

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF MARINETTE

and

**MARINETTE POLICE DEPARTMENT EMPLOYEES ASSOCIATION
LOCAL 230, LABOR ASSOCIATION OF WISCONSIN**

Case 91
No. 62175
MA-12187

Appearances:

John Haase, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, for the City.

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, for the Union.

ARBITRATION AWARD

Under the terms of the parties' 2000-2002 contract, the Wisconsin Employment Relations Commission assigned me to serve as arbitrator to resolve an overtime grievance. Hearing was held in Marinette, Wisconsin on January 7, 2004. A stenographic transcript of the hearing was not prepared. The parties filed post-hearing written argument -- the last of which was received March 3, 2004.

ISSUE

Did the City violate the contract when it failed to offer the grievant overtime on January 13, 2003? If so, what remedy is appropriate?

DISCUSSION

Since 2000, when non-bargaining unit employees (Lieutenants) began to regularly perform patrol duties, there has been some ebb and flow as to how the City allocated overtime between unit employees and non-unit employees. That ebb and flow ended in October 2002 when the City announced that it would call in employees for overtime by seniority using a merged seniority list that included Lieutenants. On January 13, 2003, pursuant to the new overtime call in procedure, a more senior Lieutenant was called in for an emergency detention transport overtime assignment instead of the less senior grievant.

The Union asserts that the work in question is typically performed by bargaining unit patrol officers and thus that overtime generated by such work should be assigned to unit employees. The City argues that the work in question is not exclusively bargaining unit work and that it has retained the contractual right to determine how overtime assignments will be made.

Article 1, Section 1(i) of the contract provides that:

Employer except as herein otherwise provided, shall have the right to: Schedule and assign overtime based on Employer needs and employee qualifications;

Article 9, Section 6 of the contract provides that:

. . . any overtime shall be assigned as equally as possible based on employee qualifications and department needs.

Neither piece of contract language explicitly addresses the question of what overtime must be assigned to bargaining unit members. While the Union is correct that this question could be answered by a presumption that overtime generated by bargaining unit employees is bargaining unit work, such a presumption is of murky value here because Lieutenants regularly perform the same work as unit members and thus the question of who generates the work would be difficult to sort out.

In my view, recent bargaining history provides a persuasive and definitive basis for resolving the otherwise existent contractual ambiguity. During bargaining over the 2003-2004 contract, the Union proposed to modify Article 9, Section 6 to add the following sentence:

All overtime, excluding overtime as a result of a bona fide emergency, shall be offered on a seniority basis to bargaining unit employees first.

This proposal did not become part of the 2003-2004 contract. This unsuccessful effort by the Union to modify the existing contract language in response to the City's practice satisfies me that the City's method of allocating overtime does not violate the parties' contract.

Therefore, I conclude that the grievance must be dismissed.

Dated at Madison, Wisconsin, this 26th day of May, 2004.

Peter G. Davis /s/

Peter G. Davis, Arbitrator

