

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
THE LABOR ASSOCIATION OF WISCONSIN, INC.

and

VILLAGE OF TWIN LAKES

Case 14
No. 63187
MA-12517

Appearances:

Patrick Coraggio, Labor Consultant, The Labor Association of Wisconsin, Inc., appearing on behalf of the Union.

Rodney Carter, Attorney at Law, Murn & Martin, S.C., appearing on behalf of the Village.

ARBITRATION AWARD

The Union and Village named above are parties to a 2003-2005 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievance of Robert Dzbinski. A hearing was held on May 18, 2004, in Twin Lakes, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on July 13, 2004.

ISSUE

The parties ask:

Did the Employer violate the collective bargaining agreement and call-in procedure when it failed to offer overtime to the Grievant on August 1, 2003? If so, what is the appropriate remedy?

BACKGROUND

Prior to the hearing, the parties entered into the following stipulations of facts:

1. That the Village of Twin Lakes and the Labor Association of Wisconsin, Inc. for and behalf of the Twin Lakes Professional Police Officers Association, Local 322, have a collective bargaining agreement in full force and effect during all times pertinent to this grievance. (copy not attached)
2. That the grievant, Rob Dzbinski, is a member of the Association and is covered by the collective bargaining agreement referenced in paragraph one.
3. That an overtime assignment of being a hospital guard became available on July 31, 2003 at approximately 11:30 p.m. The assignment did not have a specific end time.
4. That Article XIV – Seniority, Section 14.04 of the collective bargaining agreement reads in pertinent part as follows:
“Seniority shall govern the assignment of overtime, shift preference, vacation days, holidays and days off...”
5. That pursuant to Article XIV – Seniority, Section 14.04, Sergeant Tim Shuda started calling officers offering the overtime assignment based upon seniority.
6. That Officer Dzbinski was contacted by Sergeant Shuda at approximately 11:00 p.m. on Thursday, July 31, 2003 to work the overtime commencing at 11:30 p.m. and that Officer Dzbinski declined the overtime.
7. That Officer Dennis Linn, based upon his seniority rights, accepted the overtime and informed Sgt. Shuda on July 31, 2003 at 11:30 p.m. that he would only be available to work the overtime assignment until 6:00 a.m. on August 1, 2003.
8. That Officer Linn worked the overtime assignment from 11:30 p.m. on July 31, 2003 to 6:00 a.m. on August 1, 2003.
9. That the overtime assignment was not completed and needed to be filled until the assignment ended.
10. That the overtime assignment starting at 6:00 a.m. on August 1, 2003 was filled by Officer Steve Flasch, who is the third lowest officer based on seniority and he worked from 6:00 a.m. to 3:30 p.m. on August 1, 2003. (9.5 hours of overtime)

11. That on August 8, 2003, Officer Rob Dzbinski initiated Grievance 2003-59. (copy not attached)
12. That on August 18, 2003, Police Chief Robert O'Hallen sent a memo to Officer Rob Dzbinski denying Grievance 2003-59. (copy not attached)
13. That on August 18, 2003, Labor Consultant Benjamin M. Barth sent a letter to Village Manager David Cox moving Grievance 2003-59 to step 2 of the grievance procedure. (copy not attached)
14. That on September 9, 2003, Village Manager David Cox, Labor Consultant Benjamin M. Barth and the grievant, Officer Rob Dzbinski had a meeting to discuss Grievance 2003-59.
15. That on September 29, 2003, Labor Consultant Benjamin M. Barth sent Village Manager David Cox an e-mail requesting the Village's decision on Grievance 2003-59 in writing. (copy not attached)
16. That on September 29, 2003, Village Manager David Cox responded to Labor Consultant Benjamin M. Barth via e-mail requesting more time to make a decision. (copy not attached)
17. That on October 22, 2003, Labor Consultant Benjamin M. Barth sent Village Manager David Cox a letter moving Grievant 2003-59 to step 3 of the grievance procedure and requesting that he contact him to mutually agree on an Arbitrator. (copy not attached)
18. That on November 21, 2003, Labor Consultant Benjamin M. Barth sent Village Manager David Cox an e-mail requesting a response to the Association's request to select an arbitrator. (copy not attached)
19. That on November 21, 2003, Village Manager David Cox responded via e-mail to Labor Consultant Benjamin M. Barth by stating that he will respond in writing to the initial grievance and the request to select arbitrators. (copy not attached)
20. That on December 3, 2003, Village Manager David Cox sent a letter to Labor Consultant Benjamin M. Barth denying Grievance 2003-59. (copy not attached)
21. That on December 15, 2003, Labor Consultant Benjamin M. Barth sent an e-mail to Village Manager David Cox advising him that the Association is moving Grievance 2003-59 to Arbitration and proposed three Arbitrators to the Village to mutually agree on one to be selected as the Arbitrator to hear the Grievance. (copy not attached)

22. That on December 18, 2003, Village Manager David Cox responded to Labor Consultant Benjamin M. Barth via e-mail agreeing to Karen Mawhinney as the Arbitrator. (copy not attached)
23. That on January 6, 2004, Labor Consultant Patrick J. Coraggio sent a letter to the Wisconsin Employment Relations Commission a "Request to Initiate Grievance Arbitration." (copy not attached)
24. That on January 29, 2004, Arbitrator Karen Mawhinney sent the parties a confirmation of the agreement to hold the hearing on Tuesday, May 18, 2004 at the Village Hall in Twin Lakes. (copy not attached)
25. That neither party has raised any procedural questions in reference to Grievance 2003-59.
26. That the Association is requesting that Officer Rob Dzbinski be compensated 9.5 hours of overtime.

As noted above with the number of stipulations, there is no factual dispute here, but rather, a dispute over the way the contract and overtime policy enforcing it have been administered in this particular instance.

The Grievant works the second shift between 1:45 p.m. and 10:00 p.m., but he was off on July 31 and August 1, 2003, when the overtime opportunity arose. The Grievant was called by Sergeant Shuda about 11:00 p.m. to guard someone at the hospital under a Chapter 51 arrest, but there was no time limit set for this assignment. The Grievant turned down the overtime because he had not slept. The Grievant did not ask the sergeant if the shift could be broken down, but told him that if he had more notice or the assignment was later on, he would be interested.

The Grievant was familiar with the overtime or call-in procedure policy because he helped draft it in either 2000 or 2001. The Grievant was an officer of the Association (and still is) when he worked on the policy with a sergeant and a former police chief. The first paragraph is the relevant one here, and it states:

All open (full or partial) shifts and assignments, on less than twelve hours notice (twelve-hour rule) shall first be offered, in their entirety, to full time officers/dispatchers by seniority. If the hours remain open, they will be offered, in their entirety, to part time officers/dispatchers in no particular order. If the hours remain open, then any full or part-time officer/dispatcher can split the open hours. If the hours are still open, then full time officers/dispatchers can be ordered in by reverse seniority.

The overtime in question came under the above 12-hour rule. The Grievant found out that the assignment became split up or continued with a second officer when he returned to work. Officer Linn worked between 11:30 p.m. and 6:00 a.m., and Officer Flasch worked from 6:00 a.m. until 3:30 p.m. The Grievant believes that he should have been called to take the assignment starting at 6:00 a.m. Officer Flasch was the senior officer on duty when Officer Linn had to leave, and he had the authority to fill the overtime shift. Sergeant Shuda left around two or three in the morning and told Officer Flasch that the assignment was covered until 6:00 a.m., and that it was now his mess to deal with. Sergeant Shuda did not specify whether he meant that Officer Flasch should take the overtime or to call-in officers by seniority. Officer Flasch understood the comments to mean that Sergeant Shuda had authorized him to take the overtime, and that it was a continuation of the overtime assignment, as well as a continuation of his own shift. Sergeant Shuda had no idea when the hospital duty would end. He would not have called the Grievant back around three or four o'clock in the morning for the possibility that the overtime assignment would be continued beyond 6:00 a.m.

THE PARTIES' POSITIONS

The Association

The Association submits that the language in the collective bargaining agreement and the call-in procedure is clear and unambiguous. The language in paragraph one of the procedure is the procedure to follow in this case. Sergeant Shuda originally followed it correctly. But when Officer Linn advised the sergeant that he could not stay beyond 6:00 a.m., it became the responsibility of the sergeant to fill the potential overtime vacancy starting at 6:00 a.m. Sergeant Shuda knew that Chapter 51 arrests have a history of going beyond the six and one-half hours that Officer Linn was available. The second mistake when made by Officer Flasch, who should have filled the vacancy using the call-in procedure. This was not a shift extension. Paragraph seven of the procedure required this situation to be under the twelve-hour rule in paragraph one. The overtime did not need an immediate response and was not part of an ongoing investigation.

