

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GREEN BAY POLICE PROTECTIVE ASSOCIATION

and

CITY OF GREEN BAY

Case 366
No. 64976
MA-13073

Appearances:

Parins Law Firm, S.C., by **Thomas J. Parins, Esq.**, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305-0817, on behalf of the Union.

Assistant City Attorney Steve Morrison, 100 North Jefferson Street, Room 200, Green Bay, Wisconsin 54301-5026, on behalf of the City.

ARBITRATION AWARD

The Green Bay Police Protective Association (herein the Union) and the City of Green Bay (herein the City) were at all times pertinent hereto parties to a collective bargaining agreement covering the period from January 1, 2002 through December 31, 2004. On July 18, 2005, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration concerning an allegation that the City had violated the collective bargaining agreement by failing to pay overtime to Officer Tracy Liska for a duty assignment during a Green Bay Packers football game on September 19, 2004. John R. Emery, a member of the WERC's staff, was appointed to arbitrate the dispute. A hearing was conducted on September 21, 2005. The proceedings were not transcribed. The City filed its brief on November 21, 2005, along with a supplement on November 24, 2005. The Union filed its brief on January 31, 2006, whereupon the record was closed.

ISSUES

The parties did not agree to a statement of the issues.

The Union would frame the issues as follows:

1. Should Officer Liska be paid for the Packer/Bear game overtime because the overtime assignment was never cancelled but rather worked by another officer?
2. Should Officer Liska be paid overtime for the Packer/Bear game overtime assignment under Section 6.03(3) of the Labor Contract because she was notified that she was being denied this overtime assignment “within 24 hours of the scheduled start of the assignment?”

The City would frame the issues as follows:

Did the City violate Sec. 6.06 of the Collective Bargaining Agreement when it denied Tracy Liska the opportunity to work overtime at the Packers game on September 19, 2004?

If so, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

Did the City violate the Collective Bargaining Agreement when it denied Officer Tracy Liska the opportunity to work overtime at the Packers game on September 19, 2004?

If so, what is the appropriate remedy?

If not, should Officer Liska be paid call-in pay for the overtime assignment under Section 6.03(3) of the Labor Contract because she was notified that she was being denied this overtime assignment “within 24 hours of the scheduled start of the assignment?”

PERTINENT CONTRACT LANGUAGE

ARTICLE 6. OVERTIME

- 6.01 OVERTIME PAYABLE. Employees will be compensated at the rate of time and one-half (1½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8½ hours on a regular workday or for hours worked outside the normally scheduled workweek. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. No change in the amount of overtime claimed by an employee shall be made unless the employee is notified of such proposed change within seven (7) days of the employee turning in an overtime card.

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6.03 ALLOCATION OF OVERTIME

(1) Posting. All overtime of the department schedule, where practicable, shall be posted. If more persons qualified for such overtime work sign for such than are needed, allocation of the overtime shall be on a seniority basis among those qualified for the work. (It is contemplated that at times it will be necessary to determine the qualification of the employee to work overtime based upon the employee's knowledge of the subject of the overtime work or the training and expertise of the employee. However, in the event of a dispute as to the same, the City shall have the burden of establishing the necessity.) In allocating overtime the department shall ask for volunteers on the basis of seniority regardless of whether the officer is on a work or off day. In the event sufficient volunteers are not found, the balance of the overtime shall be assigned on the basis of inverse seniority among those on their workdays and then by inverse seniority among those on off days. Management may refuse overtime where there is a legitimate safety concern. Practicability of posting shall be determined in light of time available for posting and departmental or public security, or other relevant and sufficient factors. This paragraph shall not apply to overtime resulting from an extension of a person's normal workday duty, nor shall it apply to overtime not assigned by the City of Green Bay.

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(3) Overtime as Duty Assignment. An overtime assignment may be cancelled by the City at any time, provided that if it is cancelled within 24 hours of the scheduled start of the assignment, the officer shall be paid minimum call-in under sec. 6.04 below, or in the case of shift overtime, payment for the entire shift. The term "cancel" shall include cutting short overtime which was planned to run for more than 3 hours.

(4) Special Event Overtime. For special events (such as the Fourth of July, and the like), because the City is at the mercy of the weather and the needs of the event sponsor, overtime may be cancelled or altered at any time prior to the scheduled commencement without relief; however, once the officer starts the assignment, if it was scheduled for more than three hours, there shall be a minimum three hours paid.

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6.04 MINIMUM CALL-IN TIME. Employees will be compensated for a minimum of three (3) hours for any call-in time worked on a scheduled work day, a day on which an officer works a full 8½ hour work day pursuant to posted shift overtime, or for a call-in while an officer is attending either a

voluntary school or in-service training (an officer receiving call-in pay on a day attending school shall still be entitled to compensatory time as if no call-in occurred if the officer successfully completes the school in question, and if the school is not successfully completed, shall receive compensatory time for those hours in attendance). The department may engage police officers in police business on site during in-service training without paying call-in, provided such shall not jeopardize the officer receiving full credit for the class interrupted. Employees will be compensated for a minimum of six (6) hours for any call-in time on a day off or scheduled vacation. This call-in time shall be compensated at the base rate of pay.

(1) Any officer who takes vacation or time-off coming, personal leave day or any other off-time authorized after being scheduled and notified of a required court appearance or other required non-shift departmental duties shall be compensated for a minimum of three (3) hours.

(2) Continuous Duty. In the event an officer is called in for more than one (1) call in any given day, that officer shall not receive two call ins, but shall be paid continuous pay at the overtime rate of time and one-half from the beginning of the first call in to the end of the second call in; excepting that if the call ins in question are for specialized units established and existing for the purpose of being called in for special problems or occurrences, such as SWAT, K-9, accident reconstruction, the continuous duty rule shall not apply to more than one call in of such nature, but rather each call in shall be a separate call in.

(3) When a trade of shifts is made between officers as authorized under section 5.02 of this agreement, and one of the officers is subject to a call as set forth in section 6.04 of this agreement, the officer working the day shall be subject to the three (3) hour call in compensation, and the officer who is off because of the trade shall be subject to the six (6) hour call in compensation. It is understood that the above shall not affect the application of paragraphs 6.04(1) and (2) of this agreement.

(4) Officers inversed to work overtime to satisfy safety requirements will be paid call-in time under this section. Officers who volunteer to work such overtime will be paid at time and one-half for the overtime actually worked.

(5) Officers will be subject to the residency requirements as outlined in Article 36, Residency, of the labor agreement, for immediate need safety staffing shortage call-ins and immediate need detective call-ins.

(6) Response time compensation for call-ins will apply as outlined in Article 36, Residency, of the labor agreement.

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6.06 OVERTIME FOR GREEN BAY PACKER GAMES. (1) Two postings shall be placed on the bulletin board once each year by July 1. All officers interested in working Packer games or working any extra overtime beyond what would be normal for traffic and field assignments are requested to sign the respective postings. These postings shall contain the anticipated manpower needs for the games.

(1) Officers who sign the above said posting shall be assigned to work each of the Packer games in the year in question on the basis of departmental seniority.

(2) In the event there is an insufficient number of officers signing the posting to fill the remaining complement needed for the Packer games, officers shall be assigned by inverse seniority among those on their workdays and then by inverse seniority on off days.

(3) In the event that any officer who has signed the above posting to work the Packer games later decides not to work any given game, such officer shall have the right to remove his/her name from the posting for any game by giving at least ten (10) days advance notice of such removal before the game in question.

(4) Officers working overtime for Packer games shall be compensated at twice their regular rate of pay for all hours worked.

BACKGROUND

Officer Tracy Liska, the Grievant herein, has been employed by the City of Green Bay Police Department since 2002. Under the language of the collective bargaining agreement, qualified officers may post for and be assigned to work at Green Bay Packers football games. In 2004, Officer Liska signed a posting to work overtime at Packer games and was assigned to work at a game taking place on Sunday, September 19, 2004.

On September 17, 2004, Commander Ken Brodhagen, the Packer game Security Commander, received a message from another officer that he had been overlooked for the overtime assignment and wanted the assignment. Because the other officer was senior to Liska, Brodhagen gave the assignment to the other officer and made Liska the first alternate. Brodhagen called Liska on the afternoon of September 17 to inform her of the change in assignment, but Liska was off duty between September 16 and September 18 and had gone out of town during that time. Consequently, Brodhagen was unable to reach her and left a voice mail message, instead. He also left a written message in her mail box. Liska received the voice mail on the evening of September 18.

On the morning of September 19, Liska received another call about another available game assignment, but did not get the message until later in the morning because she was asleep. Because her regular shift began at 2:15 p.m., and because she assumed another officer had already accepted the overtime, Liska did not respond to the message after she received it. On October 7, 2004, the Union filed a grievance on Liska's behalf. The grievance was denied and proceeded through the contractual steps, resulting in this arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that an officer scheduled for an overtime assignment cannot have the assignment taken away unless the overtime assignment is cancelled. Sections 6.03(3) and 6.06 of the contract establish that an overtime assignment is a binding commitment between the officer and the City and can only be rescinded according to specific rules. Section 6.06(3) requires an officer to provide ten (10) days' advance notice in order to cancel an overtime assignment. On the other hand, Section 6.03(3) allows the City to cancel an overtime assignment at any time. It does not, however, permit the City to remove an individual officer from an overtime assignment, but only cancel the assignment itself.

In this case, the overtime assignment was never cancelled. Instead, the City simply gave the assignment to another officer. The Union asserts that once the assignment was given to the Grievant it could not be rescinded and she was entitled to the overtime. The fact that a more senior officer was inadvertently passed over is of no import except that perhaps his contract rights might have been violated, as well. Once the assignment is made, the Grievant had to clear her schedule for that day and set aside her personal plans. She should not be harmed by the fact that the City made an error in scheduling her in the first place. Had she noticed the error 48 hours beforehand, instead of the City, under the contract she could not have refused to work the hours. By the same token, the City should not be able to take them away.

The policy and procedure of the Department for giving notice regarding overtime assignments is clear. The Department is required to make personal contact with the officer to convey the information. Commander Brodhagen did not make personal contact, but only left a message on an answering machine. The Grievant did not receive the message until less than 24 hours before the game. This was insufficient notice, which was made clear when Chief Van Schyndle testified that a later attempt to notify her of an available assignment was insufficient because the Department was only able to reach her answering machine.

The contract is clear that the Grievant should have been allowed to work the overtime unless the assignment itself was cancelled, which it was not. Therefore, she should receive the pay for the assignment that was taken from her otherwise the City can merely manipulate the contract to assign overtime to whomever it wishes. In the alternative, the Grievant should at least receive the minimum call-in pay provided by the contract.

The City

The City points to the language of Section 6.03(3) of the contract, which authorizes the City to cancel an overtime assignment at any time, but which requires the payment of a call-in minimum when the cancellation occurs within 24 hours of the start of the assignment. Contrary to the Union's position, the City contends that an "overtime assignment" under that provision does not necessarily mean the overtime shift itself and that the cancellation of the Grievant's overtime assignment on September 19, 2004 was within the scope of the City's authority under the cited language. Further, the City notified the Grievant of the cancellation at least 43 hours prior to the September 19 game and so should not be liable for call-in pay.

The City further contends that Section 6.03(4), covering special event overtime, extends to Packer games and allows the City to cancel overtime assignments at any time prior to commencement of the overtime without recourse. Thus, even if the City did not meet the 24 hour notice requirement of Sec. 6.03(3), under Sec. 6.03(4), the Grievant still may not recover.

DISCUSSION

The salient facts of this case are not in dispute. The Grievant was initially assigned to work overtime at a Green Bay Packers football game on September 19, 2004. Her assignment was cancelled and offered to another officer when it was discovered that the other officer also wished to work the assignment and had greater seniority than the Grievant. The Department attempted to reach the Grievant by phone approximately two days prior to the game to inform her of the cancellation, but she was unavailable, so a message to that effect was left on her answering machine. She did not receive that message until less than 24 hours prior to the start of the assignment.

At the outset, it should be noted that the contract clearly required the Department to offer the overtime assignment to the more senior officer. Both Sec. 6.03(1), which deals with the posting of available overtime generally, and Sec. 6.06(1), which specifically addresses overtime for Packer games, require that overtime be assigned by seniority among the qualified officers who post for it. There is no issue of qualification here, so the Department was bound by contract to assign the overtime to the more senior officer. Thus, the Department, once it realized its error, attempted to comply with the contract by reassigning the overtime to the appropriate officer.

The Union asserts, however, that once the Department had assigned the overtime to the Grievant it was contractually bound to allow her to work it unless the overtime, itself, was cancelled. Put another way, the Union contends that once overtime is assigned there is no way under the contract for the Department to reassign that overtime to another officer. If so, once the Department assigned the overtime to the Grievant it was in a no-win situation. As we have seen, by withdrawing the overtime assignment from the Grievant, the Union is of the view it violated her contractual right to work the hours. If, on the other hand, it allowed the Grievant

to work the overtime, the Union maintains that the Department would be subject to a grievance by the more senior officer for violating his contractual right to the assignment. Either way, it would be liable to pay both officers for the same assignment. I do not believe this is a reasonable interpretation of the contract.

In the contract, when overtime is referred to it is referred to as overtime. Article 6 is entitled "Overtime." Section 6.01 refers to the pay rate for overtime and the point during the work day or work week at which overtime commences. Section 6.03 is entitled "Allocation of Overtime," and so on. The first reference to the phrase "overtime assignment" is in paragraph 6.03(3), which sets forth the conditions under which the City may cancel an overtime assignment. Thus, I do not read the terms "overtime" and "overtime assignment" as being synonymous, as the Union would have me do. An assignment is a specific delegation of a task or duty. As contemplated in 6.03(3), therefore, an overtime assignment is a specific delegation of an overtime shift to an officer, which may be withdrawn at the City's option. The only proviso is that under certain circumstances the City is liable to pay the originally assigned officer a call-in premium, or for actual hours worked, whichever is greater. There is nothing in Sec. 6.03(3) which restricts the City's options to only canceling the overtime itself, rather than the assignment. This case is a good example of why this should be so. Here, the more senior officer should have originally been assigned the overtime, but was not due to an oversight. When the error was discovered the City could not cancel the overtime shift because it needed the personnel at the Packer game. Nor could it allow the Grievant to work the shift because of the seniority provision. So it corrected the problem by canceling the Grievant's overtime assignment and reassigning it to the more senior officer. Had the overtime been correctly assigned initially, the Grievant would never have been assigned the overtime at all, so the loss of the overtime pay for that shift is the loss of a windfall, not an entitlement, and is not contemplated under the contract.

The second question raised by the Union is whether the Grievant is entitled to three hours of call-in pay due to the fact that the notice of the cancellation of the assignment was untimely. Here, again, the facts are clear. The contract requires three hours of call-in pay to be paid when the assignment is cancelled less than 24 hours prior to its commencement. The Department attempted to notify the Grievant approximately two days before the assignment, but was unable to reach her. The Grievant actually received the notification of cancellation less than 24 hours in advance. Additionally, the Union cites an interdepartmental memorandum from July 29, 1997 (Union Ex. #4) as evidence that notification regarding overtime matters is to be in person, rather than by leaving messages, in order to be effective. By not reaching the Grievant personally, therefore, the actual time of cancellation of the assignment was when the message was received, not when it was given.

Union Exhibit #4 states as follows:

TO: Lieutenants and Captains

FR: Capt. Bill Parins

RE: Officer Notification

The question of what is official notification for officer overtime and work-related matters is again an issue to address. We must make personal notification of any overtime (Court, Posted overtime, Call-in overtime, Inversion) to the employee and only the employee can accept. Notice given to wives and children is not acceptable by the Union.

In the same respect, the Contract states:

In order to be granted sick leave or emergency leave an employee must report prior to the start of the work day to the department head or supervisor the reason of the absence.

The employee must personally make notice of sick leave.

We as supervisors create unnecessary problems for ourselves by trying to accommodate officers in these matters and invariably they throw mistakes back at us as our fault. Personal notification is what the Union has asked for and I want our supervisors to cooperate.

SUPERVISORS SHOULD TALK TO THE EMPLOYEE PERSONALLY.

Although the memorandum does not specify, apparently problems have arisen in the past with attempting to give officers notification regarding overtime by means other than direct communication. One can assume, however, that messages occasionally miscarried or were received late with the result that officers were unaware of the availability of overtime. In any event, the Department attempted to correct this problem by requiring direct communication from supervisors to officers regarding the scheduling of overtime and other work related matters. Here, direct communication was not possible because the Grievant was off work for the three days prior to the scheduled overtime and was unavailable.

On this point, I am inclined toward the Union's position. Presumably the rationale underlying the 24 hour notice requirement in Sec. 6.03(3) is that the officer must arrange his or her schedule to be available to work the overtime and a last minute cancellation is a greater inconvenience because it reduces the likelihood that the officer can make other plans for the time they were originally scheduled to work. That was the case here. The Grievant returned early from her days off only to learn that her overtime shift had been cancelled, when otherwise she might have stayed away longer. The initial error resulting in the Grievant being scheduled was the Department's. Although it attempted to correct the mistake in a timely fashion, it was unable to do so through no one's fault. Nonetheless, in balancing the equities, it is more reasonable that the Department should bear the cost of the three hours' call-in pay than that the Grievant should make herself available to work the overtime shift only to find shortly beforehand that the shift was cancelled and then not receive the call-in pay because she

did not return from her days off even earlier in order to receive the message. This is especially so since the Department was aware of the Union's concerns regarding direct communication on overtime matters and had adopted a policy to insure it.

Additionally, I do not find Sec. 6.03(4), regarding special event overtime, to be applicable here. This provision allows the City to cancel overtime, without prior notice or relief, when staffing needs change due to circumstances beyond its control, such as bad weather or a cancellation by the event sponsor. That is not what happened here. In this case, the overtime was not cancelled, but was given to another officer due to the City's error. That is not the type of circumstance contemplated by Sec. 6.03(4). If it were, then overtime assignments for Packer games could be shifted at any time prior to the game without reference to the 24 four hour notice provision in Sec. 6.03(3). Given the conflict between the provisions, I conclude that 6.03(4) was only intended to apply when the overtime has to be canceled, not where the City, for whatever reason, chooses to give the assignment to someone else.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not violate the Collective Bargaining Agreement when it denied Officer Tracy Liska the opportunity to work overtime at the Packers game on September 19, 2004. Nevertheless, it failed to personally notify Officer Liska of the cancellation more than 24 hours prior to the assignment, in contravention of Section 6.03(3) of the contract and Department policy. Therefore, the City shall pay Officer Liska three (3) hours' call-in pay at her then base rate of pay for the late cancellation of the overtime assignment.

Dated at Fond du Lac, Wisconsin, this 18th day of April, 2006.

John R. Emery /s/

John R. Emery, Arbitrator

