BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

MANITOWOC COUNTY (SHERIFF DEPARTMENT)

Case 362
No. 59004
MA-11147

Appearances:

Mr. Richard Thal, General Counsel, Wisconsin Professional Police Association/Law Enforcement Employment Relations Division, 340 Coyier Lane, Madison, Wisconsin appearing on behalf of Manitowoc County Sheriff Department Employees.

Mr. Steven J. Rollins, Corporation Counsel, Manitowoc County, 111 South Ninth Street, Manitowoc, Wisconsin appearing on behalf of the County of Manitowoc.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Manitowoc County Sheriff Department Employees (hereinafter referred to as the Union) and Manitowoc County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute regarding the interpretation of a contract clause that relates to the procedure for scheduling overtime. The undersigned was so assigned. A hearing was held on October 16, 2000, at the Manitowoc County Administration Building in Manitowoc, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted the case on oral arguments. The transcript of the proceedings was received on November 6, 2000, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties agree that the issues before the Arbitrator are:

1. Did Manitowoc County violate Article 23, Section H, of the parties' collective bargaining agreement by failing to offer overtime work to the Grievant?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 23 - OVERTIME - COMPENSATORY TIME - HOLIDAY PAY

Overtime shall be compensated at the rate of time and one-half (1½) for the following conditions:

. . .

H. The employees and Association 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.

2. Bargaining unit positions will first be offered to bargaining unit employees and management positions will first be offered to management employees.

3. Bargaining unit overtime will first be offered to bargaining unit 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 bargaining unit employees.

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

overtime has been offered to and refused by all non-bargaining unit employees, it may then be offered to and accepted by bargaining unit employees.

5. Except for unusual circumstances, and for Scuba, SWAT, Boat Patrol, Snowmobile Patrol, and Emergency Government when scheduling overtime to be worked, employees will not be allowed to work more than eight (8) consecutive work days.

. . .

BACKGROUND

The Employer provides general governmental services to the people of Manitowoc County, Wisconsin. Among these services are protective law enforcement performed by the Manitowoc County Sheriff Department. The Union is the exclusive bargaining representative for the County's non-exempt, non-supervisory employees with powers of arrest in the Sheriff Department.

The Department has three shifts to which employees are assigned on an annual basis: 4 a.m. to 12 noon, 12 noon to 8 p.m. and 8 p.m. to 4 a.m. When an employee is unable to work his or her assigned shift, the County is responsible for finding a replacement employee. The Grievant, Deputy Peter O'Connor, is normally assigned to the 4 a.m. to 12 noon shift.

On April 24, 2000 Lieutenant Seim was working the noon to 8 p.m. shift and was attempting to find a replacement employee for the 12 noon to 8 p.m. shift on April 26, 2000. Under the procedures of Article 23 of the collective bargaining agreement, Seim was required to first offer the overtime shift in seniority order to bargaining unit members on the shift where the vacancy occurred, then to those on the 8 p.m. to 4 a.m. shift and then to those on the 4 a.m. to noon shift. If the vacancy remained after he exhausted all bargaining unit members, he would then offer the shift to management by seniority by shift. If the position were still not filled, he would split the shift and offer 4 hours each to the morning and the evening shift by seniority.

In attempting to fill the April 26th vacancy, Seim went through the list and reached O'Connors' name. Seim telephoned O'Connor's home and spoke to O'Connor's wife. The call to O'Connors' home was placed after his regular shift hours, and Seim assumed that O'Connor was off work. However, during the course of the conversation with Mrs. O'Connor, Seim became aware that O'Connor was in fact at EVOC training in Elkhart Lake. EVOC training is County-provided training to teach driving techniques in an emergency vehicle. Lt. Seim did not attempt to make contact with O'Connor at EVOC even though cell

phone and dispatch radios were available in the County squad car being used at EVOC. However, Mrs. O'Connor passed his message along to her husband, who twice called in to let Seim know he was available for the overtime. By the time Seim got these messages, he had already filled the shift.

The instant grievance was filed, alleging that O'Connor should have been called at EVOC training. It was not resolved in the lower steps of the grievance procedure, and was referred to arbitration.

Additional facts, as necessary, are set forth below.

The Position of the Union

The Union submits that the County violated Article 26 of the collective bargaining agreement when it failed to offer overtime to Deputy O'Connor on April 24, 2000. While the Union concedes that Lt. Seim telephoned O'Connor's home and spoke to O'Connor's wife, they characterize the call as a mistaken call rather than a genuine offer of overtime. Since O'Connor was effectively denied the right to accept or reject the overtime, and since Article 26 guarantees him this right, it follows that the County violated the contract.

The County followed the customary procedure for deputies who are off-duty. However, O'Connor was not off-duty, and Seim was aware of that after speaking with O'Connor's wife. Once Lt. Seim became aware that O'Connor was on duty, the County's obligation changed. As was described at the arbitration hearing, if a deputy is on duty, whether physically in the Department building or in a squad, the County has always communicated to them in person or via radio, to offer them the overtime. There is no different rule for employees who are in training sessions. Lt. Seim's own testimony at hearing was that when deputies are off duty doing in-service at the range or in the training room, he contacts them. The only exception has been for officers who are at training at Fort McCoy, because it is not practical to reach them. That exception does not apply here. Since O'Connor was at EVOC training, on the County's time and under the direction of the County, and since he was easily reachable, the County was obligated to follow its past practice of speaking with on-duty officers regarding available overtime.

In response to the County's claim that any deviation from the one call to residence practice would reduce efficiency, the Union asserts there is no loss of efficiency in simply making the next call to the Grievant's squad car. The Union cites the decision of Arbitrator Krendel in the case J.T. BAKER CHEMICAL CO. 76 LA 1159 as a similar case where management's appeal to efficiency ignored a simple alternative to by-passing the senior employee, and thus, violated the contract. This arbitrator, like Arbitrator Krendel, should look beyond the mere facial claims of efficiency, and determine that the Employer had a practical and reasonable means of contacting the Grievant, and violated the contract by not taking advantage of it. Thus, the grievance should be granted, and the Grievant should be awarded eight hours of overtime.

The Position of the County

The County does not believe that a contractual violation has occurred and thus, there is no need for a remedy. The County takes the position that an overtime shift was available and Lt. Seim telephoned the Grievant's residence and offered him overtime. At the time that the lieutenant made the telephone call, he was not aware that O'Connor was on duty with the department. The telephone call in and of itself satisfied the County's contractual obligation to notify the Grievant of overtime. The contract requires that an "offer" be made, and here an offer was made.

The County points that it was following an established practice of at least 10 years duration when Seim telephoned O'Connor's residence. The practice is to make one call to the home residence of the employee which will result in one of three scenarios: 1) there will be no answer and the employee is not available; 2) the employee will not be available to speak but will have an answering machine or a family member to take a message; or 3) the employee answers the phone and is offered the available overtime. Under any of these scenarios, once the call is made the County has notified the employee of available overtime and has complied with the contract. Given the need to staff the County for multiple shifts, 24 hours a day, 7 days a week, and 365 days a year, the County cannot, as a matter of practical necessity, wait for a negative response before continuing its search for an available employee.

The County acknowledges that they could have made a second call to O'Connor as the Unions requests, but argues that it is not required to do so by the contract nor by the long standing practices of the County. The issue here is not what is practical and possible, but what is mandated by the contract. If the Union wants to expand the scope of the County's obligation to make telephone calls for overtime, the bargaining table is the most appropriate venue for the change. The Union should not ask the Arbitrator to re-write the language of Article 23 under the guise of a grievance.

Finally, the County reiterates out that the grievance itself is contradictory. The Union alleges that the County did not attempt to contact the Grievant. Yet, there is no dispute that Lt. Seim called O'Connor's home to offer the overtime. Likewise, there is no dispute that O'Connor's wife communicated this information to O'Connor and that O'Connor telephoned the Department on two occasions that evening to inform the Department of his availability. Under any common sense meaning of term, an "offer" of overtime was made to O'Connor. Plainly it is disingenuous for the Union to assert that the County did not attempt to contact the Grievant when in fact, contact was made. For all of these reasons, the County asks that the grievance be denied in its entirety.

DISCUSSION

Article 23(H) of the collective bargaining agreement requires that the County offer available overtime to bargaining unit members in order of seniority and shift. The normal practice is to contact on-duty officers either at the Department or in their squads, and to call

the homes of off-duty officers. On-duty officers who are unavailable because they are training in remote and distant locations, such as Fort McCoy, may have messages left at their homes, but will not be called at the training site itself. This case presents the question of whether the County is obligated to directly contact an officer who is training out of the County, but is reachable by radio and by telephone in the squad, or whether leaving a message at his home is sufficient. This is a case of first impression for the parties.

A. Clear Language

It is commonly understood that the plain language of the contract is the first point of reference in dispute over its meaning, and the familiar rule is that clear language is to be applied, while ambiguous language must be interpreted to discern what the parties intended when it was bargained. Article 23(H) provides, in relevant part:

> 3. Bargaining unit overtime will first be offered to bargaining unit 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 bargaining unit employees.

Language is clear where it is susceptible to but one plausible interpretation. Language may be termed ambiguous where plausible arguments can be made for competing interpretations. The language of Article 23(H) is clear to the extent that the County must "offer" overtime to employees in order of seniority and shift assignment. However, the term "offer" is not defined, and exactly what constitutes a sufficient offer of overtime is left unclear by the contract language. A plausible argument can be made that direct communication is required, and an equally plausible argument can be made that a call to the officer's home will suffice. Indeed, both methods are accepted under this contract depending on the circumstances. The question here is which set of circumstances applies to O'Connor. The contract cannot be termed clear and unambiguous on this central point, and the Arbitrator must look beyond the words used to determine what the parties meant by this clause. The two principles of interpretation relied upon by the parties here are bargaining history and past practice.

B. Bargaining History

The agreement on offering overtime opportunities was bargained 10 years ago by Inspector Peterson, representing the County, and Lieutenant Seim, who was at that time a member of the Union's bargaining team. Inspector Petersen testified that the intent of the language was to allow management to make as few calls as possible when filling overtime vacancies. Petersen recalled that he and Seim agreed that the deputies' home numbers would

be telephoned and a message would be left if the deputy were unavailable to speak. The deputy could then return the telephone call to accept or refuse the overtime, but management was not obligated to wait for acceptance or refusal before moving on and contacting the next senior person. This testimony essentially tracked Seim's recollection of the negotiation. The Union did not dispute Peterson's history of the language, and I accept that it is accurate. Having said that, the bargaining history illustrates what system was to be used for off-duty officers, but does not shed any light on what procedure the parties intended to use for on-duty officers. Since the issue here concerns an officer who was on duty, albeit on training duty, the bargaining history provides no clear answer.

C. Past Practice

Each party makes an appeal to past practice. For its part, the County points to its consistent practice of making a single phone call to an officer's home and, so long as the call goes through, counting that as an "offer" even if there may be no answer. This accurately describes the practice for contacting off-duty officers, but as noted above, it says nothing about contacting on-duty officers. There, the County's practice has been to directly contact the officer, either in-person or by calling his or her squad car. For officers on training duty, the County's practice has been to contact them in the same manner as it does on-duty officers, except where the training site is so distant as to render contact impractical, as in the case of Fort McCoy. This latter practice is relied upon by the Union for its argument that there is no difference between the contractual rights of an officer who is on-duty for normal patrol and one who is on duty for training.

In fact, this case falls in something of a gray area between the practices acknowledged by the parties, but more closely tracks the cases where an officer is in training at the range or within the Department than it does those case where an officer is training at a distant site such as Fort McCoy. Seim acknowledged that he could have contacted the Grievant's squad without much trouble, but was reluctant to do so, because he did not want to expand the scope of his obligation to make telephone calls beyond calling one number. However, this is not a case where the Union is insisting that management track down officers at unknown locations. The Grievant was where he was told to be by the County. Seim knew where he was and Seim knew how to reach him. 1/ A single call would have been all that was required, had Seim not initially proceeded on the mistaken belief that the Grievant was off duty.

1/ This might well be a different case if Seim had not talked to the Grievant's wife and learned that he was at EVOC training. Whether a good faith belief that the Grievant was off-duty would be a defense need not be determined in this Award. The undisputed fact is that Seim was immediately made aware of his mistake, and consciously chose not to contact the Grievant at training.

The labor agreement requires that overtime be offered to senior employees. By practice, the mode of offer depends upon which of three circumstances applies to the officer. If the officer is on duty, or in training at an easily reachable location, he or she is contacted directly at the Department, at the training site or in the squad. If the officer is off-duty, a call is made to the home number. If the officer is at training in a location where he or she cannot be easily reached, either the officer is skipped, or a call is made to the home number. This latter exception to the general rule is driven by practical necessity. However, the necessity of skipping the Grievant is not at all apparent in this case. Here, the Grievant was in assigned training, in a Department squad, some 25 miles from Manitowoc. No one contends that he was not easily reachable, and I therefore conclude that he was entitled to be called. 2/

2/ In determining that an attempt should have been made to contact the Grievant, I am not suggesting that he was entitled to anything more, or anything less, than any other on-duty officer in training at the range or in the Department would be entitled to. If Seim had made an effort to reach him at EVOC training, and had been unsuccessful, he need not have waited any longer for a response than he would have if he tried to reach an officer in some other training venue without success. Whether his practice in those instances is to call back, or leave messages and wait for an answer, or to move on to the next officer on the list, that is exactly the same procedure that he could legitimately have applied to the Grievant.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The County violated the parties' collective bargaining agreement when it failed to offer overtime to Deputy Peter O'Connor for the date April 26, 2000;

2. The appropriate remedy is to compensate Deputy O'Connor for eight hours of overtime pay.

Dated at Racine, Wisconsin, this 31st day of January, 2001.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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