

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**LOCAL 235, AFSCME, AFL-CIO**

and

**CITY OF SUPERIOR**

Case 194

No. 65073

MA-13111

---

**Appearances:**

**Mr. James Mattson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, appearing on behalf of the Union.

**Ms. Cammi Koneczny**, Human Resources Analyst, City of Superior, 1316 North 14<sup>th</sup> Street, Superior, Wisconsin 54880, appearing on behalf of the City.

**ARBITRATION AWARD**

The Union and Employer named above are parties to a 2003-2005 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve a dispute about overtime. A hearing was held on November 17, 2005, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 22, 2005.

**ISSUE**

The parties did not stipulate to the framing of the issue. The City's framing is preferred:

Did the City violate the collective bargaining agreement when Holly Belch was not called to come in early for her scheduled shift and work four hours of an eight hour overtime shift? If so, what is the appropriate remedy?

**CONTRACT LANGUAGE**

- 19.03 Should it be necessary to require overtime that working day, employees on duty when the decision to work said overtime is made shall be entitled to work said overtime regardless of seniority. In the event that overtime is to be scheduled, employees will be called to work such overtime work according to seniority rights, provided such employees are qualified to perform the work scheduled. Senior employees who are not consulted or given priority on such scheduled overtime jobs and therefore do not work such jobs, may file a grievance to receive pay for the number of hours worked by a junior employee. Said grievance shall be filed before the end of the next working day.

. . .

- 19.05 Communication Center: Should it be necessary to fill an overtime shift, the full-time employee(s) on duty shall be entitled to work said overtime. In the event the full-time employee(s) on duty refuse the overtime, employees will be offered the overtime according to the full-time seniority list. An employee who does not answer a telephone call or who answers by a telephone answering machine may be considered unavailable for overtime. If a full-time employee is not confirmed for the overtime shift within one hour of the start of the shift, the overtime will be offered to the part-time employee(s) on duty.

The parties also have a side letter of agreement in effect since the middle of 2003. The relevant part of it states:

1. It is understood for the term of this contract that the Communication Center Supervisor will be scheduled to work as one of the two post positions for up to two shifts per week and/or in the case of emergency when no full-time or part-time dispatcher is available to fill a shift, even in an overtime capacity. The Communication Center Supervisor may be scheduled to work to fill the shift prior to offering overtime to dispatchers.

## **BACKGROUND**

On April 17, 2005, an employee scheduled to work at the Communication Center called in sick. This triggered the events that are being grieved here, wherein the Grievant was not called but was available to work part of the shift. The Supervisor of the Communication Center is Jeffery Larkin, and he worked the open shift. Douglas County funds and manages the Communication Center that is staffed by City employees. Larkin is a County employee. The side letter noted above signed in 2003 allowed Larkin to work two shifts per week to save on overtime costs.

The Grievant is Holly Belch, an emergency dispatcher since 2003. She was scheduled to work from 6:00 p.m. on April 17<sup>1</sup> to 6:00 a.m. the following morning. Gretchen Molina called in sick and couldn't work the 6:00 a.m. to 6:00 p.m. shift on the 17<sup>th</sup>. A dispatcher on duty, Amanda Royer, started calling for help, starting with the most senior employees. Of the full-time staff, two refused the overtime, two were not available, and a message was left for one of them. The Grievant was not called. There are 10 people on the list that can be called.

Although dispatchers may not exceed 16 hours in a shift, the Grievant could have worked another four hours and come in at 2:00 p.m. The Grievant was not called to work the open shift and found out that Larkin worked eight hours of the shift. Royer worked part of the shift in the morning. The Grievant has been willing to work overtime and has worked four hours or partial shifts in the past.

Danielle Miller is the Union Steward. When she came in to work on the 17<sup>th</sup>, Royer told Miller that they had called the list and no one wanted the shift, and Royer asked her whether she should call Larkin. They all agreed to wait a little while to call Larkin. Miller was not aware that the Grievant had not been called. Miller said that in the past, Larkin is called as a last resort, and Larkin usually worked to cover vacations or compensatory time off. In the past five years since Miller started, employees have been offered both partial and full shifts when called to cover an open shift.

Larkin calls employees when he is there but has dispatchers make the calls when he is gone. Royer called Larkin to come in at 10:00 a.m. on the 17<sup>th</sup>. She mentioned to Larkin that the Grievant was working that evening, and that there wasn't anyone to work. When Larkin got to work, he did not check the call out list. It was his understanding that everyone had been called. He thought that the Grievant was not called because she could not have filled an eight hour shift or she would have been over the maximum number of hours allowed in a shift. Once Larkin was there, he decided to work the eight hours rather than call the Grievant in for four of those hours. However, he was not aware that the Grievant was not called on the day in question. Had he known that early enough in the day, he would have told Royer to call the Grievant, who would have worked between 2:00 p.m. and 6:00 p.m. Then Larkin would have worked between 10:00 a.m. and 2:00 p.m.

---

<sup>1</sup> All dates will refer to the year 2005 unless otherwise noted.

## **THE PARTIES' POSITIONS**

### **The Union**

The Union asserts that the collective bargaining agreement is clear that senior qualified employees are given first choice for overtime. Even though a fellow bargaining unit member made a mistake, it does not negate her contractual rights. Management has the obligation to monitor call outs to insure the proper procedure was followed, especially when the supervisor took eight hours before offering it to all available dispatchers. The past practice is that employees are contacted by seniority to work open shifts and asked whether they will work the entire shift or portions of an open shift.

The Union contends that the City has taken an unreasonable position in asserting that Larkin had the right to arbitrarily schedule himself into this open shift under the terms of the side letter. The intent of the side letter is to allow the supervisor to be scheduled for up to two shifts per week. Or as in this case, the supervisor may work to fill the shift prior to offering overtime to dispatchers. However, the call-in procedure was in progress, employees were being contacted, and the Grievant should have been called in the order of her seniority. Either Larkin could have taken the shift before anyone was called in, or he could have waited and double checked to see that all dispatchers had been contacted. He could not insert himself into the work schedule midway in a call out process.

### **The City**

The City submits that neither the collective bargaining agreement nor the side letter state that every Union dispatcher must be contacted prior to Larkin working a dispatcher shift. Nothing states that once the call out is started, that every dispatcher must be contacted prior to Larkin working, as long as he is within the two shifts per week condition of the side letter. Article 19.03 of the contract does not apply because a junior employee did not work the overtime in question.

The City contends that Larkin was within the conditions of the side letter when he worked the dispatcher shift. Larkin had no reason to believe that any dispatcher was available to work, based on his conversation with Royer. At that time, it was not a common practice to call dispatchers in for a partial shift. The side letter allows Larkin to work up to two shifts in each week regardless of overtime opportunities lost by employees.

## **DISCUSSION**

The side letter of agreement is the critical focus here, because it applies in this situation and is an exception to the contract. The critical sentence is: "The Communication Center Supervisor may be scheduled to work to fill the shift prior to offering overtime to dispatchers."

The City is correct in that the sentence does not say “all dispatchers,” but that is the obvious intent of the language and the language uses “dispatchers” in the plural sense. Clearly, no one would agree that the first one or two most senior people could be called out, then the call out could be stopped, then the supervisor could be offered the overtime. That would negate a call out procedure in the first place and show favoritism to certain employees. No one would have agreed to such a procedure. The phrase “prior to offering overtime to dispatchers” means just that – that before the dispatchers are offered the overtime, the supervisor may work the shift.

Therefore, the Union’s interpretation is the better one – either Larkin steps in right away, or the whole call out procedure is finished. But the supervisor cannot be put on a shift in the middle of the call out procedure. There are not a lot of employees and this is not very burdensome. The City still retains the option of determining whether to start a call out procedure or offer the overtime to the supervisor first, if he is within the limitations of two shifts per week. The language says he may be scheduled to work prior to offering overtime to dispatchers. That is consistent with the interpretation that all dispatchers be called first, or Larkin be scheduled to work first.

As for a remedy, the Union asks that the Grievant be paid for four hours of overtime that she would have worked if she had been called. This is a reasonable remedy and is in line with the contract, Section 19.03, which says that an employee may file a grievance to receive pay for the number of hours worked by a junior employee. While a supervisor worked the hours, not a junior employee, the parties clearly contemplated that pay would be the remedy for a violation of overtime call outs.

### AWARD

The grievance is granted. The City is ordered to pay to the Grievant four hours of overtime.

Dated at Elkhorn, Wisconsin, this 7<sup>th</sup> day of February, 2006

Karen J. Mawhinney /s/

---

Karen J. Mawhinney, Arbitrator