

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

PUBLIC SAFETY PROFESSIONAL DISPATCHERS' ASSOCIATION

Case 351

No. 61593

MA-11996

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, WI 54915, on behalf of the Association.

Mr. John A. Bodnar, Corporation Counsel, Winnebago County, 448 Algoma Boulevard, P.O. Box 2808, Oshkosh, WI 54903-2808, on behalf of the County.

ARBITRATION AWARD

Pursuant to Article 20, Grievance Procedure, of the 2001-03 collective bargaining agreement between Winnebago County (hereafter County) and Labor Association of Wisconsin, Inc. on behalf of Public Safety Professional Dispatchers' Association (hereafter Association) the parties jointly agreed and requested that Arbitrator Sharon A. Gallagher hear and resolve two overtime assignment grievances filed by Dispatcher Brian Smith. The hearing was scheduled and held at Oshkosh, Wisconsin, on December 12, 2002. No stenographic transcript of the proceedings was made. The parties agreed to submit their initial briefs directly to each other, a copy to the Arbitrator, postmarked February 10, 2003. The parties also agreed to file reply briefs, if any, postmarked February 24, 2003. The Association advised by letter received on February 13, 2003, that it would not file a reply brief herein; the County advised on March 4, 2003, that it would not file a reply brief. Therefore, the record was closed on March 4, 2003.

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 stipulated to the issues to be determined herein as follows:

Did the Employer violate the terms and conditions of the collective bargaining agreement when it refused to allow the Grievant to work available overtime hours at the Experimental Aircraft Association Fly-In on July 23 and 24, 2002? If so, what is the appropriate remedy?

The County also stated herein that by its stipulation to the above issues, it was not thereby agreeing that EAA overtime was in fact available on the dates mentioned or that the County had in fact refused to allow Grievant Brian Smith EAA overtime.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

3.1 Except as otherwise specifically provided herein, the management of the Communication Center and the direction of the work force including, but not limited to, the right to hire, to discipline and discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, together with the right to determine the methods, equipment, process and manner of performing work, are vested exclusively in the Employer.

3.2 Nothing contained herein shall divest the Association of any of its rights under Wisconsin Statute 111.70.

...

ARTICLE 7 – OVERTIME AND COMPENSATORY TIME

7.1 Time worked in excess of the regular workday or workweek shall be compensated for in the form of pay or compensatory time off at the rate of time and one-half of overtime worked at the option of the employee, however, compensatory time may be earned for overtime hours worked in excess of the normal workday but not for hours worked in excess of forty (40) hours within the normal workweek. Such hours worked in excess of forty (40) hours within the normal workweek shall be compensated in the form of pay at the rate of time and one-half. No compensatory time off may be accumulated in excess of eighty-two and five-tenths (82.5) hours per year.

7.2 Utilization of compensatory time off by any employee shall be subject to the staffing needs of the Employer.

7.3 - No Compensatory Time Carry-Over. By December 31 of each year, the accumulated but unused and unscheduled compensatory time of each employee shall be converted to pay on the next payroll at the rate at which it was initially earned. There shall be no carry over of unused compensatory time from year to year.

7.4 Overtime shall be in segments of not less than fifteen (15) minutes, and compensatory time shall be in segments of thirty (30) minutes.

7.5 - Minimum Call-In Pay. Whenever an employee is required to work during scheduled off time he/she shall be entitled to a minimum of two (2) hours of pay at time and one half, or time and one-half for all actual time worked, if greater.

7.5.1 An employee may be ordered in to work for only four (4) hours on his regularly scheduled day off. In the event that Management determines that additional hours are needed, an employee may elect to work additional hours, at the employee's option.

7.5.2 - Mandatory Meetings. Whenever an employee is called in to work, or attend meetings, during scheduled off time, he/she shall be entitled to a minimum of two (2) hours of pay at time and one-half (1-1/2), or time and one-half for all actual time worked, if greater. Such call-in shall not be applicable within one (1) hour of the start of the shift, or within one (1) hour following the shift.

RELEVANT COUNTY PROCEDURES

OVERTIME CALL-IN PROCEDURE 1/

PURPOSE: To establish a procedure for filling overtime.

PROCEDURE: When a temporary vacancy occurs on a shift and the vacancy needs to be filled, the following procedure shall be followed.

1. **VACANCY WITH MORE THEN 24 HOURS NOTICE.**
 - A. The DIC or designee shall post the vacancy and it will be available to anyone wishing to sign for the time.
2. **VACANCY WITH LESS THEN 24 HOURS NOTICE.**
 - A. The DIC or designee shall call personnel using the "call-out" list. Prior to calling the DIC shall establish the "order list". The DIC will then start with the next person on the list who did not get called the last time the list was used.

- B. If the entire list of employees has been contacted and no one accepts the offer to fill the vacancy, then the time will be offered to any employee on duty, who is not on the “call-out” list.

3. ORDERING IN PEOPLE.

- A. If the vacancy is not filled using the above procedures, then someone will need to be ordered to fill the vacancy. To be “ordered-in” an employee must be on normal time off. NO ONE shall be ordered in while on paid time off, unless as an absolute last resort, and all of the following procedures have been exhausted.

1. The DIC will then consult the schedule and overtime book to determine which employee(s) from the shift(s) adjacent to the vacancy can be ordered.
2. Using the list of people that can be ordered, the DIC will then determine which of the available employees has not been ordered for the longest period of time, utilizing the “ordered-in” list, and that person shall be ordered.
3. The person who was ordered, will then have their name placed at the bottom of the “order-in” list.

- B. If the above procedure still fails to fill the vacancy then someone on their days off will need to be ordered in.

1. The DIC shall determine if there is anyone on their day off, who is working already either on a trade or on voluntary OT, that would be available for an order and that person shall be ordered for no more than four hours.
2. If the time is still not filled, the DIC, utilizing the “day off order-in” list shall order the least senior person whose name is at the top of the list. The order shall be for four hours unless the person being ordered agrees to an eight hour order.
3. Any person being ordered in shall have their name placed at the bottom of the “day off order-in” list.
4. In the event that all of the above procedures still fails to fill a vacancy, the DIC shall fill the vacancy in what ever manner the DIC deems reasonable.

CONSECUTIVE HOURS WORKED

PURPOSE: To limit the number of consecutive hours worked by an employee.

PROCEDURE: No employee shall normally work more than 12 1/4 consecutive hours unless a replacement is unavailable or an emergency situation exists. The sergeant or lieutenant must be made aware of any situation causing the extension of hours beyond 12 1/4 as soon as reasonably possible.

Any employee who has worked 12 1/4 consecutive hours, must be off at least 7 3/4 hours, before they can be considered available to work again unless an emergency situation exists.

1/ The parties agreed to this procedure in the year 2000.

FACTS

Grievant Brian Smith has been employed as a dispatcher by the Winnebago County Sheriff's Department for the past eight years. It is undisputed that Smith is a qualified dispatcher who has never been disciplined and about whom no complaints have been filed. During all times relevant herein, Smith worked the 2:00 p.m. to 10:15 p.m. shift in the County's 911/Dispatch Center located in the County's Public Safety Building on Jackson Street in downtown Oshkosh. The Public Safety Building 911/Dispatch Center is staffed 24 hours per day, 7 days per week. Geoffrey Anderson is Captain of Administration whose responsibilities include managing the 911/Dispatch Center and its employees. Kathy Bigger is the Communications Manager; she is responsible for the direct supervision of dispatcher employees and the day-to-day operations of the County's 911/Dispatch Center.

Since 1996, Lieutenant Paul Schreiber has been in charge of Special Operations and Training for the Sheriff's Department. As such, part of Schreiber's responsibilities include the assignment of employees to work at special events held in the City of Oshkosh. 2/ One such special event held every year is the Experimental Aircraft Association Convention and Air Show, also known as the EAA Fly-In which is normally held during the last week of July. During this event, approximately 700,000 to 800,000 people, both members of the public and EAA members, come to Oshkosh to attend the Fly-In.

2/ The City of Oshkosh has approximately 60,000 residents.

The EAA grounds are adjacent to Winnebago County's Wittman Airport, which is several miles from the County's 911/Dispatch Center in the Public Safety Building. Part of the EAA grounds are located in the City of Oshkosh and part of its grounds are in the Town of Nekimi. The EAA Fly-In operates the busiest airfield in the United States at Wittman Field during the week before and week of the EAA Fly-In. Between 12,000 and 14,000 flight enthusiasts fly their airplanes to Wittman Field and park their planes on the grounds of the EAA, where the aviators often camp next to their airplanes or they stay in hotels or homes in town. Because Wittman Field is so busy during the Fly-In, there is a very high probability of a plane crash, fire or other disaster at Wittman Field during the EAA. Therefore, special procedures have been set forth by the Oshkosh Fire Department and the Winnebago County Sheriff's Department to handle crashes, disasters and fires should such occur at the EAA during the Fly-In.

During the EAA Fly-In, the County operates a separate command/dispatch center on the EAA grounds, which is housed in a special temporary building put up by the EAA. The County provides dispatchers and dispatch equipment for this Center. Only one dispatcher works at EAA on the first shift, 7:00 a.m. to 3:00 p.m. and one second shift dispatcher is assigned to work at EAA between 1:00 p.m. and 9:00 p.m., leaving a two hour overlap when two dispatchers are present in the EAA command/dispatch center. Dispatch duties are not performed at EAA after 9:00 p.m. County dispatchers who are assigned to work at the Fly-In have to interact regularly with FAA, NTSB and FBI employees due to the size and nature of the event. 3/

3/ County dispatchers at the 911/Dispatch Center in Oshkosh do not have the opportunity to interact with these Federal employees regularly.

Prior to 1999, the County regularly assigned only the following dispatchers to staff the EAA Dispatch Center during the EAA Fly-In:

- (1) 1992-1993: Hansan and Rasmussen;
- (2) 1994-1998: Rasmussen and Anderson.

County Managers made these assignments at EAA without regard to overtime/call-in procedures and did not seek volunteers.

In 1999, Communications Manager Bigger sent out a memo requesting that dispatchers inform her of their interest in being assigned to work at the EAA dispatch center during the Fly-In that year. One of the employees who expressed an interest in the work was Grievant Brian Smith. The following dispatcher employees who had expressed an interest in working at the EAA Fly-In from 1999 forward, worked the Fly-In event in the years listed below for the shifts listed next to their names:

- 1999 Smith, 1 shift; Hafemeister, 1 shift (the remaining 12 shifts were worked by Rasmussen and Anderson).
- 2000 Smith, 2 shifts; Piotter, 2 shifts; Remer, 1 shift; Hafemeister, 1 shift (the remaining 8 shifts were worked by Rasmussen and Anderson).
- 2001 Smith, 1 shift; Remer, 1 shift; Hafemeister, 1 shift; Piotter, 1 shift (the remaining 10 shifts were worked by Rasmussen and Anderson).
- 2002 Hafemeister, Anderson and Remer worked all 14 shifts.

Since 1999, Lieutenant Schreiber stated he has assigned dispatchers to work at the EAA Fly-In from a list of those interested in the work collected each year by Manager Bigger. 4/ Schreiber stated herein that he has always selected employees to work at the Fly-In based on their prior experience working at EAA and based on which employees he (Schreiber) feels would be a good part of his team on the EAA grounds. Schreiber stated that he wants dispatchers at EAA who are comfortable staffing the EAA command/dispatch center alone, dispatchers that he can rely upon and whose work he is aware of and who need no training and are aware of the geography of the EAA grounds.

4/ Bigger also sends out interest memos seeking dispatchers to work at other special events in the City: Country USA, the County Fair and Ducks Unlimited.

During the Fly-In, 911 calls automatically go to the County 911/Dispatch Center at the Public Safety Building in downtown Oshkosh, but all other emergency calls on EAA grounds go directly to the EAA dispatch center from telephones on the EAA grounds. (Information sheets posted on the EAA grounds list the EAA dispatch center as the emergency number.)

The County submitted uncontradicted evidence that in 1997, Dispatchers Anderson and Rasmussen worked on their regular off days while they were assigned to the EAA and therefore worked two overtime shifts each at EAA while assigned to that event. In 1998, Rasmussen and Anderson again worked their regular off days while assigned to the EAA, for a total of five overtime shifts between them. In 1999-2001, no overtime shifts were worked at the EAA by those assigned to work the Fly-In or by any other dispatchers. The overtime hours worked at EAA in 1997 and 1998 were not posted as overtime and the Association did not file any grievances regarding those overtime hours.

There was no additional training that was necessary to be conducted by the Oshkosh Fire Department prior to the 2002 EAA Fly-In as no changes in procedures from prior years were expected in 2002. Brian Smith had previously been trained to work at EAA when he did so in 1999, 2000 and 2001. Smith is qualified to dispatch at EAA. Bigger stated that Smith's work as an EAA dispatcher in the past was good.

On July 23 and 24, 2002, Smith was on his regular off days and would have been available to work the overtime shifts that were worked by Dispatchers Remer and Hafemeister during their assignment to EAA, as both overtime shifts were between 1:00 p.m. and 9:00 p.m. 5/ It is undisputed that there were between one and five hours of overtime at the Public Safety Building, created by vacation selections and sick leave as well as the need to staff for Remer, Hafemeister and Anderson's regular positions while they worked at the EAA Fly-In. However, the Grievant did not sign for any of these overtime opportunities.

5/ Both Remer and Hafemeister were on their regular off days when they worked this overtime at EAA during their assignment thereto.

The Association filed two grievances on behalf of Brian Smith 6/ which formed the basis for this case. On September 11, 2002, the County Director of Personnel, William Wagner, sent the Association following Step 3 answer to Smith's grievances as follows:

. . .

This letter constitutes my response at Step 3 to the two grievances cited above. It appears that both grievances are part of a class action grievance, that started with grievances A/2002-33 and A/2002-34, regarding the assignment of overtime by work location. It is my understanding that overtime work during the EAA convention was made available to all represented personnel but that work location assignments were determined by Management.

There is no contractual provision that indicates that work locations are to be posted and there is an existing past practice that provides for Management to determine work locations of personnel. As such, no contractual violation has occurred and the grievances are therefore denied.

. . .

6/ The Association also filed other grievances regarding alleged overtime vacancies. However, the parties stipulated that the Brian Smith grievances would stand for the other grievances in terms of a generalized remedy but that only Brian Smith would receive a monetary remedy, if the Association prevailed.

The County has another annual special event, known as Ducks Unlimited (DU), which occurs on three days in the middle of August each year. It is also held at the EAA grounds. DU attracts between 70,000 and 75,000 participants. Several months before the event,

Manager Bigger normally sends out a memo requesting those who might be interested in working at DU to identify themselves. All hours are then posted and any dispatcher who wishes to work at Ducks Unlimited can sign for those hours (pursuant to the Department's overtime/call-in procedure) for the ten shifts (one dispatcher per shift) which occur across the three days of the DU event. During DU, dispatch hours are conducted on the EAA grounds in the same temporary building used for the Fly-In, using County equipment and dispatchers, from approximately 9:00 a.m. to 9:00 p.m. on each day of the event. Lieutenant Schreiber selects dispatchers and the patrol officers who work the regular shifts at the DU event. Schreiber and another County Patrol officer generally patrol the grounds during the DU event, and six or seven patrol officers are normally assigned to control traffic coming into and out of the EAA grounds during DU.

In 2002, the Department posted the following notice in mid-July regarding DU event overtime:

. . .

The following are times available to sign for overtime to work for the Ducks Unlimited Event. They are mostly 4-hr blocks but these are the hrs. that Lt. Schreiber would like covered. I have tried to break them up fairly. You can sign for this like you sign for regular OT but you cannot sign for the time in the book and for and DU too. Same rule applies that you can sign for a block and must wait 3 days to sign again. You MUST also sign in the book if/when you take DU time and please put "DU" after the time signed for.

**Please note there is 1-3 hr. block and the last block of time could be extended depending on how things go (You may be done sooner than 4 hours and you may be there a little long [sic] than 4 hrs. . . .

All dispatchers were allowed to sign for these hours based upon the County's Overtime Call-In Procedure. Dispatchers who signed up then received the hours they had requested.

POSITIONS OF THE PARTIES

The Association

The Association argued that the Overtime Call-In Procedure was established by the parties to fill all available overtime. In this regard, the Association noted that all vacancies with more than 24 hours notice should be posted under the labor agreement and the Overtime Call-In Procedure. Since the dispatcher work at the EAA Fly-In was published in a memo dated May 31, 2002, (more than 24 hours ahead) and because the contract makes no distinction

between overtime at the 911/Dispatch Center in downtown Oshkosh and the command/dispatch center set up at the EAA Fly-In, this work should have been posted according to the Procedure.

The Association argued that the available overtime hours at the EAA Fly-In were, in fact, “overtime” as defined in the labor agreement. On this point, the Association argued that the fact that the overtime work at the EAA was listed in the overtime-call back book as such means that the time was in fact available overtime. Furthermore, the fact that there is no separate classification/wage rate in the contract for EAA dispatcher; that the duties at the EAA Fly-In are identical to those performed at the 911/Dispatch Center; and that there are no specific qualifications for work at the EAA, require a conclusion that overtime during the EAA Fly-In at Wittman Field should be considered regular overtime work. Thus, the EAA Fly-In overtime work should have been posted pursuant to Article 6 of the labor agreement and because the County failed to post this overtime, it violated the labor agreement.

Grievant Brian Smith had the qualifications and the experience working at the EAA Fly-In and should have been selected for the overtime work. The Association noted that Smith had worked more hours at the EAA Fly-In from 1999 through 2001 than Hafemeister and Remer. Therefore, the Association argued that the Grievant was more qualified to perform the overtime work at the Fly-In than dispatchers selected to work the Fly-In. The County failed to refute the Grievant’s evidence that he had the qualifications to work at the Fly-In and is familiar with the equipment and procedures at the EAA.

The Association argued that the Grievant was unfairly denied the opportunity to post for and receive the EAA Fly-In overtime. The Grievant responded to a request from Management for volunteers to work at the EAA in 2002. However, the Grievant was later told that he could not work at the Fly-In. When the Grievant asked for details regarding problems with his work, the County failed to give him details.

Therefore, the Association argued that Brian Smith should receive four hours of overtime pay each day for July 23 and July 24, for hours he should have worked at the EAA Fly-In; that the Association should be granted “costs and fees” incurred in pursuing the instant grievance because the Employer’s actions were arbitrary and capricious; and the Arbitrator should issue a cease and desist order.

The County

The County argued that it retains the right to determine assignments to specific jobs in the Sheriff’s Department. The County noted in this regard that Section 3.1 of the contract states that the County can determine schedules of work and that it controls the methods, equipment, process and manner of performing work, and that it has the right to make reasonable rules and regulations governing conduct and safety in the Sheriff Department. In

addition, Article 8.1 of the contract states that the County can promulgate reasonable rules. In this context, the County urged that the assignment of dispatchers to the EAA Fly-In is a recurring temporary annual assignment which is not addressed by the labor agreement nor does the contract restrict the County's right to choose dispatchers for work at the event.

The County contended that the method of assigning dispatchers to the temporary EAA Fly-In work is a long-standing past practice which has been recognized by the both the Association and the County to be extra-contractual. In this regard, the County noted that at the time it promulgated the Overtime Call-In Procedure in the 2000, there was then a long-standing past practice of assigning specific dispatchers to the EAA post (from at least 1993 through the year 2000). It is also clear based on this record, that employees assigned to work at the EAA Fly-In did so in lieu of their regular assignments at the County's 911/Dispatch Center in downtown Oshkosh, such that they did not receive additional overtime.

The County noted that there was no evidence that the County had been arbitrary in assigning employees to work at the EAA Fly-In or that these employees unfairly received more overtime than other employees because of their EAA assignment. Rather, the County noted that Lieutenant Schreiber stated the rationale for assigning certain employees to the EAA Fly-In and that this rationale was reasonable – that experience as a dispatcher, experience working at the EAA Fly-In, familiarity with EAA grounds and Wittman Field were important in Schreiber's decision who to assign to the EAA Fly-In each year. The County pointed out that there was no evidence that the County had deviated from its normal procedures in assigning overtime at the 911/Dispatch Center. Rather, assignment of overtime in the 911/Dispatch Center remained the same as always pursuant to the contract and the Overtime Call-In Procedure.

Notably, the overtime at the EAA Fly-In for those assigned to work the Fly-In was only incidental to that work. Thus, the County argued that the EAA Fly-In dispatch work was temporary, annual and a long-time deviation from the normal practices of the parties; that the Association knew of this deviation and condoned it and that no grievances had been filed prior to the instant one. Finally, the County noted that the Ducks Unlimited event was treated like all other overtime opportunities under the contract and the Overtime Call-In Procedure, making the EAA Fly-In the only exception to the rule.

In the County's view, the issue here is whether overtime work was unjustly denied to the Grievant. The County urged that the answer to this question should be no and that the grievance should be found to be without merit. The Grievant had opportunities to work overtime in the 911/Dispatch Center but he failed to take advantage of any of these opportunities on July 23rd and 24th. Here, the County urged that the evidence showed that Smith could have signed for regular overtime hours on July 23rd and 24th but simply decided not to do so.

Even if the Arbitrator sustains the grievance, the County urged the Arbitrator that no monetary remedy should be due the Grievant because the County had not intended to violate the labor agreement and because overtime was otherwise available to Smith and he failed to take advantage of those opportunities to post for that other overtime work. In all the circumstances, the County urged the Arbitrator to deny and dismiss the grievance.

DISCUSSION

Initially, I note that in Article 3 – Management Rights, the parties agreed that the County should retain the exclusive right “. . . to determine schedules of work . . . together with the right to determine the methods, equipment, process and manner of performing work. . . .” This is general language which does not address special events or work locations. In addition, I note that the labor agreement (including Article 7 – Overtime and Compensatory Time) is silent regarding special events such as the EAA Fly-In and silent regarding how dispatchers are to be selected to work at such special events. Also, neither the Association nor the County proffered any evidence regarding bargaining history surrounding the Overtime Call-In Procedure to show the parties’ specific intentions concerning the applicability of the Procedure to special events. Furthermore, the Overtime Call-In Procedure (which was mutually agreed upon by the parties in 2000) contains broad language which applies to all temporary vacancies on a shift, distinguishes between shift vacancies only on the basis of the amount of advance notice (more than 24 hours notice or less than 24 hours notice) and provides that for the former, such vacancies should be posted and “will be available to any one wishing to sign for the time.”

Although the County attempted to distinguish opportunities for overtime at the EAA Fly-In from other regular and special event overtime, the facts simply do not support such a distinction. The broad definition of overtime contained in the labor agreement, as well as the unrestricted applicability of the Overtime Call-In Procedure, necessarily require a conclusion that hours worked by EAA Fly-In dispatchers on their regular off days, which are by definition beyond their regular work day and work week, should be considered overtime subject to the Overtime Call-In Procedure. Furthermore, the record is undisputed herein that any dispatcher can sign for overtime available at the DU, County Fair, and County USA special events and that signers can then expect to receive the overtime slots they have signed for without regard to their seniority.

The work time on July 23 and 24, 2002, which Grievant Brian Smith requested clearly constituted “overtime” under Article 7 of the labor agreement. Thus, the fact that overtime worked by dispatchers assigned to work their regular shifts at the EAA Fly-In was “incidental” to that assignment and that the dispatchers assigned to EAA were not eligible for greater overtime hours than other dispatchers are facts which have no relevance under the language of the labor agreement or the language of the Overtime Call-In Procedure. I note that the overtime worked by Remer and Hafemeister during the EAA was listed in the Overtime/Call-In Book, as is all overtime.

The County has argued that a long-standing past practice existed from the early 1990s to date that overtime available at the EAA Fly-In was exempt from the normal process whereby any dispatcher could sign for available hours of overtime and receive them based on their signature. However, the parties' mutual agreement to codify their Overtime Call-In Procedure in the year 2000, renders the County's evidence regarding what occurred from 1992 through the year 2001 irrelevant. In this regard, I note that there were no overtime opportunities at the EAA Fly-In during the years 1999 through 2001, although there had been overtime given to dispatchers assigned to work their regular shifts at EAA during the years 1997 and 1998. Thus, there was no evidence of Association condonation of or acquiescence in an alleged past practice after 1998. In the absence of bargaining history evidence to the contrary, the parties' agreement to the broad language of the Overtime Call-In Procedure in the year 2000 nullified the alleged past practice of allowing dispatchers assigned to work at the EAA Fly-In to also work all overtime at the EAA during that assignment.

The County also argued that the Grievant was not unjustly denied overtime and that he essentially turned down other opportunities to work overtime at the County's 911/Dispatch Center, such that he should be denied a remedy herein. In addition, the County argued that it lacked the intent to violate the contract by its treatment of Smith and therefore Smith should not receive a make-whole remedy herein. Regarding the former point, it is unnecessary under the County's Overtime Call-In Procedure for an employee to sign for every overtime opening on a date on which the employee wishes to work overtime. Rather, the employee need only sign for the opening he/she desires to take and if no one else has signed for it, the employee will receive it, pursuant to the Overtime Call-In Procedure. As Smith was not allowed to sign for the overtime opportunities available at the EAA Fly-In, he had no alternative but to file the instant grievance to pursue his claim. 7/ Regarding the latter point, intent to violate the contract and/or the Overtime Call-In Procedure is not a necessary prerequisite for a make-whole remedy under the relevant language.

7/ The County argued that Article 8.1 of the contract which allows the County to promulgate reasonable rules provides support for its position. I find no support in Article 8.1 for the County's position as there was no evidence proffered herein that the County ever promulgated any rules regarding special events or work locations.

As the above analysis makes clear, I have found that the language contained in the labor agreement, as well as that of the mutually agreed upon Overtime Call-In Procedure, is clear and unambiguous. The County's argument that the EAA Fly-In is a special event unlike other special events in Oshkosh by size, nature and potential danger, is insufficient to overcome the clear language of the contract and the Overtime Call-In Procedure which are by their terms applicable to special events such as the EAA Fly-In. I note, in accord with the Association's arguments, that there is no separate classification in the labor agreement for EAA dispatchers,

911/Dispatch Center in downtown Oshkosh and that there are no real separate qualifications for work at the EAA Fly-In except that dispatchers must be properly trained by the Oshkosh Fire Department and willing to work the Fly-In. Significantly, on all occasions when such training was given, Smith was properly trained for work at the EAA Fly-In.

Finally, I note that Smith responded to Communication Manager Bigger's 2002 interest memo for the EAA Fly-In work. He was willing to work at the Fly-In in 2002. There was no evidence that Smith was not qualified to work at the EAA Fly-In as he had worked several shifts at the Fly-In from 1999 through 2001, indeed more shifts than had Hafemeister and Remer, who were two of the dispatchers selected to work the EAA Fly-In in 2002.

In all the circumstances of this case, I find that the County violated the labor agreement and the mutually agreed upon Overtime Call-In Procedure and I issue the following

AWARD

The County violated the terms and condition of the collective bargaining agreement when it refused to allow Grievant Brian Smith to work overtime hours at the Experimental Aircraft Association Fly-In on July 23 and 24, 2002. Therefore, the County is ordered to pay Smith for eight hours of overtime (four hours per day) at his overtime rate as of July 23, 2002.
8/

8/ The Association requested costs and fees in this case for pursuing the instant grievance because the County's actions were arbitrary and capricious. In this regard, I note that the contract at Article 20.4 states that "the costs of the arbitrator and transcript if any shall be shared equally by the parties. Any other out-of-pocket expense incurred by the respective party shall be paid by the party incurring the costs." This language effectively precludes any order of costs and fees to the Association. Therefore, I deny the Association's request. The Association also requested a cease and desist order herein. In my view, the above AWARD provides same.

Dated at Oshkosh, Wisconsin, this 14th day of April, 2003.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/anl

