BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BARGAINING UNIT OF THE GREEN BAY POLICE DEPARTMENT

and

CITY OF GREEN BAY

Case 324
No. 59446
MA-11303

Appearances:

Parins Law Firm, S.C., by **Attorney Thomas J. Parins, Jr.**, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, appearing on behalf of the Bargaining Unit of the Green Bay Police Department, referred to herein as the "Union."

Mr. James M. Kalny, Director of Human Resources, Brown County, 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of the City of Green Bay, referred to herein as the "City" or as the "Employer."

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding. This agreement provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Brian Stanton, a police officer employed by the Green Bay Police Department and referred to herein as the "Grievant." Steve Morrison, a member of the Commission's staff, was appointed by the Commission as the Arbitrator. Hearing was held on March 7, 2001, in Green Bay, Wisconsin. The hearing was transcribed. Post hearing briefs were filed by May 25, 2001, marking the close of the hearing.

ISSUES

The parties were unable to agree on a statement of the issues to be decided leaving it to the Arbitrator to frame the substantive issues in the award.

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The Union would state the issues as follows:

1. Did management have a legitimate safety concern as contemplated by Article 6.03 (1) of the Collective Bargaining Agreement when it refused to allow Officer Stanton to work overtime for the Packer Game on October 15, 2000?

2. If there was no legitimate safety concern, what is the proper remedy for management not allowing Officer Stanton to work the overtime?

The City would state the issues as follows:

Did management have a legitimate safety concern as contemplated by Section 6.03 of the Collective Bargaining Agreement when it refused to allow Officer Stanton to work overtime, resulting in him working 27 hours in a 32½ hour period?

The Arbitrator frames the issue as follows:

Was management's refusal to allow overtime work to Officer Stanton supported by a legitimate safety concern as contemplated by Article 6, Section 6.03 (1) when the allowance of that overtime work would have resulted in the officer working a total of 27 hours in a 32½ hour period? If not, what is the proper remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1

RECOGNITION/MANAGEMENT RIGHTS

. . .

1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and

> authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City, including the power . . . to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, . . . The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement,as (sic) administered, without first collectively bargaining the same or the effects thereof.
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> ARTICLE 6
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> OVERTIME
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> 6.03 ALLOCATION OF OVERTIME. (1) Posting. All overtime of the department schedule, where practicable, shall be posted. . . . No shift overtime shall be allocated or assigned where it will result in an officer working more than a shift and one-half in any 24-hour period. Management may refuse overtime where there is a legitimate safety concern. . . . This paragraph shall not apply to overtime resulting from an extension of a person's normal work day duty, nor shall it apply to overtime not assigned by the City of Green Bay.
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> . . .

BACKGROUND

The substantive factual background here is not disputed by the parties. The Grievant regularly worked the 10:15 p.m. to 6:45 a.m. shift as a patrol officer. He reported for his regular shift on the evening of Saturday, October 14, 2000, and worked through the night. At some point during his shift he became involved in the investigation of a sexual assault complaint. At the normal end of his shift at 6:15 a.m. the sexual assault investigation was still in progress and the Grievant stayed over to complete the investigation and the associated paperwork. He finished these duties at 10:15 a.m. on Sunday, October 15 at which time he ended his shift. The Grievant had previously signed up for overtime to work the Packer game on Sunday, October 15. His overtime shift for the Packers was to begin at 1:05 p.m. and end at approximately 7:30 p.m. He was then scheduled to work his regular shift as a patrol officer beginning at 10:15 p.m. that same evening. The foregoing schedule would have afforded Officer Stanton a two hour and fifty minute rest period on Sunday morning from 10:15 a.m. to

1:05 p.m. (including travel time from his duty post to home and from his home to Lambeau Field) and another rest period of two hours and forty-five minutes (again, including his travel time from Lambeau Field to his home and from his home to his duty station) prior to the beginning of his regular shift. In other words, if the Grievant had worked the schedule as outlined above, he would have worked in excess of 27 hours within a 32½ hour period.

Lieutenant Mark J. Lurquin was assigned as the day shift commander on Saturday and Sunday, October 14 and 15. He was aware of the twelve-hour shift worked by the Grievant on the 14th and 15th and he was aware of the fact that the Grievant was scheduled to work the Packer game on the 15th. He also knew that the Grievant was scheduled to work his regular shift beginning on the evening of the 15th and he was concerned about the number of hours to be worked by Officer Stanton and the Officer's ability to remain alert for the duration of his regular shift that night. Lt. Lurquin brought his concerns to the attention of the commander of operations, Commander Gordon A. Heraly, who reviewed the situation and made the decision not to allow the Grievant to work the Packer game. He instructed Lt. Lurquin to assign another officer to work the game and to advise Officer Stanton of his decision. Lt. Lurquin then called the Grievant at his home and advised him that he was being denied the overtime work at the Packer game. This grievance followed.

Further facts will be set forth in the **DISCUSSION**.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union argues that the term "legitimate safety concern" as it is used in Section 6.03 (1) should be construed to allow management the right to deny overtime work only if the safety concern is evident at the time the work is denied and relates specifically to the work being denied. In this case the Union says that because there was no concern about the Grievant's ability to work the Packer game he should have been allowed to do so and that management's concern about any future performance, i.e. the Grievant's ability to safely perform his duties on the upcoming night shift, was insufficient to constitute a "legitimate safety concern." It argues that management should have evaluated Officer Stanton when he showed up for his regular night shift and only at that time should a decision have been made regarding the existence, if any, of a legitimate safety concern. The Union asserts that the determination as to whether a "legitimate safety concern" exists should be made on a case-by-case basis and that a specific safety concern should be identified. It says that the safety concern must relate to the officer's ability to perform his overtime job duties at that specific time, not to safety concerns about his ability to perform later in time. In short, the Union argues that Section 6.03 (1) does not allow for the refusal of an overtime assignment because of a safety concern at some time in the future.

The Union argues that, standing alone, the total number of hours the Grievant would have worked does not provide sufficient justification to form a legitimate safety concern because of past practices of officers working double shifts and the requirement that officers make themselves available for court testimony. The Union points out that night shift officers often must spend their "sleeping time" in court during the day only to return to the night shift at 10:15 p.m. and that this routine is no different than the events giving rise to this grievance.

The Union says that since there were no formal rules or regulations in place at the time limiting the number of hours a police officer could work (other than the reference to "shift overtime" in Section 6.03 (1), which the Union concedes does not apply to this matter) management had no basis for denying the overtime.

Finally, the Union argues that the decision to deny the Grievant overtime was arbitrary.

The City's Initial Brief

The City argues that its actions in this matter were in compliance with the plain meaning of Section 6.03 (1) and asserts that management may refuse overtime to its officers under that section when it believes that a legitimate safety concern would exist if the overtime were to be allowed. It argues that the two commanders who made the decision to deny the overtime, Lt. Lurquin and Commander Heraly, based that decision upon their combined police experience, upon certain studies relating to extended periods of wakefulness brought to their attention by their chief, James M. Lewis, and upon training sessions given by Chief Lewis on the subject of fatigue and, thus, they had an honest apprehension concerning the ability of Officer Stanton to safely complete his regular night shift assignment following the overtime assignment.

The City also argues that the collective bargaining agreement gives management the right to operate and manage its affairs and that the management rights clause, unless otherwise modified or abridged elsewhere in the agreement, gives the City the right to determine qualifications, determine reasonable schedules of work, and to establish the methods and processes by which work is performed. The determination of what constitutes a "legitimate safety concern," says the City, is discretionary with management and the actions taken by management in this case constituted nothing more or less than a good faith exercise of that discretion.

The City contends that management may have had a duty to prohibit the Grievant from working excessive hours due to potential legal liability which may have flowed from an injury to fellow officers or the public. It maintains that the recognition of this potential liability by management underscores the reasonableness of the decision.

Finally, the City argues that the Union's position is invalid and that it runs contrary to the spirit and the express provisions of the collective bargaining agreement in that it would relieve management of the use of discretion in determining what constitutes a "legitimate safety concern" and that the Union's interpretation of the Section 6.03 (1) language, if adopted, would lead to unsound public policy.

The Union's Reply Brief

In reply, the Union argues that Chief Lewis is not an expert on the subject of fatigue, that the two commanders did not rely on the studies provided at the hearing relating to fatigue, and, in any event, if they did rely on them, their reliance was misplaced because there is no evidence that the studies are accurate, up to date, or generally relied upon in the police community. The Union further says that any briefings given by Chief Lewis on the subject of fatigue did not constitute adequate training in that area because there is no evidence that the briefings "were and are valid (or that) the information that the Chief gave the officers was taught in a correct manner, and that the officers understood the information given." Hence, argues the Union, "it cannot be concluded that there was sufficient or accurate training in these areas for anyone in the Green Bay Police Department."

The Union asserts that, although the two commanders may have had an *honest* or *valid* safety concern this fails to constitute a *legitimate* safety concern because the information upon which they relied was "false."

The Union suggests that the language contained in Section 1.03 (MANAGEMENT RIGHTS) binds the City to "how the contract has been administered in the past in determining whether to refuse someone overtime based upon 6.03." In short, the Union argues that the past practice of allowing overtime work at the Packer games to police officers who have worked a night shift the night before and are scheduled to work another one that night should prevent management from denying this particular overtime assignment to the Grievant.

The Union also says that because the City has not expressed concern about the legal liability issues as they relate to officers who spend their off hours in court that it should not be able to do so here.

The Union argues that the concern over a future safety issue (whether an officer might be too tired to perform safely on his regular shift) cannot form a sufficient basis for a present legitimate safety concern so as to prevent that officer from performing overtime duty. The decision as to whether an officer's physical condition presents a legitimate safety concern must be made at the time he shows up for work, not before. Besides, says the Union, Officer Stanton told Lt. Lurquin that he thought he could work his regular shift and this should have been good enough.

The City's Reply Brief

The City replies that the language of Section 6.03 (1) is plain and unambiguous and that it cannot be construed to limit management's right to use its discretion in making a determination as to the existence of a legitimate safety concern. In short, the City argues that the language simply means that "where management has a legitimate, honest reason for believing that the performance of overtime will result in the compromise of the safety of the officer (or) the public, they (sic) can deny the overtime."

In reply to the Union's past practice arguments, the City says that the contract language gives management discretion in the matter of deciding when a legitimate safety concern exists whereas the Union argues that management *must* in all such cases deny overtime. Consequently, under the Union's interpretation, the City argues that it would have to deny all overtime to officers for appearances in court as witnesses or in cases of emergency when officers are needed. This result, argues the City, is unrealistic.

The City takes issue with the Union's assertion that there was no specific safety concern identified here by pointing out that the concern was fatigue and the effects it would have on the Grievant during the term of his next night shift assignment. It says that the decision was based on the specific facts of this case, as the Union says it should be, and had its basis in the experience of the two commanders and their training on the issue of fatigue. Consequently, it was neither an arbitrary nor a capricious exercise of discretion.

Finally, the City urges that "in the interest of public policy" managers of police officers should be given the discretion to make the determination as to whether the fatigue of an officer constitutes a legitimate safety concern under the facts of each individual case.

DISCUSSION

The issue in this case is the interpretation of the phrase "legitimate safety concern" contained in Section 6.03 (1) of the agreement and whether, under the facts of this case, the City was justified in concluding that such a concern existed and, if so, in refusing Officer Stanton overtime work due to the existence of that concern.

Article 1, Section 1.03 of the contract expressly provides the City with the authority to "operate and manage its affairs in all respects *in accordance with its responsibilities*" (emphasis added) and to "determine reasonable schedules of work" and to "establish the methods and processes by which such work is performed." The City is held to a reasonable standard when it exercises this authority. In other words, it may not act in an arbitrary or capricious way nor may it act in bad faith. The exercise of this authority requires the use of

discretion and the use of discretion is subject to an implied covenant of good faith and fair dealing which is ordinarily presumed to be a part of all agreements. E.g., Antoine (ed.) The Common Law of the Workplace – The Views of Arbitrators, 75 (NAA/BNA, 1998).

Article 6, Section 6.03 (1) expressly provides the City with the authority to " . . . refuse overtime where there is a legitimate safety concern." While the phrase "legitimate safety concern" refers only to management's ability to refuse overtime, it must be interpreted as a part of the instrument as a whole in order to determine the true intent of the parties. The meaning of a questioned part must be interpreted with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. See RILEY CORP., 7 LA 764, 767 (PLATT, 1947) The undersigned reads Article 6, Section 6.03 (1) in connection with Article 1, Section 1.03 and concludes that management's analysis of the existence of a "legitimate safety concern" is subject to the same constraints as are the management rights set forth in Article 1, i.e. the action may not be arbitrary, capricious or taken in bad faith. If the decision as to the existence of a safety concern was not made in an arbitrary or capricious manner, and was not made in bad faith, then the safety concern is a legitimate one. That is the case here.

Management reserves those rights set forth in Article 1, Section 1.03 unless they are abridged, delegated or modified by the agreement. In the instant case there is no such limiting language and so the analysis of the City's action turns on whether it was arbitrary, capricious or taken in bad faith. The record here does not support such a conclusion. This Grievant had worked a twelve-hour night shift in what police officers universally describe, and what common sense supports, as a high risk, high stress business. He was then scheduled to work another seven hour shift as an armed police officer charged with the duty to keep the peace at the Packer game where it is common knowledge that people become rowdy and officers are often called upon to effect arrests. This duty was to be performed outdoors in the elements. Between these two shifts the Grievant had less than two and one half hours to rest, let alone get any meaningful sleep time. Following his Packer game shift which was to end at 7:30 p.m. he was scheduled to begin another regular night shift at 10:15 p.m. giving him only two hours or so to rest. The commanders who made the decision to deny the Packer overtime shift considered the fact that this officer would have worked a total of 27 hours in a block of 32½ hours and, based upon their experience and training came to the considered conclusion that at some time during his second night shift he stood a good chance of "hitting the wall," which they describe as that point where his lack of sleep would catch up with him and he would become at least partially impaired. They further concluded that, in that event, he could become a danger to his fellow officers and to the population he was charged to serve and protect. The safety of this officer, his fellow officers and the public is a practical reason for limiting the overtime work. As Arbitrator Dr. Louis C. Kesselman observed upon his consideration of the limitation of overtime as it related to the safety of other employees,

> . . . all phases of the production of acetylene gas are fraught with explosive possibilities as a result of human error. While it is true that such accidents have not taken place at this plant despite long consecutive hours of overtime worked in the past, it is both "practical" and reasonable for the Company to take preventive measures to forestall future dangers just as it is reasonable that it adopt rules requiring employees wear safety helmets and glasses and restricting smoking to designated areas."
> AIRCO ALLOYS & CARBIDE CO., 51 LA 156, 160-61 (KESSELMAN, 1968)

A fatigued police officer, faced with the "explosive possibilities" which exist on his job every day, is as legitimate a safety concern as the fatigued acetylene gas production worker.

The conclusion reached by the commanders in this case is consistent with the City's responsibility to provide police protection to its residents. Implicit in that responsibility is the fact that the City will not, to the best of its ability and in the exercise of sound discretion, send officers out onto the streets who it knows or suspects to be ill equipped to do the job. In this analysis the reference to discretion is key. It is within the discretion of the commanders to determine when a legitimate safety concern exists. The Union suggests that if the City is to be allowed to deny overtime in this particular instance, then it should be ordered to deny it in all other similar situations. In other words, it should be consistent. They cite the situation where an officer is caused to spend his normal time off at the courthouse in readiness to testify and say that these officers should be denied that overtime because they might be too tired to complete their next shift. The facts of this case are distinguishable from those. There, the officer can rest, can relax, can have a good meal and even sleep for periods of time. In the instant case the officer could do none of those things. The courthouse analogy provided by the Union does not take into account the fact that the officer may have worked four hours beyond the end of his regular shift the night before, as was the case here. These differing fact scenarios create the foundation for the application of a decision-making process which is cautious, prudent and made according to propriety and one's idea of what is right and proper under the circumstances without willfulness or favor. Said differently, it is the exercise of sound discretion. A hard and fast rule providing the consistency advocated by the Union would eliminate the City's liberty of action, its freedom in the exercise of judgment, its discretion.

The City argues that its commanders relied upon various studies which support the concept of fatigue and offered some of these studies and papers into evidence. While these may be valid studies and while they may have played some part in the decision-making process of the commanders, the City need not have done so. The evidence supports the notion that Chief Lewis has a quantum of superior knowledge in the area of fatigue. That he is an expert in the matter was not proven, nor did it have to be. His testimony was credible and merely supported the notion that the action taken in this case was not arbitrary or capricious. Whether the commanders actually relied upon this knowledge or not is irrelevant. The commanders'

decision was based, in the main, upon their combined 50 plus years of experience as police officers and police officer supervisors. The record reflects that it was well considered and reasonable under the circumstances and facts of this case and as such was not arbitrary or capricious. The idea that these two police supervisors should have had to wait until the Grievant displayed the kind of impairment they anticipated was likely to manifest itself during his upcoming night shift, or that they had some duty to follow the officer on his rounds until they observed such a manifestation before they could take action to prevent it, as the Union suggests here, would result in the elimination of the right of management to exercise its discretion in these matters. The Arbitrator is not vested with the authority to rewrite the contract by granting such a request.

The record is void of any evidence that this action was taken in bad faith. On the contrary, it was taken following an analysis of the facts of the situation as they may foreseeably impact the officer involved and that analysis was based upon extensive experience in police work and upon common sense.

AWARD

The City did not violate the collective bargaining agreement by denying the overtime assignment scheduled by the Grievant on October 15, 2000.

Dated at Wausau, Wisconsin, this 10th day of August, 2001.

Steve Morrison /s/

Steve Morrison, Arbitrator

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