

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE VILLAGE OF GERMANTOWN

and

**THE GERMANTOWN PROFESSIONAL POLICE ASSOCIATION
LOCAL 301 LABOR ASSOCIATION OF AMERICA, INC.**

Case 50
No. 59259
MA-11233

Appearances:

Attorney James R. Korom, vonBriesen, Purtell & Roper, S.C., Attorneys at Law, 411 Office Building, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin 53201-3262, appearing on behalf of the Village.

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., Suite 24, 2835 Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of the Association.

ARBITRATION AWARD

The Village of Germantown, hereinafter referred to as the Village, and the Germantown Professional Police Association, Local 301, Labor Association of America, Inc., hereinafter referred to as the Association, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration, the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the denial of overtime. Hearing on the matter was held in Germantown, Wisconsin on January 10, 2001. Post-hearing arguments were received by March 23, 2001. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

“Did the Village violate the collective bargaining agreement by not offering authorized overtime on August 29th, 2000 and August 30th, 2000 to Officer Jeffrey Schnell?”

“If so, what is the appropriate remedy?”

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE V – OVERTIME

. . .

Section 5.07 Officer Staffing Procedure: Officer staffing problems shall be resolved by the supervisor on duty following these sequential steps:

1. Assign the relief-shift officer next scheduled to work with a practicable change of reporting time.
2. Assign an officer not scheduled to work but normally scheduled during the hours which require a replacement on a seniority basis.
3. Assign on a seniority basis the officers not scheduled to work.
4. Assign extended hours either or both to an officer on duty and to an officer next scheduled to work on a seniority basis.

The parties agree that any alleged violations of the above procedure will be processed through the grievance procedure up to and including arbitration if necessary. Furthermore, the parties agree that if a bargaining unit employee, or other non-supervisory employee, makes an error in judgment which could be in conflict with the above procedures, the Employer will not be held responsible for this infraction.

Finally, the parties agree that no employee will be allowed to volunteer or be assigned to work overtime on both of his two (2) consecutive days off if the shifts on both days are eight and one-half (8½) hours or longer. This does not preclude an officer from working eight and one-half (8½) hours on one of his off days and then working overtime on his following off day provided that the overtime assignment is less than eight and one-half (8½) hours in duration.

This procedure can be circumvented in an emergency. For purposes of this paragraph, an emergency is defined as some sudden and unforeseen event which takes place without prior notice and utilizing the list would be impractical. Except in cases of an emergency, a Supervisor will not be assigned to replace a police officer when there are two or less police officers assigned and available to work a shift, and the period of 4:00 P.M. to 3:00 A.M. shall have three or less police officers assigned and available before a Supervisor is assigned.

BACKGROUND

At the commencement of the hearing the parties submitted the following stipulation of facts:

The parties to this Stipulation of Fact are the Village of Germantown, hereinafter referred to as the "Village" or the "Employer" and the Labor Association of Wisconsin, Inc., for and on behalf of its affiliate local, The Germantown Professional Police Association, hereinafter referred to as the "Association".

The above referenced parties acknowledge and agree to the following facts as set forth below.

1. The Village and the Association have a collective bargaining agreement for calendar years 1999-2001 which was in full force and effect at all times material hereto, a copy of which is enclosed herein and attached hereto as Appendix A.
2. That Officer Jeffrey Schnell is a member of the Germantown Professional Police Association and is covered under the collective bargaining agreement referenced in paragraph 1, at all times material hereto.
3. That on Sunday, August 27, 2000, Captain Craig Evans advised Patrol Officer Raymond Borden that Borden would be going to the State of Ohio on Tuesday, August 29, 2000 to pick up a department vehicle.
4. That Officer Borden and Sgt. Brian Henning went to the State of Ohio with Captain Evans to pick up the new department vehicle on Tuesday, August 29, 2000.
5. That Officer Borden and Captain Evans returned to the Village with the vehicle on Wednesday, August 30, 2000.

6. That Officer Borden was paid 16½ hours of overtime for driving to the State of Ohio and returning with the new department vehicle.
7. That Officer Jeffrey Schnell is senior to Officer Borden and was available to work the overtime on Tuesday, August 29 and Wednesday, August 30, 2000.
8. That Officer Schnell would have accepted the overtime if it would have been offered.
9. That Officer Schnell put in a request for 21 hours of overtime which he would have received had he been allowed to drive to Ohio to pick up the new department vehicle.
10. That Officer Schnell's overtime card was denied, a copy of which is enclosed herein and attached hereto as Appendix B.
11. That grievance 2000-53 was filed with the Village, a copy of which is enclosed herein and attached hereto as Appendix C.
12. On September 6, 2000 at 9:30 a.m. Step 1 was initiated by Officers Jeffrey Stieve and Jeffrey Schnell with the Chief of Police and subsequently denied on the same date.
13. That on September 19, 2000, the Association advanced the grievance to Step 2 and a written response was received from Paul E. Brandenburg, Village Administrator, denying the grievance by letter dated October 2, 2000, a copy of which is enclosed herein and attached hereto as Appendix D.
14. That on October 5, 2000, the Association filed a request to initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (WERC) and a joint request was made on behalf of the Village and the Association to have Edmond J. Bielarczyk, Jr. appointed as Arbitrator, a copy of which is enclosed herein and attached hereto as Appedix E.
15. That on November 1, 2000, the WERC appointed Edmond J. Bielarczyk, Jr. as arbitrator and a letter of confirmation was sent to both parties, a copy of which is enclosed herein and attached hereto as Appendix F.

16. That the language in question relative to this grievance is found in Article V, Section 5.07 of the collective bargaining agreement.
17. That the language found in Article V, Section 5.07, was involved in a previous contract arbitration case in 1994, a copy of which is enclosed herein and attached hereto as Appendix G.
18. That the language found in Article V, Section 5.07, was also grieved in November of 1999. A copy of the grievance (#99-33) was filed with the Chief of Police, a copy of which is enclosed herein and attached hereto as Appendix H.
19. That the language in Article V, Section 5.07 – Officer Staffing Procedure, was placed into the collective bargaining agreement during calendar years 1986-1987 and the four part procedure has remained the same through all of the contract agreements up to and including the one currently in full force and effect. Excerpts from the collective bargaining agreements is enclosed herein and attached hereto as Appendix I 1-5.
20. That neither party to this grievance has raised any procedural questions.

Association's Position

The Association argues that Article V – Overtime, Section 5.07, is not clear and unambiguous and to assist the Arbitrator the Association has provided testimony and exhibits regarding the bargaining history that led up to the inclusion of the contested language in the parties' collective bargaining agreement. The Association also points out that in a previous decision regarding the language of Article V – Overtime, Section 5.07, and Officer Daniel Ryan, the Arbitrator therein noted neither side had offered testimony regarding bargaining history, VILLAGE OF GERMANTOWN (POLICE DEPARTMENT), Case 35, No. 51273, MA-8551 (Ryan Award). Therein, the Arbitrator found for the Village noting Section 5.07 did not apply to overtime created by special assignments. The Association asserts that with the above in mind it presented testimony from Officer Michael Yogerst and Officer Michael Eggers. The Association points out both officers testified that the language was a result of correcting problems with the assignment of overtime, and, both testified that Section 5.07's intent was to address all overtime situations.

The Association acknowledges that holidays are not staffed in accord with Section 5.07, but avers this and the Ryan Award are the only exceptions to the Section. The Association points out the procedure for staffing holidays has been an accepted practice for a sufficient period of time to establish it as a past practice. The Association asserts the testimony of Yogerst and Eggers was unrefuted by the Village. The Association also argues the testimony of Captain Craig Evans, who was a member of the Association's bargaining team when Section 5.07 was

originally drafted, failed to provide a definitive explanation as to what he believed to be the intent of Section 5.07. The Association points out that Captain Evans did acknowledge that Section 5.07 was created to correct a problem with the distribution of overtime. The Association also points out that Captive Evans testimony that his recollection was not the same as Yogerst and Eggers was not accompanied by any expounding of what his understanding of what was the intent of the language.

The Association contends that the Village's failure to provide witnesses who could testify as to the intent of Section 5.07 should give the undersigned reason to pause due to the fact no bargaining unit history was provided in the Ryan Award.

The Association points out also Captain Evans testified that since the Ryan Award he had interpreted the decision to mean that when special occasions came up at the last minute he could select anyone he wanted for an overtime assignment. However, the Association points out, Evans also testified that whenever the Village had time to post overtime, it had been posted and the Village would go by seniority when filling the position.

The Association contends there is no nexus between the Ryan Award and the instant matter. The Association notes that in the Ryan matter the Village had argued it would not be logistically practical to follow the procedures of Section 5.07 because the Wisconsin State Patrol was in control of the unit, there were a the number of unforeseeable factors and there was a need for specialized training. Herein the Village was in complete control, the unforeseeable factors would occur regardless of who was assigned the overtime, and there was no need for specialized training.

The Association also argues the language of the agreement supports the Association's position and that it must be applied to all overtime assignments that are not the result of emergencies. The Association avers that the supervisor on duty shall resolve staffing problems by following the steps of Section 5.07. The Association contends that had the parties intended to limit Section 5.07 to only cover shift shortages the language could have been easily drafted to do so. The Association points out the parties did not limit the circumstances. The Association contends the purchase of a vehicle is a problem but it is not a sudden and unforeseen event. The Association also contends that Section 5.07 is not limited to instances where a police officer is absent from a shift and replacement of that officer is not mandated by minimum staffing requirements. The Association contends that a plain reading of Section 5.07 reflects an intent to apply the procedure to all staffing problems except in cases of emergencies. The Association also contends the overtime that occurred on August 29th, and August 30th, 2000 was not a result of an emergency.

The Association would have the undersigned sustain the grievance.

Village's Position

The Village argues the Association is contending the Village is bound by a "stand-alone" past practice of distributing all available overtime via seniority. The Village argues the

Association can not claim that Section 5.07 as written can apply to the instant matter. The Village also argues that the undersigned can not add to the collective bargaining agreement and to do so would go beyond the authority given to the arbitrator by the collective bargaining agreement. The Village asserts there is no language anywhere in the collective bargaining agreement which addresses in any shape, manner or form, the distribution of any overtime opportunities except those caused by officer staffing problems under Section 5.07. In support of this position the Village points to the Ryan Award wherein the Arbitrator verified that Section 5.07 is not followed for a wide variety of overtime opportunities. The Village argues the Association is not asking the undersigned to apply Article 5.07 but to provide for strict seniority selection. The Village asserts there is no language within the four-corners of the collective bargaining agreement which would compel granting the grievance.

The Village contends that because it has used seniority based system for some types of overtime in the past the Association argues it is required to use a seniority based system for all overtime in the future. The Village asserts the Association should seek such a change at the bargaining table. The Village points out the Association did not seek a change in the language after the Ryan Award and the Association is therefore bound by that interpretation of Section 5.07.

The Village also points out that the Association is attempting to apply an alleged past practice to a new situation. The Village argues the instant matter was a unique situation and not bound by any alleged past practice. The Village argues that this was not a situation like parades where the overtime was known for certain for weeks in advance, the starting and ending times were known in advance, the notices were up for weeks in advance, the identity of the person selected would have no financial impact on the Village, and there was no need for tie breakers. The Village also points out that the Association did not dispute that if performance of a function takes a person beyond the end of their shift, that person has been consistently allowed to continue to perform that function on overtime without the necessity of any other officer being called in to relieve them.

The Village asserts Captain Ryan did not know in advance when he would be leaving or on what day he would be leaving. By using an on duty officer he saved overtime dollars consistent with the practice testified to by the Association's witnesses. Officer Borden continued his straight time assignment, and, after twenty-two (22) straight hours Officer Borden had two (2) days scheduled off. Officer Schnell would have had to report to duty after six (6) hours.

The County would have the undersigned deny the grievance.

DISCUSSION

In the 1995 Ryan Award the Arbitrator held that Section 5.07 was not intended to include overtime created by special assignments. The assignment of Borden to go to the State of Ohio to pick up a vehicle was clearly a special assignment. As the Village noted, the Association

had the opportunity during negotiations on successor agreements to rectify what the Association perceived to be the intent of the language of Section 5.07. There is no evidence the Association chose to do so. The parties have readopted the same language in two (2) successor collective bargaining agreements. Having readopted the same language the undersigned finds the parties have also adopted the interpretation of Section 5.07 in the 1995 Ryan Award.

The undersigned finds the following. An on-duty employee, Borden, was given a special assignment that resulted in overtime. The timing of the assignment was based upon; 1, the acceptance of a bid for a vehicle, 2, the approval of the purchase by appropriate officials, and 3, the creation of a purchase order and check. It was only when all this was done that Captain Evans could determine when to leave for Ohio. The undersigned finds it was the burden of the Association to demonstrate that the Village had, in similar situations in the past, called off duty employees to offer them such an assignment before assigning it to an on-duty employee. If, as the Association has claimed, holiday assignments and the Ryan Award are the only exceptions to overtime not being assigned in conformance with Section 5.07, it was the Association's burden to demonstrate such assignments had occurred, and, that the Village had used Section 5.07 to make the assignments. However, there is no evidence that would demonstrate the Village has ever offered an off-duty employee an assignment that would result in overtime when an on-duty employee has been available to commence the assignment. Having failed to do so, the undersigned finds the Association has failed to meet its burden in the instant matter.

The Association has offered the testimony of two employees, Yogerst and Eggers, to demonstrate that the intent of the parties when they originally adopted the language of Section 5.07 was that it was to cover all overtime assignments. Captain Evans disputed this, stating he did not believe this was the intent. All three may have left the bargaining table with their beliefs. The testimony of Yogerst and Eggers by itself does not demonstrate that the Village had the same interpretation of Section 5.07. At the least the testimony of Yogerst, Eggers and Evans is self serving because there are no documents or bargaining notes which support their recollection of the bargain that led to the adoption of Section 5.07. At the most the Yogerst and Eggers testimony is rendered irrelevant by the failure of the Association to take the matter of the Ryan Award to the subsequent bargaining negotiations.

The undersigned also finds that contrary to the Association's claim there is a nexus between the Ryan Award and the instant matter. Both are special assignments. Neither relates to a staffing shortage. Both commenced during on-duty time. Both make operational sense that the employee who started the activity finished the assignment.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented the undersigned finds the Village did not violate the collective bargaining agreement when on August 29 and 30, 2000 it failed to offer overtime to the Officer Jeffrey Schnell. The grievance is therefore denied.

AWARD

The Village did not violate the collective bargaining agreement when it did not offer authorized overtime on August 29th, 2000 and August 30th, 2000 to Officer Jeffrey Schnell.

Dated at Madison, Wisconsin this 14th day of June, 2001.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

