John Mulder**, Lincoln County Administrative Coordinator, for the County.

**ARBITRATION AWARD**

The Lincoln County Professional Deputies' Association, Local 101 (herein the Union) and Lincoln County (herein the County) are parties to a collective bargaining agreement covering the period January 1, 1999 to December 31, 2000, and providing for binding arbitration of certain disputes between the parties. On September 29, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on overtime work assigned to Randall Osness (herein the Grievant) and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on December 7, 1999. The parties filed briefs on February 2, 2000.

**ISSUE**

The parties stipulated to the following statement of the issue:

Did the Employer violate the specific and implied terms of Articles 6 and 12 when it required the grievant to work overtime under the “Stomp Grant” on June 4, 1999?

If so, what is the appropriate remedy?

**PERTINENT CONTRACT PROVISIONS**

**ARTICLE 2 – MANAGEMENT RIGHTS**

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

**2.1.1** To direct all operations of the County;

**2.1.2** To establish reasonable work rules and schedules of work;

...

**2.1.6** To maintain efficiency of County government operations;

...

**2.1.8** To introduce new or improved methods or facilities;

**2.1.9** To change existing methods or facilities;

**2.1.10** To determine the kinds and amounts of services to be performed as pertains to County government operation; and the number and kinds of classifications to perform such services;

...

**2.1.12** To determine the methods, means and personnel by which County operations are to be conducted,

...

**ARTICLE 6 – SENIORITY RIGHTS AND LAYOFF**

**6.1 – Definition.**

...

**6.1.2 Bargaining Unit Seniority.** Is defined as all time worked of [sic] Lincoln County within the Sheriff’s Department bargaining unit. Bargaining unit seniority would apply to pay entitled to, shift selection, vacation selection, the overtime list, and layoff/recall.

...

**6.3 Seniority List.** The Employer shall keep a current seniority list of all employees. The list shall be kept up to date by the Employer, and shall be kept on file in the Employer’s office. It shall be available for inspection by the individual employees upon request.

...

**ARTICLE 12 – OVERTIME**

...

**12.2 Administration of Overtime.** All overtime that becomes available to Patrol Officers, shall be filled by the following method:

**12.2.1** Using a rotating system, per shift, based on seniority, the immediate preceding and succeeding shifts shall have the first opportunity to fill such overtime. Accordingly, a list shall be established, by seniority of the people on each shift. Consequently, there shall exist a separate list for each shift.

**12.2.2** When a shift is short of personnel (i.e., 2 absences), the person at the top of the list from the preceding shift shall be offered the opportunity to work the first four (4) hours, and the person at the top of the list of the succeeding shift shall be offered the opportunity to work the second four (4) hours. If the person, so offered, accepts the offer, or refuses the offer, then that person’s name moves to the bottom of the overtime list for that shift. If the overtime is not filled with the person(s)

at the top of the respective lists, then such overtime shall be offered to the others on that list consistent with the above-described rotation of names.

**12.2.3** Any and all hours that are not filled pursuant to the above provisions shall be offered to any other officer who is normally assigned patrol duty, with the intent being to equitably distribute such overtime.

### **BACKGROUND**

The Lincoln County Sheriff's Department operates with three shifts: 5:45 a.m. – 2:15 p.m., 1:45 p.m.-10:15 p.m., 9:45 p.m. – 6:15 a.m. Historically, when there is a need to fill a shift, the Department tries to split the shift, offering the first four hours to the officers on the preceding shift in descending order of seniority, and the second four hours to the officers on the succeeding shift in descending order of seniority. If no one volunteers for the overtime hours, the least senior officer on the preceding and/or succeeding shift is assigned to work. Off-duty officers typically are not offered the hours unless they would otherwise be filled by a sergeant or other non-bargaining unit employe.

During the Spring and Summer of 1999, the Department received funding for and participated in a program sponsored by the Wisconsin Department of Transportation designated as "Several Traffic Officers on Multiple Patrols" (STOMP), which was intended to reduce aggressive and unsafe driving by putting more patrol officers on the road. Sheriff's deputies were encouraged to volunteer to work overtime for this project and a STOMP sign-up sheet was posted in the Department.

The Grievant, Randall Osness, has been a deputy with the Lincoln County Sheriff's Department for over 22 years. On June 4, 1999, the Grievant was working the first shift as a patrol officer. On that date he was informed by the first shift sergeant, Donald Friske, that he would need to work overtime as a STOMP officer from 2:00 p.m. – 6:00 p.m. The Grievant indicated he would prefer to not work the overtime hours, but Friske indicated it was not optional, as there was no one else to work the hours. On June 9, 1999, the Grievant filed a written grievance, contending that the Employer violated the contract by ordering him to work the overtime hours on June 4, which was denied. The grievance thereupon proceeded through the contractual steps to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the Award.

## POSITIONS OF THE PARTIES

### The Union

The STOMP (Several Traffic Officers On Multiple Patrols) program, in which the County participated between May 28 and September 7, 1999, was originally conceived as being voluntary on the part of the participating officers, and, in fact, nothing in the STOMP grant requires mandatory overtime. As such, the County posted a sign-up sheet to allow bargaining unit employees to volunteer for overtime hours by participating in the program. This was explained to all employees at the time the program was instituted and, with the one exception of the Grievant, no bargaining unit member was ever required to work overtime as a consequence of the STOMP program.

On June 4, 1999, Sgt. Donald Friske ordered the Grievant to work overtime because no one had signed up to participate in the STOMP program that day and the County was afraid of losing its funding. The Union does not take issue with the County's authority to require overtime from its employees. This right is established in the County's management rights and is supported by arbitral precedent. When the County does so, however, it is bound to follow the procedure outlined in Article 12, Section 12.2 of the collective bargaining agreement, which governs the administration of overtime. Under that provision, the County is required to offer available overtime on the basis of seniority. Had Sgt. Friske done so, the Grievant would have been able to refuse and the overtime could have been offered to the thirteen officers with less seniority than the Grievant, four of whom were not scheduled to work that day. Had none of them volunteered, the least senior deputy could have been ordered to work the hours. Ordering the Grievant to work the hours, however, was a clear violation of the agreement.

The Union recognizes that in emergency situations the County may deviate from the established overtime procedure, but such was not the case here. The County had ample advance notice of the available STOMP hours and that no one had signed up to fill them. It cannot argue that an emergency existed. Rather, it simply chose to disregard the contractual requirements and the grievance should be sustained.

### The County

The fact that the overtime at issue here arose in the course of implementing the STOMP program is irrelevant to this case. The Union misconstrues the fact that STOMP is described as a "voluntary" program to mean that the County should not have been able to require overtime. STOMP was voluntary in the sense that the County was not required to apply for the grant. Once the grant was received, however, the Sheriff was within his authority to

require his deputies to work overtime in implementing it. The fact that the Sheriff allowed officers to volunteer for shifts prior to June 4 did not preclude him for being able to order shifts filled on that day. The grievance, itself, asks as part of the remedy that the County be required to administer the grant pursuant to the provisions of the collective bargaining agreement. The agreement, however, makes no reference to STOMP, or any other type of grant, nor how such are to be administered.

The Union attempts to draw a distinction between “scheduled” and “non-scheduled” overtime. The contract, however, also makes no distinctions between types of overtime. The reason the overtime was ordered is beside the point. Article 12.2 is clear that all overtime is covered by its provisions. According to Article 12.2.1, each shift is to use a rotating system, based on seniority, which the County did in this case. On June 4 the following deputies, in order of seniority, worked the first shift: Peter Annis, Randy Osness and Norm Winters. Annis declined the overtime and Winters was already scheduled to transport a prisoner to another County and was, therefore, unavailable. That left the Grievant as the most junior available deputy and he was, accordingly, ordered to extend his shift. There is no contractual provision or past practice requiring the County to offer overtime to off-duty officers. Rather, the County followed the contract as it is written and the grievance should be denied.

### DISCUSSION

The Lincoln County Sheriff’s Department applied for and received funding to participate in the Aggressive Driving “STOMP” (Several Traffic Officers on Multiple Patrols) project developed by the Wisconsin Department of Transportation during the Spring and Summer of 1999. This project involved Lincoln County Sheriff deputies cooperating with other police agencies to provide extra patrols on U.S. Highway 51 for the purpose of interdicting aggressive and unsafe drivers. The program description and grant request does not reveal how many hours were to be involved in patrols, nor does it make any mention of overtime, presumably because staffing decisions remained in the purview of the individual agencies. It stands to reason, however, that if all deputies were already working full-time, the additional hours required by the STOMP project would, of necessity, create overtime.

One question which arises is whether overtime created as a result of the STOMP project is somehow to be treated differently than typical overtime which occurs in the ordinary course of business as a result of absences or a need for extra personnel at a given time. The County says not and points to the fact that the collective bargaining agreement makes no distinction as to types of overtime or the reasons it arises, but treats it all the same, which is in fact the case. There is nothing in the agreement to suggest that overtime created due to participation in the STOMP project is to be treated differently than any other. Nevertheless, the STOMP overtime was treated differently.

The record reveals that when the STOMP project was initiated a sign-up sheet with patrol times listed was posted to allow officers to volunteer for STOMP shifts. This appears to have been a unique occurrence and is certainly not part of the formula for allocating overtime set forth in the agreement. Likewise, there is no indication that volunteer sign-up sheets were used for allocating overtime on other occasions. The Grievant testified that Sergeant Friske told him the project was voluntary. To him this meant that participation by the deputies was voluntary and, therefore, there would not be mandatory overtime as a result of it. Chief Deputy Soucy testified, however, that the project was “voluntary” only insofar as the County’s participation in it was not mandated, but that once the grant was received the County retained the authority to order the deputies to work overtime to fill the patrol shifts. It appears that the reality lies somewhere in between. The voluntary nature of the STOMP program lay in the ability of the deputies to sign up for particular patrol shifts, apparently regardless of seniority. Nevertheless, the possibility remained that some shifts would remain unfilled and so it was foreseeable that the County might have to require someone to work overtime occasionally to fill open shifts. The Union concedes, moreover, that requiring the working of overtime is within the County’s management rights. That it did not do so other than in the Grievant’s case does not, in and of itself, mitigate that authority.

The Union did not grieve the method by which the “voluntary” overtime was allocated under the STOMP grant project and that issue is not before me. Rather, the issue is whether, on the one occasion when STOMP overtime became mandatory, the County violated the collective bargaining agreement in requiring the Grievant to work it. The answer turns on various factors.

First, did Sgt. Friske follow the procedure for administration of overtime as set forth in the agreement? Section 12.2 governs allocation of all overtime within the bargaining unit. Each of the three shifts operated by the Sheriff’s Department maintains its own seniority list and overtime, when available, is offered on a rotating basis (subsection 12.2.1). When there is a need to fill a shift, the deputies on the immediately preceding shift, in order of seniority, have the opportunity to work the first four hours and the deputies on the immediately succeeding shift, again on the basis of seniority, are offered the chance to work the remaining four hours (subsection 12.2.2). In the event the overtime remains unfilled, it is then to be offered to any officer who is normally assigned patrol duty (subsection 12.2.3). Friske did not follow this last step, but instead ordered the Grievant to work the first four hours of the shift after Deputy Annis, who had more seniority, had declined the overtime. The only other officer working the first shift that day, Deputy Norm Winters, who had less seniority than the Grievant, was unavailable. The hours were not offered to other deputies, as called for by subsection 12.2.3 before the Grievant was ordered to work them. This was a prima facie violation of the contract.

At the hearing, however, the County argued that Section 12.2 is ambiguous with regard to the way in which overtime is assigned and that in assigning the overtime to the Grievant the County was following an established past practice. The County does not specify in exactly what way Section 12.2 is ambiguous, although one obvious problem is that it repeatedly speaks of offering the opportunity for overtime, but nowhere sets out the procedure to be followed if all the available officers decline the opportunity. All agree that the County has the ultimate authority, under the Management Rights clause, to order an employee to work the overtime, if necessary, but the question of how the employee is selected remains open.

In that regard, Chief Deputy Soucy testified that the established practice within the Department when a shift needs to be filled is to split the overtime and offer the first four hours to the preceding shift and the remaining four hours to the succeeding shift, as called for by subsection 12.2.2. If none of the deputies desire to work the hours, then the officer with the least seniority on each shift is ordered to work the hours. According to Soucy, the only time overtime is offered to off-duty deputies is when no one is available from the preceding and/or succeeding shifts to work the hours and the only alternative is to use a sergeant or non-bargaining unit officer, such as himself. Because the junior deputy on the shift was already working overtime and the senior deputy declined the overtime, therefore, the Grievant was appropriately ordered to do so.

Assuming, *arguendo*, that the agreement is ambiguous, as the County contends, past practice may be used to clarify the intention of the parties. In such cases, however, the practice must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by the parties." [CELANESE CORP. OF AMERICA, 24 LA 168, 174 (Justin, 1954)]. Such is not the case here. According to the testimony of Deputy Steffenhagen, who also serves as the Union President, the procedure for assigning overtime requires the hours to be offered first to the deputies on the preceding and succeeding shifts, in order of seniority. If those deputies decline the overtime, then the hours are to be offered to all the deputies on the full-time list in order of seniority. Only in the event that no one on the full-time list agrees to take the overtime is a deputy to be ordered to do so. Further, Steffenhagen testified that, in fact, off-duty deputies are at times offered overtime after the deputies on the preceding and succeeding shifts have refused it.

The testimony of Chief Deputy Soucy and Officer Steffenhagen differs markedly as to what, if any, established practice exists regarding the assignment of overtime. Further, no records were offered at the hearing to clarify whether there is any established past practice of ordering the least senior officer on a shift to work overtime before offering the overtime to off-duty officers. Thus, there clearly is not an unequivocal practice, which has been accepted by both parties, with regard to the ordering of overtime.

Even were such a practice as is advanced by the County established, however, I am not convinced that it would benefit the County here. With respect to the offering of overtime, I find the agreement to be clear and unambiguous. Overtime is to be offered, according to the method set out in Subsection 12.2.3, to all deputies in the Department, regardless of shift, prior to ordering any deputy to work the hours. Any ambiguity only arises with regard to determining who is to be ordered to work if no one volunteers. Because Sgt. Friske never offered the overtime to the off-duty deputies prior to ordering the Grievant to work, this threshold was never reached. While the County has the authority to order employees to work overtime, therefore, except in an emergency it can only do so after having exhausted its options under Section 12.2 of the agreement, which it did had not done in this case.

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

**AWARD**

By ordering the Grievant to work overtime on June 4, 1999, without first offering the overtime hours to the other officers in the bargaining unit, the County violated the collective bargaining agreement. However, no grievance was filed by any employee who felt aggrieved by being denied the overtime. Accordingly, the County is ordered to cease and desist in the future from assigning overtime contrary to the provisions of Section 12.2 of the collective bargaining agreement.

Dated at Eau Claire, Wisconsin this 27th day of April, 2000.

John R. Emery /s/

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John R. Emery, Arbitrator

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