

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
KEWAUNEE COUNTY (SHERIFF'S DEPARTMENT)
and
TEAMSTERS LOCAL UNION NO. 75

Case 54
No. 59519
MA-11319

(Shift Selection Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jonathan Conti**, 1555 North RiverCenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 75.

Attorney Elma Anderson, Corporation Counsel, Kewaunee County, 620 Juneau Street, Kewaunee, Wisconsin 54216, appearing on behalf of Kewaunee County.

ARBITRATION AWARD

According to the terms of the 1999-2000 collective bargaining agreement between Kewaunee County (County) and Kewaunee County Professional Police Association (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them concerning Grievant Paula Bernetzke's request to displace a regularly scheduled part-time employee on the 7:00 a.m. to 3:00 p.m. shift on October 20, 2000. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled for and held on March 13, 2001 at Kewaunee, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to file their briefs directly with each other postmarked April 30, 2001 and they agreed to waive reply briefs. The documents in this case having been received by May 1, 2001, the record was thereupon closed.

ISSUES

The parties were unable to stipulate to an issue to be determined in this case. However the parties stipulated that the arbitrator could frame the issue based upon the relevant evidence and argument as well as the parties' suggested issues herein.

The Union suggested the following issue in this case:

Did the County violate the collective bargaining agreement when it restricted Grievant Bernetzke from working first shift on October 20, 2000?

If so, what is the appropriate remedy?

The County suggested the following issue for determination herein:

Did Kewaunee County violate the collective bargaining agreement when it refused to allow Paula Bernetzke to displace a regularly scheduled part-time employee on the 7:00 a.m. to 3:00 p.m. shift on October 20, 2000?

If so, what is the appropriate remedy?

Based upon the relevant evidence and argument, I find that the Union's statement of the issue is preferred and it shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3: HOURS OF WORK

A. WORK CYCLE

The work cycle that employees work is as follows:

WORK six (6) consecutive days, then OFF three (3) consecutive days, then WORK six (6) consecutive days, then OFF three (3) consecutive days, then, the entire above cycle is repeated.

B. WORK DAY

A work day shall consist of eight (8) consecutive hours.

C. SHIFT SCHEDULE

Shift schedule, for all officers except the Court Security Officer shall be as follows:

- 7:00 a.m. – 3:00 p.m.
- 10:00 a.m. – 6:00 p.m.
- 3:00 p.m. – 11:00 p.m.
- 7:00 p.m. – 3:00 a.m.
- 11:00 p.m. – 7:00 a.m.

...

D. OVERTIME

All hours worked in excess of an eight (8) hour work day, on a day off, or outside of the sixth (6th) consecutive work day, except for attendance at nonmandatory (sic) schools or training, shall be paid at the rate of time and one-half (1 ½) without pyramiding.

...

F. DISTRIBUTION OF OVERTIME

1. Whenever possible and practicable overtime shall be distributed equally among full-time personnel in each classification first before being offered to other full-time employees and then permanent part-time personnel. The Court Security Officer shall be eligible to accept overtime hours in the Kewaunee County Sheriff's Department, which he or she is otherwise qualified to perform, at the discretion of the department head, or his/her designee.

2. If there is less than 24 hours notice of an unscheduled shift, full-time employees in that classification, on their day off shall be offered the shift, in order of least overtime to most overtime. If no employee in that classification on their day off wants the shift, employees in that classification working that day may split the shift. If no employee in that classification wants to split the shift, an employee in that classification working that day may take the full open shift.

3. If there is more than 24 hours notice of an unscheduled shift, all full-time employees in that classification scheduled to work on that day, shall be given the opportunity to move into the open shift according to seniority. Whatever shift is then left open, shall be offered up for overtime to full-time employees in that classification, in order of least overtime to most overtime.

...

H. AUTHORIZED ABSENCE

A day of authorized absence shall be a day in which authorization for such absence has been obtained from the department head or his/her delegated assistant in writing prior to the day of absence, except in case of absence due to illness. Absence due to illness shall be counted as an authorized absence only if in compliance with other sections of this Agreement.

. . .

K. SHIFT SELECTION

All shifts and slots, including the Court Security Officer, shall be open for bidding among full-time employees from November 1 to November 15 of any current year and to take effect on the following January 1st. Bidding shall be in order of seniority.

When the filling of a permanent vacancy in any job description has been approved, according to the procedures outlined under the Kewaunee County Personnel Policy, full-time employees may bid, in order of seniority, for any open slot or shift at that time. No employee shall be forced to move out of his or her current slot or shift.

When the Department Head or his designee has notice, at least 24 hours in advance of an unscheduled open shift, all full-time employees scheduled to work on that calendar day in that classification, shall be given the opportunity to move into that open shift according to seniority. When there is less than 24 hours advance notice, or when all full-time employees scheduled to work on that calendar day in that classification have refused the shift, full-time employees, in that classification, who are on scheduled days off, will then be offered the chance to fill the open shift. Then, full time employees in any other classification shall be offered the work. Thereafter, the shift will be offered to regular part-time personnel. Under this section, an offer of work shall require only a single telephone contact at the employee's residence. An employee who cannot be contacted personally in this manner shall be deemed to have rejected the offer.

FACTS

The Grievant Paula Bernetzke was originally hired and worked as a part-time employee of the Sheriff's Department for one year before she received a full-time position as a jailer/radio operator. To date, Bernetzke has been employed by the County Sheriff's Department for five years. Bernetzke is assigned to work second shift (3:00 p.m. to

7:00 a.m.). The Department also employs four permanent part-time employees, one of whom is Marlene Augustian. It should be noted that the Department has a minimum manning policy which indicates that on a three person shift, the Lieutenant who schedules employees need not replace an employee if the shift is still at two employees, but must replace if the shift is reduced to one. Also, employees at the Department work six days on and three days off. The days off are known as “scheduled days off.”

Lieutenant Treml does the scheduling for the Department. On August 8, 2000, he issued the first tentative schedule covering the period September 24, 2000 to October 21, 2000. At this time, Bernetzke was shown to be on a scheduled day off on October 20, 2000 and no employees on any of the three shifts had requested time off (vacation, holiday, training or sick leave) for October 20th. Treml issued several more tentative work schedules covering the above period dated August 10th, August 22nd, and September 14th which reflected changes in the schedule. On September 14, 2000, Sergeant Flaherty requested a holiday on October 20th. Flaherty works the second shift and there are three officers regularly scheduled on that shift. At this point, Lieutenant Treml did not schedule anyone or offer the second shift opening to Bernetzke as the second shift still contained two officers and satisfied minimum manning. 1/

1/ It should be noted that each day, one officer on each of the three shifts is normally on a scheduled day off.

Treml issued revised schedules on September 19, 25 and 26, 2000. As of September 26, 2000, the first shift was fully manned with two employees. On second shift, Bernetzke was on her scheduled day off, Flaherty had requested a holiday and a third employee was listed as being in training that day, leaving only one employee on that shift. As of the September 26, 2000 schedule, Lieutenant Treml scheduled a permanent part-time employee onto the second shift without first offering it to full-time employees. No grievance was filed thereon. Two employees were also scheduled to work on the third shift. As of September 26th, no additional employees were needed on the first or third shifts on October 20th, according to the County’s minimum manning policy.

On September 29, 2000, Officer Karman requested a holiday for October 20th. Karman is regularly assigned to first shift. This left first shift with only one employee and triggered the necessity to fill a first shift slot under the Department’s minimum manning policy. At this point, Lieutenant Treml decided to schedule Marlene Augustian, a permanent part-time employee, onto first shift. Treml did not offer any full-time employees the first shift opportunity before Treml offered it to Augustian.

As of the revised schedule issued October 2, 2000 Augustian was scheduled for the first shift and Treml removed the permanent part-time employee who had been scheduled for second shift from the schedule and instead listed a second shift overtime opportunity. At approximately this time, the Grievant wrote on the schedule that she wished to work the first shift as overtime, bumping Augustian out of that shift and giving Augustian the second shift opportunity that was then listed on the schedule. Bernetzke did this without speaking to Augustian; Augustian never agreed to switch shifts with Bernetzke on October 20th. Treml denied this trade after speaking to Augustian about it and put Augustian back on first shift. Thereafter, Officer Lemke requested to take the second shift overtime opportunity instead of working her regular third shift on October 20th. Treml granted Lemke's request as of the October 12, 2000 schedule. At this point, Augustian was still assigned to first shift and Treml had listed a third shift opportunity for overtime (created by Lemke's taking the second shift opening).

Treml stated that there was never a first shift overtime opportunity on October 20th. Treml also stated he did not know if another part-time employee was available for the third shift opportunity on October 20th, although he normally checks this out. Treml stated that when Officer Karman requested a holiday on October 20th, he could have refused to allow him to take one. Treml stated that after he saw Bernetzke's attempted trade on the schedule, he called Augustian and asked if Bernetzke had asked her to switch shifts. Augustian told Treml that Bernetzke had not spoken to her and she stated that she could not work third shift on October 20th due to her hours of work at her second job. Thereafter, Lieutenant Treml spoke to Bernetzke and wrote her a note indicating that she could not bump Augustian in this fashion and that he denied her the first shift on October 20th. Eventually, Lemke and Officer Jandrin (on the first shift on October 21st) split the third shift overtime opening on October 20th.

It should be noted that when employees agree to switch shifts with each other they may do so so long as no overtime is created thereby. The department has employed permanent part-time employees for more than fourteen years to fill out the Department schedules. In October, 2000 the Department employed four permanent part-time workers including Augustian. Augustian stated herein that she understood that her working dates at the Department could change if a full-time employee decided not to take vacation or holiday as scheduled, or if a full-time employee took her hours. However, Augustian was unaware of the circumstances under which she could be bumped by full-time employees. Augustian stated that she generally works for the Department ten days in each month, although there is no guarantee and she has no regularly assigned shift when she is assigned to work. Augustian also stated that she gives Lieutenant Treml her schedule at her second job at least three months in advance.

Bernetzke would not have been called to work on first shift from her regular day off on October 20th, as Treml believed no extra employees were needed on that shift. Treml stated that in his opinion an unscheduled opening is one that occurs within 24 hours before the shift, due to vacation, holiday, training or scheduled absences. In Treml's opinion if vacation,

holiday, training or scheduled absences are scheduled more than 24 hours in advance, the shift becomes a scheduled open shift which can be filled by part-time employees, according to the parties' past practice over the past fourteen years. Treml also stated that full-time employees have only bumped part-time employees in shift preference situations – where a full-time employee is scheduled to work on a back shift and wishes to move up.

POSITIONS OF THE PARTIES

Union

The Union noted that if the County has at least 24 hours notice the contract requires that a vacancy in a shift should be offered first to full-time employees in that classification who are scheduled to work that day, then to full-time employees in that classification who are off duty that day and then to full-time employees in any classification. Only after such offers are made and refused may the County ask part-time employees if they wish the vacancy. In the instant case, Paula Bernetzke was off duty on her regular day off on October 20th. Lieutenant Treml did not ask any full-time employees in any of the three classes of employees mentioned in Article 3, Section K if they wished the opening. Rather, Treml scheduled a part-time employee, Marlene Augustian into the first shift October 20th opening. It was at this point that Bernetzke attempted to bump Augustian to second shift on October 20th and take the first shift opening as overtime. Treml denied this bump and put Augustian back on the schedule on the first shift on October 20th. Thereafter, a third shift full-time employee bumped into the open second shift and Bernetzke asked Treml again if she could take the first shift on October 20th to which Lieutenant Treml responded in the negative, leaving Augustian in first shift on October 20th.

In this situation, the Union argued that the contract is clear and unambiguous. As such, there is no contract basis for the County's argument that there is a distinction between scheduled open shifts and unscheduled open shifts. In the Union's view, an unscheduled open shift is any open shift arising with more or less than 24 hours notice to the County. Therefore, the County has no grounds upon which to support its placement of Augustian into the first shift opportunity on October 20th without having followed the strictures of Article 3, Section K regarding offering that work to full-time employees first.

The Union also argued that there is a clear and unambiguous practice to allow full-time employees to bump part-time employees for shift preference. In this regard, the Union noted that both Marlene Augustian and Paula Bernetzke testified that as part-time employees for the County they had been bumped out of their part-time shifts by full-time employees. In addition, both Augustian and Bernetzke stated that at times full-time employees did not ask them whether they could bump them and the result was that as part-time employees, they did not work a shift from which they had been bumped.

The Union noted that Lieutenant Trembl stated that it would have been no problem for Bernetzke to bump Augustian off first shift if Augustian had been available to work third shift. The Union found this argument irrelevant. In addition, the County's concern about paying two employees overtime as a result of a ruling in favor of the Union in this case would not necessarily occur. Thus, if the County had gotten a part-time employee for the third shift and paid Bernetzke overtime on first shift the County would only have paid one overtime shift on October 20th. Thus, the Union urged that the full-time employee shift preference has been widespread, consistent and mutually accepted by the parties and constitutes a past practice which has operated without regard to part-time employees' availability to work a different shift on the day in question. Therefore, the Union urged that the grievance be sustained and that Bernetzke be made whole.

County

The County argued that there was no overtime available on the first shift on October 20th and that therefore the preference provisions of Article 3, Section K do not apply in this case. Here, Lieutenant Trembl had posted an opening long in advance which the County did not consider to be an unscheduled open shift. Rather, employees could have signed up for that shift at any time, prior to October 20th. The County noted that the Grievant claimed that full-time employees have always had a preference over part-time employees for shift selection and that therefore, she should be able to receive overtime whenever she wants it. The County argued that this has never been the case in the County.

On October 20th, the Grievant was on her regular off day and she had no right to displace, on her own initiative, any other deputy, either full or part-time, who was already scheduled on the duty roster in order to give herself overtime that day. The County noted that it has regularly used part-time employees to fill work rotations because of vacation, training and scheduled absences and that the Department cannot maintain adequate staffing without regular part-time employees. When the October 2, 2000 schedule came out for October 20th, Bernetzke was then on her day off, Augustian was scheduled to work in the first shift slot and no overtime had been authorized for first shift. This type of situation has occurred regularly in the Department and no grievances have been filed previously.

The County noted that Bernetzke could have taken the overtime on third shift or she could have traded with another deputy and worked first shift at overtime assuming she received a proper trade. However, Bernetzke did not even attempt to make a trade; she merely crossed out Augustian's name without consulting Augustian or Lieutenant Trembl. In this fashion, Bernetzke attempted to grant herself unnecessary and unauthorized overtime on first shift as no extra employees were needed on first shift that day. The County noted that, in any event, Bernetzke would not have been called in to work first shift on October 20th. As Article 3,

Section K is not applicable because this is not an “unscheduled open shift,” the County urged that no violation of the contract has occurred herein and that the grievance should be denied and dismissed in its entirety.

DISCUSSION

The grievance, dated October 26, 2000, was filed by Bernetzke on her own behalf. The grievance seeks compensation for the Grievant of eight hours overtime pay and an order that the County “cease and desist any further violations” of Article 3, Section K. The grievance also states that “(t)he employer violated the terms and conditions of the Collective Bargaining Agreement by refusing to recognize shift selection rights of a full-time employee over a part-time employee.”

The labor agreement at Article 3, F(1) states that “whenever possible and practicable overtime shall be distributed equally among full-time personnel in each classification before being offered to other full-time employees and then permanent part-time personnel.” This is the context in which this case must be decided. In the instant case, management knew more than 24 hours before the vacancy that there would be a need to fill an open shift on October 20, 2000. Where, as here, the Grievant seeks overtime pay for a contract violation, the initial inquiry must be whether the overtime provision of the agreement (Article 3F) requires such a payment to the Grievant in the circumstances.

Article 3, F(3) addresses the distribution of overtime where there is more than 24 hours notice. Pursuant to this clear language, the County was required to offer the first shift opening occasioned by Officer Karman’s holiday request to full-time officers scheduled to work on October 20th. This would have allowed officers working on October 20th on second and third shifts to “move into the open shift according to seniority” (at straight time). However, this did not happen as Lieutenant Treml offered the first shift opening (at straight time) to part-time officer Augustian. Had Treml followed Article 3 F(3), a second or third shift opening would likely have been created which should have been “offered up for overtime to full-time employees in order of least overtime to most overtime.” 1/

1/ In this case, no evidence was proffered regarding which second and third shift full-time employee(s) might have requested the first shift opening and which full-time employee had the least overtime.

It is clear from the facts of this case that Bernetzke was not contractually eligible to take the first shift opening on October 20th as she was not scheduled to work that day. In addition, it is clear that Bernetzke had no authority to designate a shift as overtime for herself.

There is simply no contractual basis for such an action by a bargaining unit member no matter what errors management may have made in administering the contract.

The Grievant has alleged and argued that Article 3, Section K – Shift Selections is applicable to this case. However, the facts of this case do not support this assertion, given the language of Article 3, Section K. In this regard, I note that Article 3, Section K details the finding process for regular shifts. Article 3, Section K at paragraph 3 describes the shift preference procedure for non-regular shifts by detailing the employees who must be offered “an unscheduled open shift” when there is “at least 24 hours” notice, when there is “less than 24 hours advance notice” and when all full-time employees scheduled to work on the day in question have refused the shift. None of these provisions applies to Bernetzke, as she failed to prove that all full-time employees scheduled to work as officers on October 20th had refused the first shift opening. Indeed, the record demonstrates that those employees were never offered the first shift opening and therefore had no opportunity to accept it or refuse it.

Lieutenant Trembl stated herein that he believed an unscheduled open shift is one that occurs 24 hours before the shift due to vacation, holidays or training; but that if training, holidays or vacation are scheduled more than 24 hours before the start of the shift, the shift becomes a scheduled open shift which can be filled by permanent part-time employees. The difficulty with this position is that it is unsupported by any contractual language. In this regard, I note that a scheduled open shift is neither referred to nor defined anywhere in the parties’ labor agreement or in the record herein. This argument is, therefore, unpersuasive.

The County has argued that it has regularly used part-time employees to fill rotations due to vacations, training and scheduled absences and that the Department cannot maintain adequate staffing without utilizing regular part-time employees. This is undoubtedly so, given the work schedules made a part of the record herein. However, the clear contract language fails to grant the County the right to do as it did in this case. Rather, Article 3 F(3) makes no reference to the use of part-time employees, referring only to full-time employees. 2/ Absent evidence of a clear past practice or bargaining history to the contrary (even assuming such could be successful), Article 3 F(3) must be applied as it is written. I find the County failed to proffer any evidence of bargaining history to prove the existence of such past practice.

2/ Indeed, Lieutenant Trembl could have assigned a regular part-time employee to work on October 20th after following Article 3 F(3) if no full-time employee wished to work the overtime shift “left open.”

The Union argued that there is a clear and long-standing past practice that full-time employees can bump part-time employees for shift preference purposes. I need not rule on this

issue as I have found Article 3, Section K inapplicable to this case. Based upon all of the evidence and argument and the specific allegations of the grievance herein, I find Bernetzke was neither eligible for nor entitled to the relief she sought herein and I issue the following

AWARD

The County did not violate the collective bargaining agreement when it restricted Grievant Bernetzke from working first shift on October 20, 2000. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 29th day of June, 2001.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator