

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION - LOCAL 320**

and

VILLAGE OF SPENCER

Case 14
No. 58065
MA-10831

(Daniel Schneider Grievance)

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association/LEER Division, on behalf of the Union.

Mr. Dean R. Dietrich, Attorney at Law, Ruder, Ware & Michler, S.C., on behalf of the Village.

ARBITRATION AWARD

The Wisconsin Professional Police Association/Law Enforcement Employee Relations Division – Local 320 (herein the Union) and the Village of Spencer (herein the Village) are parties to a collective bargaining agreement dated March 4, 1998, covering the period January 1, 1998 to December 31, 2000 and providing for binding arbitration of certain disputes between the parties. On October 11, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding a dispute over filling vacant shifts with non-bargaining unit employees 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 14, 1999. The hearing was not transcribed and the parties filed briefs on January 31, 2000 and informed the arbitrator on February 9, 2000 that reply briefs would not be filed.

ISSUE

The parties were unable to stipulate to a statement of the issue. Therefore, the arbitrator frames the issue as follows:

Did the Village violate the Collective Bargaining Agreement when it filled vacant shifts with a part-time employe on August 21, 1999, and the Chief of Police on August 22, 1999, without first offering the work to the Grievant?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

ARTICLE X - HOURS OF WORK WEEK, HOURS AND OVERTIME

. . .

Section 10.08 – Vacant Shifts: All vacant shifts shall first be offered to full-time employees before part-time employees, with the exception of three-hundred (300) hours in each contract year, which can be used at the discretion of the Police Chief.

OTHER RELEVANT CONTRACT LANGUAGE

ARTICLE IV – MANAGEMENT RIGHTS

. . .

Section 4.02 – The Village shall have the right to determine the kind and amounts of service to be performed as pertains to the department operations and the number and kinds of employees to perform such services provided, however, that all bargaining unit work shall remain within the bargaining unit, except that supervisory personnel in the department may assist in bargaining unit work when directed by the Chief of Police provided that this shall not replace a bargaining unit member or be used for the purpose of denying overtime.

ARTICLE V – BARGAINING UNIT WORK

Section 5.01 – Bargaining unit work, including that assigned on an overtime basis, shall only be performed by bargaining unit personnel unless after advance notice has been given of the opportunity to perform such work or other reasonable efforts made by the Employer fail to provide bargaining unit personnel for such work assignments. This Article does not apply to mutual aid by state patrol or other law enforcement agencies.

BACKGROUND

This case involves an issue of the entitlement of bargaining unit employees to overtime arising from shift vacancies. The Collective Bargaining Agreement provides that shift vacancies shall be offered to full-time officers before part-time officers, with the exception of 300 hours per year, which may be assigned at the discretion of the Chief of Police. In early June 1999, Officer Keith Vander Putten requested personal days for August 21 and 22. The Chief of Police, William Hoes, authorized the leave on the condition Vander Putten arrange for part-time officers to fill in for him on those days. The vacant shifts were not offered to the Grievant, who is the only other full-time officer in the bargaining unit. Vander Putten arranged for part-time officers Jason Bauer and Marty Schwantes, respectively, to fill the August 21 and 22 shifts. On approximately August 9, Schwantes contacted Chief Hoes and informed him he could not work on August 22. Hoes did not offer this shift to the Grievant, but worked the first four hours himself and remained on-call for the remaining four hours.

The Grievant, Daniel Schneider, has been a full-time police officer for the Village of Spencer for twelve years and has also served as President of the Union in the past. On August 24, 1999, the Grievant discovered that on August 21 a part-time officer had filled a vacant shift for Officer Keith Vander Putten. He also learned that another part-time officer had been scheduled to fill in for Officer Vander Putten on August 22, but had canceled and that, instead, Chief Hoes had taken the shift. The Grievant filed a grievance based upon his belief that the Chief's allotment of discretionary hours had been exhausted for 1999 and that, therefore, he had a right of first refusal as to each shift. The Village denied the grievance based upon the Chief's contention that at the time the part-time officers were scheduled to work the vacant shifts he had not yet reached the 300-hour threshold and had, therefore, discretion to assign the shifts to part-time officers. The matter then moved to arbitration.

POSITIONS OF THE PARTIES

The Union

Section 10.08 of the contract provides that vacant shifts must be offered to full-time officers before part-time officers, except that the first 300 hours of vacant shifts may be assigned in the Chief's discretion. It is undisputed that by August 21, 1999 the Village had exceeded the 300-hour limit on discretionary scheduling imposed by the contract. The Chief assigned vacant shifts to part-time employees on August 21 and 22, however, without first offering them to the Grievant. The Village maintains that on June 14, 1999, when Officer Vander Putten made his request for time off on August 21 and 22, the 300-hour limit had not yet been reached and, therefore, the Chief had the contractual right to offer those hours to part-time officers first. This is an incorrect interpretation of the contract.

The Police Chief determines the usage of discretionary hours by keeping count of the hours offered to part-time officers, unless they were first offered to full-time officers, relying on printouts of hours actually worked by part-time officers. He testified that by June 14, when he told Officer Vander Putten to find part-time officers to work for him in August, only 279 hours had been used. However, between June 16 and 18, 23 additional hours were offered to and worked by part-time officers, bringing the total to over 300 hours. After this point Chief Hoes began offering all open shifts to full-time officers first. Nevertheless, the shifts on August 21 and 22 remained assigned to part-time officers.

Under the Village's interpretation, the Chief could theoretically determine at the beginning of the year which shifts would be offered to part-time officers throughout the year, at which point all other additional shifts would have to be offered to full-time officers. Thus, at the time the Chief scheduled the hours the 300-hour threshold would be reached. As he testified, however, Chief Hoes actually keeps track of the 300 hours according to hours worked, not hours scheduled, otherwise the 17 hours represented by the August 21 and 22 shifts would have been added on June 14. Had he done so, the 300 hours would have been reached on June 16 and the Chief could not have offered the June 17 and 18 shifts to part-time officers.

Furthermore, it should be noted that, prior to April, and long before Officer Vander Putten's request, the Grievant requested vacation from July 31 through August 15, which was granted. Nevertheless, these shifts were offered to, and worked by, Officer Vander Putten because the Chief didn't schedule those shifts until after the 300-hour plateau had been reached. The result is that overtime shifts were offered to Officer Vander Putten and not to the Grievant, even though the shifts offered to Officer Vander Putten became available earlier. This reflects a disparity of treatment, which is inconsistent with the intent behind Section 10.08.

Another violation of Section 10.08 occurred when Officer Schwantes, the part-time officer scheduled to work August 22nd, declined the opportunity to work the shift. At that point, long after the 300-hour threshold had been reached, the Chief, instead of offering the shift to the Grievant, worked the shift himself. Under the contract, this shift should have been offered to the Grievant.

Section 10.08 requires the Village to calculate when the 300-hour threshold is reached in order to determine the point when vacant shifts must first be offered to full-time officers. No accurate method for calculating these hours was demonstrated, which makes it difficult for the Union to verify the information, so the burden should shift to require the Village to prove it was not required to offer the August 21 and 22 shifts to the Grievant. The Village cannot meet that burden even if it is assumed that scheduled hours may be counted against the 300 hours.

When counting hours toward the 300-hour threshold, the Police Chief only counts those hours actually worked by part-time officers. Under Section 10.08, however, the threshold is reached after the first 300 hours of vacant shifts are used at the Chief's discretion. Timesheets of the part-time officers reveal that prior to June 14, 40 8.5-hour shifts, totaling 340 hours, had been offered to part-time officers. This figure does not include vacant shifts covered by the Chief, himself. Under Federal law, it is the Village's responsibility to maintain accurate records of wages and hours. The Grievant should not be denied a recovery because it failed to do so.

The Village

The central issue is whether the Village violated the collective bargaining agreement when it offered a vacant shift on August 21 to a part-time officer. The Union argues that the Village was beyond the 300-hour threshold for offering shifts to part-time employees set forth in Section 10.08 of the agreement. The Village maintains that the scheduling of the shift in question was within the discretion of the Police Chief and he exercised his discretion properly.

It is long established that, absent a waiver, an arbitrator must apply clear and unambiguous contract language and that an arbitrator's power is limited by the contract's terms (citations omitted). In this case, the language of Section 10.08 is clear and unambiguous. It states:

Section 10.08 – Vacant Shifts: All vacant shifts shall first be offered to full-time employees before part-time employees, with the exception of three-hundred (300) hours in each contract year, which can be used at the discretion of the Police Chief.

The language clearly gives the Police Chief the discretion to schedule 300 hours of vacant shifts and places no restrictions upon how or when he must do this. This is consistent with the definition of discretion found in Webster's Dictionary:

Individual choice or judgment (left the decision to his); power of free decision or latitude of choice within certain legal bounds.

The only "bounds" on the Chief's discretion is the 300-hour limit set forth in the contract, after which all vacant shifts must first be offered to full-time employees. When Officer Vander Putten requested the time off, the Chief conditioned his approval on Vander Putten finding part-time officers to replace him on the days in question. At the time, approximately 279 hours had been worked by part-time employees in 1999. Thus, the Chief still had adequate discretionary hours to use a part-time employee on August 21 and chose to do so, which was within his authority under the contract.

There is no support for the Union's contention that a past practice exists whereby the Police Chief must assign the first 300 hours of vacant shifts each year to part-time employees on a consecutive hour basis. To become binding, a past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both of the parties. [CLEANSE CORP., 24 LA 168, 172 (Smith, 1954)]. Many practices arise, not as the result of agreement, but in the exercise of managerial discretion, and in such cases they are subject to change in the same exercise of discretion without need for mutual agreement. In this case, the Police Chief has regularly used his discretion in assigning shifts to part-time employees and there is no evidence of any binding practice requiring him to do so consecutively.

There was also no violation of the contract when the Police Chief filled the vacant shift on August 22 by remaining on call, himself. The Chief works regular shifts along with the full-time officers and fills in to cover vacant shifts from time to time. This is not a violation of the contract. Article IV – Management Rights, Section 4.02 provides:

Section 4.02 – The Village shall have the right to determine the kind and amounts of service to be performed as pertains to the department operations and the number and kinds of employees to perform such services provided, however, that all bargaining unit work shall remain within the bargaining unit, except that supervisory personnel in the department may assist in bargaining unit work when directed by the Chief of Police provided that this shall not replace a bargaining unit member or be used for the purpose of denying overtime.

In this instance, the Chief filled the shift because the part-time officer originally assigned to it was no longer available. This is not an instance of denial of overtime because the work was originally assigned to a part-time employee. The Chief merely filled in on a vacant shift, as he has regularly done in the past, and as he is authorized to do under the contract.

The original scheduling of the August 21 and 22 shifts to part-time employees occurred prior to reaching the 300-hour limit imposed by the contract. When the part-time employee scheduled on August 22 became unavailable, the Police Chief exercised his discretion to fill the shift himself. Neither act constituted a violation of the contract and the grievance should be denied.

DISCUSSION

Section 10.08 of the contract exists to address the allocation of vacant shifts among bargaining unit employees, which include both full-time and part-time officers. The general rule, set forth in the first sentence of the section, is that "(a)ll vacant shifts shall first be offered to full-time employees before part-time employees . . ." The only exception to this rule

is that the Police Chief has discretion to allocate up to 300 hours in each contract year as he sees fit. There is dispute as to how the 300 hours are to be calculated and when they must be used, but it is clear that beyond that point all vacant shifts in each year must first be offered to full-time officers before other employees may be considered.

The contract language does not give guidance as to how or when the 300 discretionary hours are to be calculated. One possibility, advanced by the Union, is to count the first 300 hours of vacant shifts as they arise each calendar year as the discretionary hours, and to count the full 8.5 hours of each shift into the total, whether they are actually worked by part-time employees or not. By the Union's calculations, over 340 hours of "vacant shifts" had been offered to part-time employees by June 14. Another possibility would be to deduct hours from the 300-hour total as they are offered to, and worked by, part-time employees. This method would appear to be consistent with the Chief's regular practice, as he testified that his basis for determining how many hours are available at any one time is to add up the hours on the part-time employees' time cards. According to his records only 279 "vacant hours" had actually been filled by part-time employees during the same period. Presumably, the remaining 61 hours were filled either by full-time officers or the Chief after the part-time officers had refused them. A third approach, which the Village appears to support, would be that the Chief can schedule the 300 hours whenever he wishes during the year, but that the hours would then be counted against the 300-hour maximum at the time they are scheduled, rather than at the time they are worked.

I am satisfied that Section 10.08's reference to 300 hours refers to actual hours scheduled and worked, rather than shifts. The clear purpose of the provision is to balance the interests of the bargaining unit in protecting access to overtime with those of the Village in controlling wage costs, as well as providing the Village with an additional incentive to offer part-time employees. If a part-time employee does not work an entire vacant shift, the balance is presumably worked by a full-time officer, in which case those hours should not be counted against the 300-hour total. If, on the other hand, the balance of such vacant shift is covered by the Chief, a separate issue is raised, which will be dealt with below.

The question still remains, however, whether the Village is to count the discretionary hours as they are scheduled or as they are worked. In the last analysis, it doesn't matter a great deal which method is used, except that record keeping would likely be easier if based upon hours actually worked because it would eliminate the possibility of cancellations. Either way, however, it is important to know which method is used. The Union raises a salient point in arguing that it is difficult, at best, to calculate the balance of the discretionary hours at any given time, due to the Village's inadequate accounting and reporting procedures. Chief Hoes' testimony was to the effect that he keeps a running tally of available vacant hours in his head based upon his review of the part-time employees' time cards and that there is no systematic

method of recording these hours. Further, according to the Grievant and Officer Vander Putten, information regarding the status of the discretionary hours is not regularly communicated to the Union. In fact, they were unaware the 300 hours had been expended until late July or August, whereas, by the Chief's tally, the hours had been used up by the middle of June. It was the problems inherent in this system which resulted in the present grievance, consequently, instructions for revising the recordkeeping and reporting procedures are incorporated into this award.

The Village's payroll records reveal that 289.25 of the discretionary hours had been used by June 14, when Officer Vander Putten put in his request. Chief Hoes testified, however, that he believed that only 279 of the discretionary hours had been used, leaving 21 remaining hours he could assign. Based on that assumption he had Vander Putten find part-time officers to take the August 21 & 22 shifts, which amounted to 16 hours. He did not, however, deduct those 16 hours from the balance. Had he done so, and had he further correctly computed the actual hours used he would have used up the remainder of the discretionary hours at that point. All shifts thereafter, except those on August 21 and 22 should have been offered first to full-time employees. Instead, however, Officer Diane Cook and Officer Marty Schwantes worked an additional 23 hours on June 16, 17 & 18. After that point, all vacant shifts were offered to full-time officers.

There were multiple breakdowns accounting for this situation. In the first place, the Village maintained no regular records regarding the use of the discretionary hours. Had it done so, it would have been easier to establish at any given time how many discretionary hours actually remained. Further, no timely notice was provided to the Union to the effect that the 300 hours had been used up and that all vacant shifts thereafter would be offered to full-time officers. Finally, the practice of scheduling vacant shifts prior to using up the 300 discretionary hours, but only deducting them from the balance when they were actually worked, resulted in the Village substantially exceeding the 300-hour cap. The record reflects that by June 18 the Village had used up the discretionary hours provided in Section 10.08. Because the August 21 and 22 shifts had not been included in that total, they cease to be discretionary at that point and, should have, therefore, been offered to the Grievant.

The Village argues, in the alternative, that there was no violation of the contract as to the August 22 shift because the Chief ultimately covered that shift himself, which he was authorized to do under Article IV, Section 4.02. Irrespective of the Grievant's rights over and against a part-time employee, this argument raises a separate issue, that being the respective rights of a full-time employee and a supervisory employee to bargaining unit work.

Article IV, Section 4.02 provides, in pertinent part, that ". . . all bargaining unit work shall remain within the bargaining unit, except that supervisory personnel in the department may assist in the bargaining unit work when directed by the Chief of Police provided that this

shall not replace a bargaining unit member or be used for the purpose of denying overtime.” The Village contends that inasmuch as the Chief was filling in for a part-time officer on August 22, there was no denial of overtime, therefore the Chief was within his authority to cover that shift himself. The Village further points out that the Chief is in the habit of filling vacant shifts for full-time officers and that this occasion was no different than any other. I do not concur with the Village’s interpretation of the contract language, nor its application to these circumstances.

In the first place, it has already been determined that the August 22 shift should properly have been offered to the Grievant, a full-time employe. By filling the shift himself, therefore, the Chief did effectively deny the Grievant overtime, in violation of Section 4.02. The fact that the shift was improperly offered to a part-time employe in the first place does not mitigate the violation. The grievance is based on a claim of improper denial of overtime and is not dependent upon whether the violation was accidental or intentional.

Secondly, the language of Section 4.02 must be read together with that of Article V, Section 5.01, which covers bargaining unit work. Section 5.01 makes it clear that bargaining unit work must remain within the unit, unless the employer is unable, after advance notice of availability or other reasonable efforts, to identify a bargaining unit employe to do the work. Read in context, therefore, the Chief’s discretion to assign bargaining unit work to supervisory personnel under Section 4.02 is limited by his obligation under Section 5.01 to first make reasonable efforts to assign the work within the bargaining unit. This language has implications for Section 10.08, as well. By requiring that an effort be made to assign bargaining unit work to bargaining unit employes before supervisory personnel, Section 5.01 establishes that the Chief’s discretion under Section 10.08 is limited to the bargaining unit and he may not use the 300 hours to assign vacant shifts to supervisory employes.

Chief Hoes testified that Officer Schwantes informed him on August 9 that he could not work the August 22 shift. The Grievant returned from vacation on August 16 and at anytime thereafter the Chief could have inquired as to his interest in the August 22 shift, but did not do so. Inasmuch as the Chief intended to cover the shift himself, there was no reason that he could not have approached the Grievant about the opportunity at some time prior to August 22. His failure to do so under the circumstances was not reasonable. By covering the August 22 shift without first offering it to the Grievant, the Chief violated Section 5.02 of the contract.

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

AWARD

The Village violated Article X, Section 10.08 of the contract when it failed to offer the Grievant the vacant shifts on August 21 and 22, 1999. Therefore, it is ordered that the Village

shall pay the Grievant the equivalent of seventeen hours overtime at his rate of pay as of August 22, 1999. It is further ordered that the Village shall henceforth adopt a specific and verifiable method of calculation of discretionary hours under Section 10.08 to be employed in the future and shall provide a copy of the same to the Union. It is further ordered that the Village shall henceforth report to the Union annually at such time as the discretionary hours have been expended and shall, upon request, provide the necessary data to verify the calculation.

Dated at Eau Claire, Wisconsin this 5th day of May, 2000

John R. Emery /s/

John R. Emery, Arbitrator

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