BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, LOCAL 986-B, AFL-CIO

and

MANITOWOC COUNTY
(SHERIFF'S DEPARTMENT)

Case 350
No. 57648
MA-10707

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, for AFSCME.

Atty. Steven J. Rollins, Corporation Counsel, Manitowoc County, 1110 South Ninth Street, Manitowoc, Wisconsin 54220, for Manitowoc County.

ARBITRATION AWARD

The Manitowoc County Sheriff's Department Employees, Local 986-B, AFSCME, AFL-CIO ("the Union,") and Manitowoc County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On June 18, 1999, the Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relative to assignment of overtime. The Commission designated William C. Houlihan to serve as the impartial arbitrator. Hearing in the matter was held in Manitowoc, Wisconsin on September 29, 1999, with a stenographic transcript being prepared by October 8. The parties filed written arguments by November 17, 1999, and on February 28, 2000 waived their right to file reply briefs.

BACKGROUND AND FACTS

On March 28, 1999 corrections officer Misty Wenzel called in sick for her four to midnight shift at the Manitowoc County Jail. In seeking a single fill-in for the eight hour shift, Sergeant Cory Zimmer called officers from that shift who were on their day off, then officers from the preceeding and succeeding shifts. When no member of the bargaining unit accepted the eight-hour shift, Zimmer began contacting supervisory, non-unit personnel. Sergeant Mike Polich accepted the overtime. Officers Kim Decker and Bruce Bonk were the most senior unit employes on the shift previous and following the one being filled, respectively.

On April 1, 1999 the union filed a grievance on behalf of Bonk, alleging that "management violated Article #23 Section I #2, 3 + 4 by failing to offer overtime to all union employees and awarding it to management on 3/28/99. Past practice was also violated." The union sought as adjustment that the employes be made whole, that Bonk be paid four hours overtime and that "management follow past practice and union contract."

On May 17, 1999, County Personnel Director Sharon Cornils wrote Union Staff Representative Jerry Ugland as follows:

> Inspector Peterson, who was present at the negotiations when this language was agreed to, described the practice of offering overtime to be:
>
> 1. Offer the full first shift the employee was scheduled to work on.
>
> 2. If no one is interested, offer the full shift as overtime to the next shift.
>
> 3. If no one is interested, offer the full shift as overtime to the next shift.
>
> 4. If no one is interested, repeat the same process offering the full shift as overtime to non-union employes.
>
> 5. If no one is interested, go back to step one, offering the overtime as a partial shift.
>
> 6. If no one is interested, assign the overtime as described in ARTICLE 23 (I)(6).

> No where in ARTICLE 23(I) does it require the employer to split a shift. It is the established practice of the Sheriff's Department to follow the practice described by Inspector Peterson. This practice is consistent with bargaining history.
>
> At the step three meeting it was stated that this has not been the established practice of the jail staff. In subsequent conversations with Jail Administrator Aukamp and Assistant Jail Administrator Welnicke, they confirmed Inspector Peterson's statement regarding what the practice is. If staff who have been assigned the duty of calling staff for overtime had deviated from this practice it has been without management's knowledge or consent.
>
> The grievance is denied at step three.

According to Richard Aukamp, jail administrator, the standard policy for filling vacant shifts is to offer the shift as follows: first to part time employes, then to full time employes on that affected shift on their regularly scheduled day off, then to employes on the preceding shift who had been on their day off, and then to non-unit personnel (sergeants). If no one had accepted the eight hour shift at that point, it would be offered to unit personnel as a split (4-hour) shift. All offers to unit personnel are to be made according to seniority. It is the sergeant in charge of each shift who conducts or directs the calling. Over the past several years there have been deviations from this arrangement. In such circumstances, the situation was rectified with the unit personnel who were improperly passed over later being offered other overtime. On occasion, unit personnel have been required to accept four-hour shifts.

The union called three witnesses, Kim Decker, Bruce Bonk, and Stan Kulas, to testify as to the practice of the parties relative to call-in. Decker testified to the following:

. . .

> Q. To your understanding, is there a reason why they should have called people on the previous preceding shift?
>
> A. Since I've started there, it was always done that way. The people who were on duty at the time if all refused, all union employes refused to work the whole eight-hour shift, all the people that were asked, all the people that were working were asked if they wanted the first four hours, the next shift was called to see which one wanted to come in early, and this was done by seniority. It was done each time. It was done including forced-in, people who were forced in. If you answered your phone, you were forced in. They never asked the sergeants.

. . .

Decker went on to testify as follows:

. . .

Q. And after that, who is approached?

A. The people who are working at that time for the first four hours.

Q. And then who was called after that?

A. The people who are working the following shift who to come in four hours early.

Q. Now is that the order that's been – so you're saying that's the order that's been followed prior to March 28, 1999?

A. Yes.

Q. Has it been consistent?

A. No.

Q. When there have been deviations, has it been – has there been a grievance filed?

A. I'm not sure.

Q. Okay. I'm talking about prior to March 28, 1999?

A. I know there have been understandings made by the employer and the employe when a person in the seniority list has been missed without a grievance being filed, there has been an agreement met.

Q. What was the nature of those agreements that you're aware of?

A. The nature - somebody wasn't called in according to seniority, they were passed over, and that person was allowed to work overtime.

Q. So there was – so that situation was remedied by having the employe work overtime at another time?

A. Yes.

. . .

Bruce Bonk testified to the following:

. . .

Q. What's your understanding of how shifts have been filled in the past?

A. Just by seniority on, I do believe, first it would be filled by part-timers, under any part-timer that's off should be called first, then it goes by a list of seniority on every shift on their days off, and if they are not reached, then it goes by seniority of the people that are on that day.

Q. So, on the previous shift and the following shift?

A. Right.

Q. And is it then offered as a split shift?

A. Right.

Q. How long have you known it to be offered as a split shift?

A. As long as I've been there, six and a half years.

Q. Has that been consistent?

A. No.

Q. Okay, the inconsistencies, are you aware of whether there was a resolution when it wasn't consistent; in other words, was a person given some kind of remedy?

A. I'm not sure.

Q. So you're aren't aware of those circumstances?

A. Right.

On cross-examination, Bonk testified as follows:

. . .

Q. You indicated that the practice of offering split shifts has not been consistent over the years, what did you mean by "not consistent"?

A. Just how instances where individuals that were correction officers were told to call people in by sergeants and they made mistakes by calling people in. That's the only thing I can think of at the time that would have happened where the sergeant delegated a C.O. to do it and it was mixed up that way.

Q. So when you said it's "not consistent", am I understanding you correctly, you're saying that in the past there have been errors in the calling?

A. Right, and that would be just one that I can think of. That's about it.

Q. Okay. You heard Officer Decker testify that when those errors had been discovered and brought to management's attention, generally additional overtime was made available to the individual to compensate for their having lost the overtime call?

A. No. No one ever has that I know, not to me anyway.

Q. So you don't have any knowledge of that?

A. Right.

. . .

Stan Kulas, president of Local 986-B, testified as follows:

. . .

Q. So after those who are off are called, then those who were on that day previously and following shifts, would be called and offered as a split shift, you're saying?

A. Right.

Q. How long has that been the case as far as you are aware?

A. As long as I've been there.

Q. And has that been done consistently?

A. No, it hasn't.

Q. And when there were deviations from that, what happened?

A. There have been instances where the people have been offered to work overtime on another day soon to follow.

. . .

ISSUE

The Union states the issue as follows:

Did the employer violate the collective bargaining agreement by not offering an available shift for union position to be split among union employees? If so, what is the appropriate remedy?

The County states the issue as follows:

Did the county violate Article 23H of the collective bargaining agreement when it offered eight hours of overtime to non-union employees after union employees had been offered and refused the eight hours of overtime as a block? If so, what is the appropriate remedy?

I state the issue as follows:

Did the county violate the collective bargaining agreement when it offered overtime to non-union employes on March 28, 1999? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 23 – OVERTIME, COMPENSATORY TIME, HOLIDAY PAY

I. The employees and Union 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 regardless of whether it is management/non-union or union.

2. Union positions will first be offered to all union employees and management/non-union positions will first be offered to all management/non-union employees.

3. For all classifications except those in PSJS, Union overtime will first be offered to union 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 union employees. For positions in PSJS, when there is a need to fill vacant shifts, the Employer will first call those employees, in order of greatest seniority, for whom the additional hours will not result in overtime. If unfilled work hours remain, employees for whom the additional work time would be overtime shall be called in order of greatest seniority.

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

5. Except for unusual circumstances, when scheduling overtime to be worked, employees will not be allowed to work more than eight (8) consecutive work days. Exceptions to this are Emergency Government, and training. These may be scheduled at any time regardless of the number of consecutive days being worked either prior to or after these assignments.

6. When overtime is mandated it shall be done on a rotational basis, from least senior employee to most senior employee.

OTHER RELEVANT LANGUAGE

OPERATIONAL DIRECTIVE
February 15, 1993
Lt. R.J. Aukamp, Jail Administrator
Notice to All Jail Staff

..... If an employee calls in sick and this results in a staffing level below six (6), full time employees on days off from the affected shift should be called according to seniority. If this does not fill the vacancy full time employees from the next shift should be called according to seniority and then the following shift. If this still does not fill the vacancy, the part time employees on days off from the affected shift should be called and then down the line on the other 2 shifts. If the shift is still not filled, an employee from the preceding shift should be asked to stay for 4 hours and an employee from the following shift should be called in early 4 hours to fill the vacancy. This should also be done according to seniority.....

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts that contract language and past practice support the conclusion that split shifts had been offered to union employes before the overtime was offered to non-union employes. Testimony shows that four hours of available overtime have been offered to employes working the previous shift and the following shift if the employes had refused the whole eight hours. Employes were even required to come in prior to sergeants. There is a procedure memorialized in an "Operational Directive" dated February 15, 1993, which was not followed in this case, and the customary procedure for offering overtime was not followed. The contract requires offering the available time to Union employees first! It does not say only as a whole shift. The overtime in question was not offered to all union employes; it was not offered to employes working the previous shift or the following shift, as had been the practice, in four hour blocks.

The senior union employes from those shifts are entitled to be paid for the overtime they were denied. The employer is wrongly denying the practice and the clear language of the collective bargaining agreement. The affected employes are entitled to the full benefit of the agreement, without compromise. Access to overtime is widely recognized as a benefit. The call-in procedure was clear and known to the employer. There is no contradiction in the agreement to splitting shifts into four hour blocks, and is consistent with the contract. Clearly a past practice has been established that shifts must be offered in four hour blocks before sergeants are offered Union overtime.

In support of its position that the grievance should be denied, the county asserts that the union's demand is inconsistent with the collective bargaining agreement and improperly intrudes on the employer's reserved rights of management of the work and direction of the workforce. Moreover, it seeks a remedy that was rejected at the bargaining table. While there may have been some variations in practice followed by individual supervisors, such variations demonstrate that the county has exercised its discretion under the agreement and show that no binding past practice has been created. There is no language in the collective bargaining agreement that requires the employer to split shifts when filling vacancies or assigning overtime; indeed, the union president testified that the contract "doesn't specifically address the split issue." Further, the union has not established the existence of a past practice in this regard, in that even its own witnesses testified that there was no consistent practice of supervisors splitting shifts. The union's reliance on the 1993 directive is also misplaced, in that the department has undergone significant structural changes since that directive which nullify its validity. While the union is correct that the county has on occasion split shifts, there is nothing in the collective bargaining agreement which requires it to do so; rather, the decision to split shifts is a management decision and management right. The standard policy as testified to by the Jail Administrator is consistent with the collective bargaining agreement. Finally, this grievance involves facts and contract language substantially identical to a grievance which a Wisconsin Employment Relations Commission arbitrator denied precisely because neither the collective bargaining agreement nor past practice required the employer to split overtime shifts.

DISCUSSION

When corrections officer Misty Wenzel called in sick for her second-shift tour on March 28, 1999, Sgt. Corry Zimmer first sought to fill her vacancy by offering an eight-hour overtime assignment to unit personnel from that shift who were on their day off. When that proved futile, he offered the assignment to third shift personnel on their day off, then first shift personnel. Finally, before offering the overtime in four-hour split shifts to any unit personnel, Zimmer offered it as an eight-hour shift to non-unit supervisory personnel. Sgt. Mike Polich accepted the offer, and the union filed this grievance.

There is some dispute over the complete nature of past procedures. But no one disputes that the proper order of offering overtime is as follows: the full eight hours are first offered to part-time employes, then to unit personnel on the affected shift on their day off, then to unit personnel on the subsequent shift on their day off, then to unit personnel on the preceding shift on their day off. The dispute is what happens if that process fails to produce sufficient staff.

The union contends that the next offers are to be to unit personnel as split shifts; only then, the union contends, can the county offer the work to non-unit employes. In support of this theory, it cites various but unspecified instances in the past where offers were made in this manner.

The county contends that, while the collective bargaining agreement would *allow* the county to offer the work in this manner, there is nothing in that agreement which *requires* it to do so.

Part of the confusion stems from structural and staffing changes over the past several years, particularly the abolition of corporal and the increase in the number of sergeants per shift.

It is well-established that, where the language of the collective bargaining agreement is ambiguous, a binding past practice may develop. But it is equally well-established that to become binding, the 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 parties." LINCOLN COUNTY (HIGHWAY DEPT.), Case 154, No. 54708, MA-9765 (Levitan, 6/97), citing CELANESE CORP. OF AMERICA, 24 LA 168, 172 (Justin, 1954).

Here, the language in question – by not specifying in the very instance now before me – is arguably ambiguous, and subject to varied interpretations. And, as the union asserts, there have certainly been instances where the call-ins were done as the Union alleges they should have been done in this instance, namely the offers of split shifts to unit personnel prior to offering the work to sergeants.

The union argument is helped substantially by the existence of the 1993 Operational Directive from the Jail Administrator, which certainly seems to indicate that the split shift alternative takes precedence over offering overtime to non-unit personnel. The employer discounts the relevance of this directive on two counts. It notes that the memo dates to a time when there was only one sergeant per shift, significantly limiting the usefulness of sergeants for fill-in work. The County further notes that the directive calls for vacancies to be offered to full-time employes first, and part-time employes last, when in fact all parties agree that the current practice is to call part-time employes first, and only then offer overtime to full-time employes. Given the significant structural change in the workforce, and the fact that aspects of

the memo have clearly been disregarded, I am not inclined to sustain the grievance solely on the text of this directive.

And I am very skeptical that a binding past practice has developed. Indeed, all witnesses testified to a range of understandings and interpretations, and great inconsistency among sergeants on the proper call-in procedure. Indeed, in his opening statement, the union representative referred to the purported practice as the way things were done on "the usual basis", but acknowledged that the work "may have been offered with different members at different times." The grievant testified that the county had not been consistent in conforming to what the union was claiming was the past practice, but also that such overtime had "been consistently offered" on a split shift basis during her twelve years of employment.

Bargaining history also supports the employer, in that the evidence shows that the union sought, but failed to obtain, language in the collective bargaining agreement explicitly providing for the split-shift overtime assignment the union claims is implicit in the current language.

Finally, as the employer correctly asserts, it recently prevailed in an arbitration involving similar circumstances and substantially identical language. And although this analysis is not dispositive, it is instructive and supportive, especially since it was adopted after the union's unsuccessful attempt to codify the split-shift alternative noted above. In MANITOWOC COUNTY (SHERIFF'S DEPARTMENT), Case 349, No. 57594, MA-10684 (Gallagher, 1999), a third-shift officer reported sick; when all bargaining unit officers declined the eight-hour shift, the supervisor chose not to split the shift but instead offered the full shift to a non-unit Sergeant, who accepted. Interpreting provisions identical to those before me, the arbitrator held that:

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

Ultimately, I find that the employer's basic argument prevails – that the language of the collective bargaining agreement allows it to offer overtime as the union proposes, but does not require it to do so.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 12th day of July, 2000.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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