

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE MUSKEGO POLICE ASSOCIATION

and

THE CITY OF MUSKEGO

Case 72

No. 62995

MA-12465

(Walejewski Grievance)

Appearances:

Mr. Robert E. West, Consultant, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, 2001 Gilbert Road, Madison, Wisconsin, appearing on behalf of the Muskego Police Association.

Mr. Jonathan Swain, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of the City of Muskego.

ARBITRATION AWARD

The Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, hereinafter "Association," requested that the Wisconsin Employment Relations Commission appoint a WERC commissioner or staff member to hear and decide the instant dispute between the Association and the City of Muskego, hereinafter "City" or "Employer," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Susan J.M. Bauman, a member of the Commission, was designated to arbitrate the dispute. The hearing was held before the undersigned on March 11, 2004, in Muskego, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on May 20, 2004. Neither party opted to file reply briefs, thus the record was closed on May 20, 2004. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties agreed at hearing that there were no procedural issues in dispute. They stipulated to the substantive issue as follows:

Did the Employer violate the collective bargaining agreement when it revoked the overtime of the grievant? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV - - GRIEVANCE PROCEDURE

Section 1 – Definition. A grievance is a claim based upon an event or condition which effects the wages, hours or conditions of employment of one or more employees, or the Association, involving the interpretation, meaning or application of any of the provisions of this Agreement. . . .

Section 2 – Procedure.

A. The grievance procedure shall consist of four steps hereinafter set forth. No grievance shall be made or recognized unless it is founded upon an alleged breach of the terms and conditions of this Agreement.

. . .

C.

. . .

STEP 4.

. . .

b. The arbitrator shall have the authority to determine issues concerning the interpretation and application of all articles and section of this Agreement.

. . .

c. The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement.

. . .

ARTICLE V - - WAGES

. . .

Section 2 – Overtime.

. . .

Section 2(a). Overtime shall be divided as equally as possible among the employees.

ARTICLE XIII - - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote, or suspend or otherwise discharge for proper cause and the right to relieve employees from duty because of the lack of work or other legitimate reason is vested in the Employer.

If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due for such period of time involved in the matter.

The Employer may adopt reasonable rules and amend the same from time to time.

BACKGROUND AND FACTS

The essential facts of this case are not in dispute. In addition to road patrol, the City of Muskego provides seasonal water patrol. School liaison officers staff the majority of hours of the water, or boat, patrol. Other hours, primarily on Sundays, are worked by other police officers on overtime.

Grievant John Walejewski has been a police officer in the City for 19 years. In addition to his regular duties on road patrol, he has volunteered for water patrol each year since 1987 or 1988. In order to be assigned to water patrol, an officer must be properly trained on boat operations, boat accident reports, boat operation law and the like. Grievant and numerous other Muskego police officers have received such training on an on-going basis and were scheduled to work water patrol during 2003.

The initial 2003 water patrol schedule was posted in mid-May 2003. 1/ This schedule indicated that Officer Walejewski was scheduled to work four (4) hours on May 25, four (4) hours each on June 14 and 29, and four (4) hours on July 3, for a total of 16 hours of overtime on water patrol in 2003. Bad weather at the start of the season resulted in cancellation of the May 25 overtime assignment.

1/ The posting was dated 05-16-02, indicating that it was the 2002 Water Patrol Schedule, and that it was issued by Lieutenant Paul P. Geiszler. There is no dispute that the schedule was actually issued by Lt. John La Tour in May 2003 for the 2003 season.

Officer Walejewski had suffered an on-the-job back injury in July 1999 that required surgery and resulted in a return to work in late December 1999. In Spring 2003, he experienced additional back problems. By e-mail dated June 4, he advised his commanding officer, Craig Moser, that he was having difficulty, had seen his physician, and was scheduled for an MRI. The only work restrictions indicated at the time were that Officer Walejewski not partake in unnecessary physical contact, and that sitting be limited to 30 minute segments. A copy of this e-mail was also sent to Lt. La Tour who, among other duties, was charged with scheduling employees.

On June 11, Officer Walejewski and Lt. La Tour met and discussed the situation. They agreed that Officer Walejewski would not serve on boat patrol on June 14, pending the results of the MRI, scheduled for June 13. Grievant did not feel, however, that the situation with his back should affect his future water patrol assignments inasmuch as he could stand or sit while on the boat, so the medical restrictions did not affect his ability to perform water patrol duty. Officer Walejewski left the meeting with the understanding that the water patrol schedule would not be changed, except for June 14, until after the results of the MRI were received. Lt. La Tour left the meeting with the understanding that he had been requested to keep the water patrol schedule as it was, pending results of the MRI, but that he had not committed to doing so and had, in fact, taken the request under advisement.

By e-mail dated June 12, Lt. La Tour advised P.O. Walejewski:

John,

I am currently in the process of re-doing the boat patrol schedule. Because of the potential for your back injury being an issue I am going to use the hours you were originally assigned to train some new officers for the remainder of this season. At the end of the season I will evaluate the overall program and make personnel adjustments from there. As soon as some other voluntary overtime becomes available I will let you know.

Officer Walejewski received this message on his next workday, June 14. He responded as follows:

Lt. La Tour,

AS WE DISCUSSED LAST WEEK I DO NOT FEEL IT IS NECESSARY TO REMOVE ME FROM BOAT PATROL DUTIES. AS INDICATED ON MY DR SLIP IT STATES I ONLY HAVE RESTRICTION OF BEING ABLE TO GET OUT OF SQD EVERY 1/2 HR IF NEEDED AND CALLS ALLOW SUCH. AS I TOLD YOU THE BOAT ALLOWS ME TO STAND, WALK AROUND AND IN GENERAL MORE FREEDOM OF MOVEMENT THAN THE SQD. BOUNCING AS A RESULT OF WAVES AND SIMILAR ACTIVITY DOESN'T SEEM TO BOTHER ME MUCH. WHEN I WENT FOR MRI FRI EVENING, I GO TO DR ON THUR WITH FILMS OF MRI FOR HIM TO VIEW, WHY NOT HOLD OFF UNTIL WE KNOW MORE ON THURS?

Officer Walejewski saw his physician on June 17 and was advised that there were no additional restrictions on his activity; he could work boat patrol. However, in the interim, Lt. La Tour had contacted Officer Diedrich, ascertained that he was interested in water patrol duty and assigned him Greivant's hours on June 14, June 29 and July 3. Officer Walejewski was not returned to the original water patrol schedule.

After being advised that Officer Walejewski was able to work boat patrol, Lt. La Tour e-mailed all personnel assigned to water patrol on June 23 as follows:

Boat Patrol Officers,

If you run across a conflict related to your assigned *O.T. boat patrol hours* please offer them to Officer Walejewski first before attempting to make any other arrangements. If this should occur please write a quick e-mail to me so I can monitor the hours.

Lt. JZL

Officer Diedrich was unable to work on July 3 and Officer Walejewski worked that day for 6 hours rather than the four for which he was originally scheduled. Over the course of the 2003 water patrol season, Officer Walejewski worked 17.5 hours, all but three of which were after the schedule was changed. Of the officers assigned to water patrol, he worked the second most number of overtime hours. 2/

2/ The parties agreed that the listing of overtime/comp. water patrol hours was incomplete as at least one officer, Officer West, was not included on the chart.

Additional facts are included in the Discussion, below.

POSITIONS OF THE PARTIES

The Association

The core of the Association's argument is that by notifying the Employer of his physical condition, Walejewski had acted in an open, honest and direct manner and was rewarded for this by the loss of his overtime. The Association contends that the cause standard and the requirement that the Employer's action must be justified, contained in the management rights clause of the collective bargaining agreement, was violated.

Management has sole control of scheduling, limited only by the requirement of the collective bargaining agreement that overtime be distributed as equally as possible. One must assume that the original water patrol schedule was developed in accordance with this criterion. When management argues that it revoked Walejewski's overtime to distribute overtime more equally, it fails as seen in Union Exhibit 2 and Employer Exhibit 5. When management argues that it rewrote the schedule in order to get new people involved in water patrol, this fails as this could have been done when the original schedule was established and Lt. La Tour's testimony was clear that he had plenty of staff available for water patrol.

Management has provided numerous defenses to its improper act of denying Walejewski overtime. Walejewski acted properly in contacting his doctor and notifying management when he experienced back pain. Twelve days prior to his next scheduled overtime and two days prior to the posting of the revised schedule, Walejewski notified his supervisor that he was physically fit to perform water patrol. Nonetheless, he was denied his overtime.

Management overreacted to the possibility that Walejewski would not be able to perform water patrol. Instead of maintaining the original schedule, as the new one had not been posted when advised that Walejewski had no additional restrictions and could perform water patrol, management asserted its right to make changes without regard to contractual standards requiring cause and justification of management's exercise of its rights. If management's action in this regard is sustained, it will encourage employees to reveal as little as possible to management regarding any potential physical reprisals, whether intentional or just resulting from the overzealous reactions of management.

Walejewski did everything he could to inform management and keep them informed regarding his back symptoms and diagnosis. Management's revocation of overtime was not right, it was not fair, and it violated the collective bargaining agreement which requires cause, justification, and a legitimate reason to relieve an employee from duty. Accordingly, the Association requests a finding that the Employer had no cause, justification, or legitimate reason for revoking the water patrol overtime and order that Walejewski be made whole by paying him for the four hours of lost overtime which occurred as a result of the Employer's improper action.

The City

The City initially argues that the grievance fails to state an actionable grievance under Article IV – Grievance Procedure, Section 2. That provision states, “no grievance shall be made or recognized unless it is founded upon an alleged breach of the terms and conditions of this Agreement.” The original grievance, filed on June 26, 2003, alleges that the basis for the grievance is Article V – Wages, Section 2(a). That section merely requires that overtime shall be divided as equally as possible among the employees. The amended grievance of August 1,

2003 asserts a violation of the Management Rights clause, but fails to specify how that clause had been violated by the Employer's action. Because a grievance can only be founded upon an alleged breach of the terms and conditions of the contract, the grievance must be dismissed as having failed to meet the definition of an actionable grievance.

The Union concedes this in its August 6 letter appealing the grievance to the next step wherein the Union alleges, "The Association does not believe that the action taken against Officer Walejewski was reasonable given the circumstances" and fails to assert a violation of a specific clause of the contract or articulate how the clauses referenced were violated.

The only obligation of the City with respect to scheduling of overtime is to see that overtime opportunities are divided as equally as possible among the officers. Officers have no right to a given overtime assignment, including water patrol, and the City reserves the right to make changes in the assignments as necessary to ensure that the policing needs of the City are met. The City cannot act arbitrarily and capriciously in exercising its rights under the contract, but there is no evidence that it has done so in first assigning and then re-assigning the overtime water patrol hours among the officers.

Although the Grievant requested that Lt. La Tour hold off in re-assigning the hours, pending the results of the MRI on his back, the Lt. acted appropriately when he declined this suggestion and determined to change the water patrol schedule. This action met the legitimate needs of the City in knowing that the water patrol policing duties could be met, and it allowed the Lieutenant the opportunity to train an additional officer for water patrol. In so doing, however, Lt. La Tour recognized the Grievant's legitimate interest in working overtime and assured him that additional opportunities would be sought for him.

As a result of Lt. La Tour's actions in ensuring that the Grievant was offered any hours that other water patrol officers could not work, after receipt of notification that Officer Walejewski was physically able to work water patrol, Grievant suffered no damage. He worked seventeen and one-half hours on water patrol, including six hours on July 3, a day on which he was originally scheduled to only work four hours. Although he did not work four hours on June 29, 2003, he actually worked fourteen hours of overtime on water patrol after that date, while having originally only been scheduled for eight. Thus, Officer Walejewski was in no way damaged or adversely affected by the conduct of the Employer. Accordingly, the grievance should be dismissed.

DISCUSSION

The initial grievance in this matter was filed on June 26, 2003, after Lt. La Tour had posted the revised Water Patrol schedule that removed the Grievant, Officer Walejewski, from the water patrol schedule. The grievance alleges that Officer Walejewski signed up for and was assigned overtime on Water Patrol on June 29, 2003 and July 3, 2003 and that he was

“improperly removed from this list.” This is alleged to be a violation of Article 5 – Wages, Section 2(a) Overtime of the collective bargaining agreement that requires overtime to be divided as equally as possible among the employees. The remedy sought was to “reinstate the overtime taken away from Officer Walejewski.” On August 1, an amended grievance was filed that includes an allegation that the Grievant’s removal from the water patrol overtime list was a violation of Article 8 – Managements Rights. 3/ The remedy was also modified to specifically reimburse the Grievant for the 4 hours of time lost on June 29 as well as the more generic request included in the initial grievance.

3/ Although referenced as Article 8 in the amended grievance, the Management Rights clause in the collective bargaining agreement at issue herein is actually Article 13.

As noted by the City, the contract states, “No grievance shall be made or recognized unless it is founded upon an alleged breach of the terms and conditions of this Agreement.” Accordingly, our inquiry begins with the Wages and Management Rights clauses of the contract to determine whether the Association has made a showing that there is a breach of either of those clauses.

Article 5 – Wages, Section 2(a) applies to all overtime work performed by members of the Muskego Police Department and requires that it be divided as equally as possible among the officers covered by the Agreement. A review of the amount of overtime earned by officers assigned to water patrol demonstrates that Officer Walejewski earned 17.5 hours of water patrol overtime in 2003. This compares favorably with the overtime earned by the other officers assigned to water patrol on overtime, being second to Officer Mrotek (18.5 hours), and more than that earned by the individual who replaced him on the water patrol schedule, Officer Diedrich (16.0 hours). A review of the total department overtime in 2003 demonstrates that the number of hours worked by commissioned officers varies from a low of 21.5 hours to a high of 268.5 hours, with an average of 124.67 hours. Officer Walejewski worked 173 hours, more than the average. 4/

4/ While the amount of total overtime clearly is not divided equally among all the officers covered by the collective bargaining agreement, the instant dispute centers on whether the denial of water patrol overtime to the Grievant results in a violation of this provision of the Agreement. There is no record evidence to explain the discrepancies in total overtime, and this decision does not address that. It is clear that the overtime assigned for water patrol purposes was reasonably equally divided. The undersigned declines the opportunity to determine whether the fact that the Grievant had more overtime than most is, in itself, a violation of the “equally divided” requirement.

After the Grievant had advised the Employer that he was medically able to perform water patrol duty, and that there were no additional medical restrictions, Lt. La Tour e-mailed the boat patrol officers as follows:

If you run across a conflict related to your assigned *O.T. boat patrol hours* please offer them to Officer Walejewski first before attempting to make any other arrangements. If this should occur please write a quick e-mail to me so I can monitor the hours.

Lt. JZL

As a result, although not on the water patrol schedule, the Grievant worked 6.0 hours on July 3, 4.0 hours on July 13, 2.0 hours on July 26 and 2.0 hours on August 16. He did not, however, work on June 29 as had been indicated on the original schedule.

It would appear that had Officer Walejewski worked the disputed four hours on June 29, 2003, he would have earned more overtime on water patrol than any of the other officers. Based on this record, the undersigned must conclude that the removal of the Grievant from the water patrol schedule did not violate Article V – Wages, Section 2(a) of the collective bargaining agreement.

The Association also contends that the removal of Officer Walejewski from the water patrol schedule was a violation of the Management Rights clause of the Agreement. In particular, the Association argues that the establishment of the new schedule violated the cause standard and the requirement that the Employer's action must be justified. The Management Rights clause states:

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, demote, or suspend or otherwise discharge for proper *cause* and the right to relieve employees from duty because of the lack of work or other legitimate reason is vested in the Employer.

If any action taken by the Employer is proven not to *be justified*, the employee shall receive all wages and benefits due for such period of time involved in the matter. (emphasis added)

With respect to this allegation, the Association has presented a claim that meets the definition of a grievance. It contends that the City did not have cause to manage the water

patrol schedule in the manner that it did, and that the action of the Employer was not justified, requiring the payment to Officer Walejewski of the four hours of overtime that he did not receive for June 29, 2003.

Lt. La Tour posted the initial water patrol schedule on or about May 20, 2003. On June 4, Officer Walejewski notified his commanding officer and Lt. La Tour that he was experiencing back problems related to a work related injury in 1999. On June 11, Officer Walejewski met with Lt. La Tour and they mutually agreed that Officer Walejewski would not serve on water patrol on June 14 as previously assigned due to uncertainty about the Grievant's back condition. Although Officer Walejewski requested that the water patrol schedule be maintained until he had the results of the scheduled medical tests and appointments, Lt. La Tour determined that it was in the best interests of the Department to remove the Grievant from the water patrol schedule and to utilize the opportunity to train an additional officer in this duty. On June 20, Officer Walejewski advised Lt. La Tour, by e-mail, that the MRI had been performed on June 13 and that on June 17 he has been seen by Dr. Fehr. The only restriction Dr. Fehr placed upon the Grievant's work duties was that he be allowed to get out of the squad to move around and walk each half hour if possible. However, Lt. La Tour had posted the revised schedule on June 19.

Lt. La Tour had a decision to make after his meeting with Officer Walejewski on June 11. He could await the results of the MRI and leave the water patrol schedule as it was until such time as advised that the Grievant could not perform water patrol duties, should that occur, or he could contact other employees to determine interest in performing water patrol duty and post a revised schedule. Although the Grievant requested that the schedule be maintained pending the results of the medical reports, there was cause for Lt. La Tour to take the action that he did. Officer Walejewski and Lt. La Tour agreed that the officer should not perform water patrol duty until he heard from his physician. That is, he would not perform the duty on June 14. There was sufficient uncertainty about the Grievant's condition that he willingly did not perform water patrol duty on June 14. That presented sufficient cause for Lt. La Tour to question whether Officer Walejewski would be available for boat patrol the remainder of the 2003 season.

Lt. La Tour took a cautious approach and removed the Grievant from the schedule. He determined that another officer was interested in water patrol and he created and posted a revised schedule on June 19. Once he knew that Officer Walejewski could perform the work, Lt. La Tour asked boat patrol officers to offer hours to the Grievant if they could not perform them. By the end of the season, Officer Walejewski had worked more water patrol overtime hours than he had originally been scheduled to serve.

Hindsight is always better than foresight. Lt. La Tour made a schedule change based on the best information available to him. Although he could have waited for the results of the medical tests, he chose not to do so. Based on the record evidence, Lt. La Tour had good cause to take the action that he did, and he was justified in doing so.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 11th day of June, 2004.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator