BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MENASHA PROFESSIONAL POLICE UNION, AFSCME, LOCAL 603, AFL-CIO

and

CITY OF MENASHA (POLICE DEPARTMENT)

Case 99
No. 58960
MA-11131

(Overtime Grievance)

Appearances:

Mr. Richard Badger, Staff Representative, AFSCME Council 40, appearing on behalf of the Union.

Attorney James Macy, Davis & Kuelthau, Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and City respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on August 8, 2000 in Menasha, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on October 11, 2000. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the City violate the labor agreement when it failed to post the overtime of May 8, 1998? If so, what is the remedy?

The City framed the issue as follows:

> Did the City violate Article V, A, 4, e of the collective bargaining agreement when it assigned an officer to a Career Exposition on May 8, 1998?

Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

> Did the City violate Article V, A, 4, f of the collective bargaining agreement when it failed to post the Career Exposition overtime work opportunity? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1998-2000 collective bargaining agreement contains the following pertinent provisions:

> ARTICLE III – MANAGEMENT RIGHTS
>
> The City possesses the sole right to operate the Menasha Police Department and all management rights repose in it, subject only to the provisions of this agreement and applicable law. These rights, which are normally exercised by the Chief of Police, include but are not limited to the direction of all operations of the Menasha Police Department, the establishment of reasonable work rules, the discipline of employees pursuant to Section 62.13, Wisconsin Statutes, the assignment and transfer of employees within the department, and the determination of the number and classification of employees needed to provide the services of the department. These rights shall be exercised in a reasonable manner and shall not be used to discriminate against any employees.
>
> . . .

Article V – WORKING CONDITIONS

A. Work Hours.

. . .

4. Overtime.

. . .

e. Assigned overtime shall be posted by the Chief of Police or his/her designee; and mandatory overtime shall not be included in the assignment of sign-up overtime.

f. The current posted overtime policy will be followed.

. . .

PERTINENT PROVISIONS OF THE POLICE DEPARTMENT'S OVERTIME POLICY

Section I – Chapter V – Overtime

. . .

B. OVERTIME RECORD:

1. For the purposes of offering overtime hours, overtime will be divided into three categories:

a. Voluntary overtime. (Special activities, vacation, other planned overtimes.)

b. Mandatory Overtime. (Filling unscheduled vacancies and/or being required to work overtime.)

c. Miscellaneous Overtime. (Parade Duty, Special Assignments, court.)

2. Overtime will be recorded on the following lists.

a. Voluntary Overtime list.

b. Mandatory Overtime list.

3. Responsibility for maintaining list.

a. Voluntary Overtime – The Operations Lieutenant shall maintain the voluntary overtime list and will post scheduled available overtime opportunities.

b. Mandatory Overtime – The Sergeants shall maintain a mandatory overtime list which is to include the hours offered, as well as the hours required to work. In the event an officer declines the opportunity to fill a staffing need, only four hours will be credited to his or her total. (Less if hours offered are less.) Officers accepting the available hours will be credited with the actual number of hours worked.

c. Miscellaneous Overtime – No list will be maintained for miscellaneous overtime; however, when practical, such non-typical patrol, investigative or supervisory assignments that require overtime will be posted. These are assignments of a non-specific nature (i.e., parade duty, park duty). The voluntary overtime list will be utilized to record and assign hours.

BACKGROUND

The Menasha Police Department has a written policy that addresses how overtime work is posted and distributed. Section B, 1 of this policy divides overtime into three categories: voluntary, mandatory and miscellaneous. The first category (voluntary) covers special activities, vacation and other planned overtimes. The second category (mandatory) covers unscheduled vacancies, and situations where employees are required to work overtime. The third category (miscellaneous) is apparently for those situations that do not fit categories one or two (i.e. voluntary or mandatory). The policy lists the following as miscellaneous overtime: "parade duty, special assignments, court." The overtime policy then goes on to state, in Section B, 2, that two overtime lists will be created: a voluntary overtime list and a mandatory overtime list. The overtime policy then goes on to state, in Section B, 3, c that no list will be maintained for miscellaneous overtime; however, "when practical", miscellaneous overtime "will be posted".

The record indicates that the overtime policy just referenced was negotiated in 1992 by the then-local union president (Charles Sahr) and the then-police chief (Robert Stanke). Sahr is no longer in the bargaining unit – he is now part of the Department's management (a supervisory lieutenant). Stanke is still the police chief. Both men testified at the hearing that it was their intent when they drafted the overtime policy to allow the chief to make miscellaneous overtime assignments without posting them. No union witnesses testified about the bargaining history of the overtime policy.

The record also indicates that in ten previous instances which involved miscellaneous overtime, the overtime was not posted, but rather was unilaterally assigned to officers by the Chief. The instances where this happened are as follows: attendance at the Governor's Safety Conference, teaching at the Citizens Academy, participation on the RMS Committee, participation in the sensitive crimes area, police artistry, bicycle control, auxiliary police advisor, attendance at DARE graduation, participation in Neighborhood Watch programs, and gang liaison officer. None of these miscellaneous overtime assignments by the Chief were grieved.

FACTS

In the latter part of April, 1998, Police Chief Stanke decided he wanted an officer from the Police Department to represent the Department at an upcoming Career Exposition at the University of Wisconsin-Oshkosh. It was envisioned that the work at this job fair, hereinafter known as the Expo work, would be about four or five hours long and would be overtime work. This Expo work was unique and not routine. Chief Stanke offered the Expo work to Officer Tim Styka, who accepted it. In doing so, Styka did not sign a written posting or sign-up sheet for the Expo work because there was none; instead, the Chief simply told Styka about the Expo work, asked him if he would do it, and Styka indicated that he would.

About a week after he accepted the Expo work, Styka determined that family obligations prevented him from working it. Styka then asked another officer, Jeff Jorgenson, if he would work at the Expo. Jorgenson indicated that he would. Chief Stanke was subsequently informed of Jorgenson's substituting for Styka at the Expo, and he accepted this substitution. Jorgenson worked at the Expo on May 8, 1998. When he did so, this was considered overtime work by the Department and he was paid accordingly.

On May 28, 1998, the Union filed a grievance concerning the overtime work generated on May 8, 1998 at the Expo. The grievance averred that the overtime work should have been posted rather than being assigned. The grievance was processed through the contractual grievance procedure and ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union contends that the City violated the labor agreement when it failed to post the Oshkosh job fair overtime opportunity. This contention is based on the premise that the overtime work opportunity should have been posted so that all members of the bargaining unit had the opportunity to apply for it. As the Union sees it, not posting the Expo overtime opportunity violated the labor agreement and the Department's overtime policy. It makes the following arguments to support this contention.

First, with regard to the applicable contract language, the Union contends that the City's reliance on the Management Rights clause is misplaced. According to the Union, the provision most applicable here is Article V, A, 4, f which references the posted overtime policy.

Second, the Union agrees with the City that the Oshkosh job fair was miscellaneous overtime within the meaning of the City's overtime policy.

Next, building on the premise that the work at issue here was miscellaneous overtime, the Union relies on the portion of the overtime policy which deals with same. The Union believes that language clearly means that miscellaneous overtime will be posted "when practical". The Union asks the arbitrator to not ignore this language, but rather to accept it at face value and apply its plain meaning. The Union asserts that while this language does restrict the Chief's discretion somewhat, it does not unreasonably tie his hands despite the City's protest to the contrary.

Next, building on the premise that miscellaneous overtime is to be posted "when practical", the Union concedes that there are certainly instances where it is not practical to post miscellaneous overtime. However, as the Union sees it, this is not one of those instances. According to the Union, the City did not provide a sound reason why it was not practical to post the Oshkosh job fair overtime assignment. The Union contends that since no reason was shown, the overtime work opportunity should have been posted.

Turning now to the City's past practice argument, the Union acknowledges that all the miscellaneous overtime assignments relied on by the City were not posted and were not grieved. That said, it is the Union's position that the Expo work at issue here is dissimilar to the miscellaneous overtime assignments that were not posted in the past. The Union submits they are dissimilar because they either required additional training to perform, were training events, or were open to employees who expressed an interest in the assignment. As the Union sees it, the City is comparing the proverbial apples to oranges when it claims it has not posted "non-typical" duties that are "non-specific" in nature.

In order to remedy this contractual breach, the Union asks for a monetary award for the lost overtime opportunity. According to the Union, this monetary award should go to Officer John Verkuilen "since he was the officer next in line for such an overtime assignment." The Union avers that if the officer who is to receive the monetary award is in dispute, then the arbitrator should retain jurisdiction to resolve that matter.

City

The City contends that it did not violate the collective bargaining agreement when it assigned an officer to the Oshkosh job fair overtime opportunity. This contention is based on two basic premises. The first is that the overtime in question is miscellaneous overtime within the meaning of the Department's overtime policy. The second is that under that policy, miscellaneous overtime does not have to be posted. Putting these two points together, the City avers that its failure to post the Oshkosh job fair overtime opportunity did not violate the collective bargaining agreement.

The City submits that two contract provisions are applicable here. First, it relies on the Management Rights clause (Article III). The City reads that clause to give the Police Chief wide discretion to manage the Department's workforce. The City asserts that the discretion which the Police Chief used to assign an officer to the Career Expo deserves great deference.

Second, the City relies on the language contained in the Department's overtime policy. According to the City, the Department's overtime policy specifies, in clear and unambiguous language, that miscellaneous overtime (which is the type of overtime the City believes is involved here) need not be posted, but rather is subject to discretionary assignment by the Chief. The City argues again that the discretion which the Chief used to make the overtime assignment in question to the person he felt appropriate deserves great deference and wide latitude.

Next, if the arbitrator decides that the contract language is not clear, but rather is ambiguous, the City maintains that the parties' bargaining history and past practice support their position that it did not need to post the overtime in question. It makes the following arguments to support this contention.

With regard to the parties' bargaining history, the City notes that the current overtime policy was negotiated in 1992 between the-then local union president and the police chief. The City further points out that both those witnesses testified that it was their intent when they drafted the overtime policy to give the Chief the discretion to make miscellaneous overtime assignments without posting them. The City also calls attention to the testimony of both those witnesses that the Career Expo was the very type of miscellaneous overtime assignment which was contemplated when they drafted the Department's overtime policy. The City also points

out that no Union witnesses testified concerning the bargaining history of the Department's overtime policy. That being so, it is the City's opinion that no evidence was presented by the Union to contradict the City's view of the bargaining history. The City contends that if the Department's overtime policy is interpreted to mean that miscellaneous overtime has to be posted, this will be a new interpretation that was not agreed upon by the parties when they negotiated the language.

With regard to the parties' past practice, the City relies on the fact that in ten previous instances which involve miscellaneous overtime, the overtime was not posted but rather was unilaterally assigned by the Chief. The instances which the City relies on are attendance at the Governor's Safety Conference, teaching at the Citizens Academy, participation on the RMS Committee, participation in the sensitive crimes area, police artistry, bicycle control, auxiliary police advisor, attendance at DARE graduation, participation in Neighborhood Watch programs, and gang liaison officer. The City disputes the Union's assertion that the instances just referenced are dissimilar to the Expo overtime work. The City avers that since none of these miscellaneous overtime assignments were grieved by the Union, these instances created a practice concerning how the overtime policy has come to be interpreted by the parties: namely that miscellaneous overtime is not posted, but rather is assigned by the Chief at his discretion. According to the City, this practice gave the Chief the right to assign the Expo overtime work to whomever he felt was the appropriate candidate without posting it.

As the City sees it, the Union is asking the arbitrator to redefine the overtime policy. The City believes there is no basis for doing so. It therefore asks that the grievance be denied. In the event that the arbitrator finds otherwise and orders a remedy, it is the City's position that the Union's suggested remedy (i.e. to make Officer Jim Verkuilen whole for the lost overtime opportunity) is beyond the scope of both the grievance and the record in this case.

DISCUSSION

At issue is whether the overtime work opportunity in question had to be posted. The Union asserts that it did, while the City disputes that assertion. If the overtime work opportunity had to be posted, then a contractual violation occurred because it was not posted. Conversely, if the overtime did not have to be posted, then no contractual violation occurred.

In the discussion that follows, attention will be focused first on the contract language cited by the parties. If that language does not resolve the matter, attention will be given to evidence external to the agreement. The undersigned characterizes that evidence as involving an alleged past practice and alleged bargaining history.

The first contract provision relied on by the City is the Management Rights clause (Article III). That clause provides, in pertinent part, that the rights:

> normally exercised by the Chief of Police, include but are not limited to the direction of all operations of the Menasha Police Department, the establishment of reasonable work rules. . .the assignment and transfer of employees within the department, and the determination of the number and classifications of employees needed to provide the services of the Department.

While this clause gives management the right to do certain things, including the right to manage the workplace and direct the operations of the Department, it makes no reference whatsoever to overtime. The latter point is important here because, as noted above, this is an overtime case. Inasmuch as this is an overtime dispute, it logically follows that the contractual language which would be most applicable to such a dispute is not the Management Rights clause, but rather the overtime language. That being so, the focus turns to an examination of that language (i.e., the overtime language).

In this contract, the overtime provision is found in Article V, Sec. 4. My discussion of same begins with the following general overview. Section 4 contains eight subsections. Six of these subsections (namely, a, b, c, d, g and h), deal with how overtime is paid and are not applicable herein. That leaves just two subsections which are arguably applicable to this case. They are subsections e and f. Each is addressed below.

Subsection e deals with two categories of overtime which are denominated therein as "assigned overtime" and "mandatory overtime". Based on a reason that will be identified later in this Discussion, the undersigned believes it suffices to say here that this case does not involve either "assigned overtime" or "mandatory overtime". Instead, it involves a different category of overtime (namely, miscellaneous overtime) which is not specifically referenced in subsection e. That being so, I find that subsection e is not applicable to the resolution of this case. In so finding, I am aware that the instant grievance listed subsection e as the contract provision involved. Be that as it may, that listing is not dispositive here.

The focus now turns to the final subsection of the overtime provision: subsection f. That clause provides thus: "The current posted overtime policy will be followed." The document referenced in this sentence, namely the "current posted overtime policy", is not contained in the collective bargaining agreement itself. Instead, it is found in a departmental policy manual. When the parties to a contract reference a document in this fashion which is outside the so-called "four corners" of their contract, what they are commonly said to have done is to incorporate the document by reference into their contract. In this case, it is apparent from subsection f that the parties intended to incorporate "the current posted overtime policy" into the collective bargaining agreement. By doing so, the parties gave a grievance arbitrator the contractual authority to review that particular policy and decide whether the Employer complied with same when it made the overtime assignment in question.

Attention is now turned to making that call. Section B, 1 of the overtime policy specifies that there are three categories of overtime: 1) voluntary, 2) mandatory and 3) miscellaneous. In the context of this case, there is no need for discussion on which category applies to the Career Expo work in question because the parties are in agreement on same. Specifically, they agree that the overtime work at the Career Expo was miscellaneous overtime within the meaning of the third category noted above. While the undersigned accepts that characterization of the overtime in question, it is specifically noted that the category denominated "miscellaneous overtime" (Sec. B, 1, c) lists the following after the phrase "miscellaneous overtime": "parade duty, special assignments, court." Since this listing is not followed by any kind of word or phrase indicating that there are other unspecified examples of miscellaneous overtime, it could reasonably be concluded that the parties intended this list of three to be all-inclusive.

The overtime policy then goes on, in Section B, 3, c, to state the following:

> Miscellaneous Overtime – No list will be maintained for miscellaneous overtime; however, when practical, such non-typical patrol, investigative or supervisory assignments that require overtime will be posted. These are assignments of a non-specific nature (i.e., parade duty, park duty). The voluntary overtime list will be utilized to record and assign hours.

In the context of this case, the part of this paragraph which is applicable here is the second half of the first sentence (i.e. the part after the semicolon). That portion specifies "however, when practical, such non-typical patrol, investigative or supervisory assignments that require overtime will be posted." I read the phrase "non-typical patrol, investigative or supervisory assignments that require overtime" to refer to the type of overtime listed at the beginning of the paragraph, namely miscellaneous overtime. Building on that premise, I read the sentence overall to say that miscellaneous overtime will be posted "when practical". In my view, its meaning is clear and unambiguous, and I accept that meaning at face value. Consequently, I find that Section B, 3, c of the overtime policy specifies that miscellaneous overtime will be posted unless the Employer establishes it is not practical to do so.

It is implicit in the phrase "when practical" that there are some situations where it is not practical to post miscellaneous overtime. That being so, the question to be answered here is whether the City provided a sound reason why it was not "practical" to post the Expo overtime work. I find it did not. First, this was not an emergency situation. The Chief knew of the Career Expo by the latter part of April, and it (i.e. the Expo) was not until May 8. As a result, there was no pressing time constraint which precluded the posting of the overtime work opportunity. Second, if the Chief wanted an officer for the Career Expo with a unique skill or a specific educational background (such as a bachelor's degree), there is nothing in Section B, 3, c which precludes him from setting criteria or qualifications for the particular overtime

work. Accordingly, I find that no sound reason was established why the overtime work in question could not have been posted.

The focus now shifts away from the language in the collective bargaining agreement and overtime policy. In litigating their case, the City also relied on evidence external to the collective bargaining agreement and overtime policy to buttress their position that it did not need to post the overtime in question. Specifically, it relied on an alleged past practice and alleged bargaining history. Past practice and bargaining history are forms of evidence which are commonly used and applied in contract interpretation cases. The rationale underlying their use is that they can yield reliable evidence of what a particular provision means. Thus, arbitrators traditionally look at past practice and bargaining history when the contract language is ambiguous. The key word in the previous sentence is "ambiguous". The reason that word is key is because that is not the case here. After reviewing Sec. B, 3, c of the overtime policy, the undersigned found its meaning to be plain and clear. That being so, there is no need in this particular case to resort to using past practice or bargaining history to interpret the meaning of that language. Consequently, the undersigned does not have to address the alleged past practice or the alleged bargaining history.

However, the City sees this case, in part, as a past practice/bargaining history case. Obviously, were I to decide this case without reviewing the alleged past practice and bargaining history, I would not have addressed the City's contentions regarding same. I have therefore decided in this particular case to review the alleged past practice and bargaining history in order to complete the record.

Attention is focused first on the alleged past practice. In situations where a party wishes to clothe a course of conduct with contractual status, that practice must reflect as many elements of a contract as possible. Stated simply, the practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future.

To support its contention that a past practice exists, the City relies on the fact that in ten previous instances which involved miscellaneous overtime, the overtime was not posted but rather was unilaterally assigned by the Chief. The City avers that since none of these miscellaneous overtime assignments were grieved by the Union, these ten instances created a practice concerning how the overtime policy has come to be interpreted by the parties: namely that miscellaneous overtime is not posted, but rather is assigned by the Chief at his discretion. Building on this premise, the City contends that this practice gave the Chief the right to assign the Expo overtime work to whomever he felt was the appropriate candidate without posting it.

Responding to the City's past practice contention, the Union acknowledges that all the miscellaneous overtime assignments cited by the City were not posted and were not grieved. However, in the Union's view, those miscellaneous overtime assignments are dissimilar from the Expo work at issue here.

I agree that the ten instances cited by the City are dissimilar in some respects from the Expo work involved here. For example, it can be inferred from the record that some of these overtime work assignments required unique skills or special training (such as police artistry work), some were training events (such as the Governor's Safety Conference), and some were ongoing assignments (such as the RMS committee, bicycle patrol and auxiliary officer advisor). In contrast, representing the Police Department at a job fair does not on its face require a unique skill, nor is it a training event , nor an ongoing assignment.

Having just noted some dissimilarities between the instances cited by the City and the Expo work in question, it is only fair to note that they share some similarities as well. For example, all involve work which was considered by the Chief to be miscellaneous overtime, all of the work was unilaterally assigned by the Chief and not posted, and none of those overtime assignments were grieved by the Union.

In my view, the similarities between the ten instances cited by the Employer and the Expo work are more important than their dissimilarities. Overall, these instances show that various types of miscellaneous overtime have not been posted. As a result, I conclude that these ten instances are sufficient to create a practice that miscellaneous overtime work has not been posted, but rather has been assigned to officers by the Chief at his discretion.

This practice of not posting miscellaneous overtime is contrary to the contract language. Previously, I found that Sec. B, 3, c of the overtime policy requires that miscellaneous overtime will be posted "when practical". Thus, the situation present here is that there is contract language which is plain and unambiguous, and a practice which is contrary to that language.

It is a generally-accepted principle of contract interpretation that language which is clear and unambiguous outweighs or trumps a past practice. Even a well-established and long-standing practice cannot be used to give meaning to, or countervail, a provision which is clear and unambiguous. When a conflict exists between the clear and unambiguous language of the contract and a long-standing practice, arbitrators usually follow the contract, and not the past practice. In accordance with that generally-accepted view, the undersigned holds likewise. In this case, the practice clearly conflicts with the language in Sec. B, 3, c of the overtime policy. As a result, the plain language of Sec. B, 3, c of the overtime policy prevails, not the conflicting practice.

Having so found, the focus now turns to the alleged bargaining history. The City notes that the current overtime policy was negotiated in 1992 between the then-local union president (Charles Sahr) and the current police chief. Sahr is now part of the Department's management. According to both Employer witnesses, it was their intent when they drafted the overtime policy to allow the Chief to make miscellaneous overtime assignments without posting them. Based on the following rationale, I conclude that even if that was their intent, that does not change the outcome herein. A basic principle which arbitrators traditionally follow in contract interpretation cases is that a written agreement may not be changed or modified by any oral statements made by the parties in connection with the negotiation of the agreement. Under this principle, a written agreement consummating previous negotiations is deemed to embrace the entire agreement. Thus, parol (i.e. oral) statements are not allowed to vary the clear meaning of a written agreement. One exception to this principle is when the written agreement is ambiguous, but here the language in Sec. B, 3, c of the overtime policy is not ambiguous. That language has previously been reviewed and its meaning has been found to be plain, clear, and unambiguous. That language speaks for itself and presumably incorporates the parties' mutual intent.

Given the foregoing, it is concluded that the City violated Article V, A, 4, f of the collective bargaining agreement when it failed to post the May 8, 1998 Career Expo overtime work opportunity.

Having found a contractual violation, the focus turns to the remedy. When an employer commits an overtime violation, the remedy which arbitrators most frequently utilize is a monetary award. The Union asks that such a monetary award be granted here. The undersigned would certainly do so if it could be ascertained from the record who gets the monetary award. Notwithstanding the Union's assertion to the contrary, I find it cannot be so ascertained from this record. Specifically, I find no support in the record for the Union's assertion in their briefs that the monetary award should go to Officer Jim Verkuilen on the grounds that "he was the officer next in line for such an overtime assignment." When a record does not indicate who is to receive a make-whole remedy, some arbitrators retain jurisdiction to resolve that question if the parties cannot do so. However, the undersigned has decided not to retain jurisdiction. My rationale for doing so is this: if the City had posted the overtime in question, it is unknown who would have signed up for it. Additionally, it is unknown what criteria, if any, the Chief would have utilized to determine who was to represent the Department at the Expo. In my view, my retaining jurisdiction will not answer those questions. Finally, I have decided to not award a monetary remedy in this case. Instead, the remedy I am ordering is this: henceforth, the City is to post all miscellaneous overtime unless it establishes that it is not practical to do so.

In light of the above, it is my

AWARD

That the City violated Article V, A, 4, f of the collective bargaining agreement when it failed to post the Career Exposition overtime work opportunity. In order to remedy this contractual violation, the City is to henceforth post all miscellaneous overtime unless it establishes that it is not practical to do so.

Dated at Madison, Wisconsin this 13th day of December, 2000.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

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