The Association believes it was reasonable for the Grievant to turn down the overtime when it was initially offered to him but that he should have been offered an opportunity to work the overtime later. Therefore, the crux of the dispute is how to compensate him for the lost opportunity to work overtime. The appropriate remedy is to pay him for the lost overtime, the Association asserts.

Moreover, the Association argues that the parties have a long standing past practice of offering overtime to full-time officers by seniority first. The practice is solidified by contract language and a very clear and unambiguous call-in procedure. The nexus between the two documents and the past practice have engraved in stone a procedure which must be enforced. The Association requests that the Grievant be compensated for 9.5 hours of time and one-half.

The Village

The Village asserts that it did not violate either the collective bargaining agreement or the call-in procedure in handling the overtime assignment. The overtime assignment was offered in its entirety to the Grievant, who flatly refused it. The record is clear that all officers with more seniority than Officers Flasch and Linn either refused or were not available for the assignment, which was offered without an ending time. Once a member of the Department is contacted in order of seniority and rejects an offer of overtime, no further obligation exists for the Village to again contact the officer until that officer would be ordered in for the assignment by order of reverse seniority.

The Village argues that the Grievant has no standing to maintain a claim for damages, because only those officers less senior in full and part-time status to Officers Flasch and Linn would have standing to file a grievance. The Grievant's refusal of the overtime position eliminated any standing he would have to pursue such a grievance.

The Grievant cannot now demand compensation for the overtime shift which he voluntarily rejected. He offered no rationale as to why he is entitled to 9.5 hours of overtime based upon his seniority.

DISCUSSION

The parties agree that they should use the first paragraph on the call-in procedure in this case. It is true that the Grievant was properly offered the overtime assignment in its entirety, and he turned it down. He could have worked the first part of it and asked for relief as Officer Linn did. But he chose to get some sleep first. He should not be complaining about not being offered overtime for the latter part of the assignment for several reasons.

The Grievant acknowledged that the third sentence of the call-in procedure — which says that if the hours remain open, any full or part-time officer/dispatcher can split the open hours — applies to this situation. The sentence says any officers can fill the hours and does not require the more senior officer to be asked first. However, the Grievant still believes that because he was home and had no knowledge that they were going to split up the hours, he should have been called again and offered the second portion of the overtime hours. Despite what the procedure says, the Grievant believes that the past practice should have been applied because the policy is not clear in his opinion, though he helped write it. He believes that once Officer Linn left, there was a new overtime assignment being offered and the senior employees should have been called first. One of the problems is that no one knew when the assignment would end, and the Grievant or other senior officers who already turned down the assignment once would have to be called early in the morning hours only to speculate on whether they would get one hour of overtime, several hours, or no hours by the time they arrived at the hospital.

Whether the overtime assignment was a split assignment or a continuation of an overtime assignment is splitting hairs here. Either way, the Village followed the call-in procedure without violating it. The assignment was offered in its entirety to those with seniority first. There were still open hours which any full or part-time officer or dispatcher could split, according to the third sentence in the first paragraph of the procedure. That was done. Officers Linn and Flasch split up the hours. There is no requirement that the split open hours be offered by seniority.

The question becomes whether there is a past practice that should be applied here. There is some testimony that the sergeants would go back to seniority by practice to avoid grievances such as this one. First of all, past practice is only used to interpret ambiguous language, and the Association does not believe the language to be ambiguous. Even if it were ambiguous, past practice cannot prevail because the policy was written only in 2000 or 2001. A past practice must be clear and unequivocal, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. There is hardly a reasonable period of time between the procedure being written in 2000 or 2001 and the incident in 2003. Moreover, there is no evidence about how many times a similar situation arose where an overtime assignment under the 12-hour rule was split up or continued by having another officer fill it or offered first by seniority. Thus, there is a failure to establish an enforceable past practice even if one were to use it to help interpret the procedure.

In sum, I find no violation of the collective bargaining agreement or the call-in procedure and the grievance is denied.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 23rd day of August, 2004.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator