

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION
and
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 561
No. 64540
MA-12931

(Grievance of Sarah Byers)

Appearances:

Eggert & Cermele, S.C., Attorneys at Law, by **Rachel L. Pings**, on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy R. Schoewe, Deputy Corporation Counsel, on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Milwaukee County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 1, 2005, in Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 21, 2005. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

Did Milwaukee County violate Section 3.02 of the collective bargaining agreement when it granted the overtime to Sergeant Haas instead of Sergeant Byers on February 18 and 19, 2004? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' agreement are cited, in relevant part:

3.02 OVERTIME

...

(3) All scheduled overtime shall be assigned within classification as follows:

(a) Employees shall volunteer for overtime and their names shall be placed on a list in seniority order within each work unit.

(b) When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list within the work unit where the overtime is being scheduled.

...

PART 5

5.01 GRIEVANCE PROCEDURE

...

(11) At each successive step of the grievance procedure, the subject matter treated and the grievance disposition shall be limited to those precise issues arising out of the original grievance as filed.

...

BACKGROUND

In February of 2004, both the Grievant, Sergeant Byers and Sergeant Haas were assigned to the Airport. Captain Jaskulski was in charge of the Airport detail at that time. The parties stipulated that Sergeant Byers is senior to Sergeant Haas and that the Airport is a separate work unit. Byers works the second shift – 3:00 p.m. – 11:00 p.m.; however because the Airport detail was short one sergeant at the time, Captain Jaskulski created a swing shift. Haas was the least senior of the Sergeants at the Airport, and as no one wanted the swing shift, she was also assigned to swing to the third shift – 11:00 p.m. – 7:00 a.m.. Haas is assigned to work third shift some days and the second shift on others.

When there is overtime available, the sergeants discuss among themselves who will take it, and if there is a dispute, they go to Captain Jaskulski, although it appears that this had not occurred prior to the instance that is the subject of this grievance. Eight hours of overtime was available on the third shift for both February 18 and 19, 2004. The sergeants discussed who would take it and both Sergeant Byers and Sergeant Haas wanted the overtime. They went to Captain Jaskulski with their dispute.

Captain Jaskulski testified that when he decided to implement the swing shift he was asked what would happen if overtime occurred on it. He was not sure how to handle it, so he called the County's Human Resource Office. He was told he would have to figure it out, as there was nothing in the Agreement about swing shifts, and that they would have to get a ruling on it, as the Dog Handlers, and now the Sergeants, had swing shifts. According to Captain Jaskulski, the practice had been that the deputies on the shift with the overtime get the first chance at it, and if no one on that shift wants the overtime, then seniority is followed. Jaskulski testified that since Haas was assigned to the third shift, as well as the second shift, she, rather than Byers, was given the overtime on the third shift on February 18th and 19th.

Sergeant Haas worked eight hours of overtime on both February 18 and 19, 2004. Sergeant Byers worked seven hours of overtime on February 19th, her regular day off. Byers filed a grievance over the awarding of the sixteen hours of overtime on February 18th and 19th to Haas. The grievance referenced Haas' being assigned to the second shift and "swinging" to the third shift and also stated, "(no swing shift provision in contract)." The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the plain language of Section 3.02(3)(a) and (b), of the Agreement, clearly provides that overtime is to be assigned by seniority within a work unit. There is no reference to shifts playing a role in determining who gets the overtime. When more than one employee in the work unit desires the overtime, whoever is most senior gets the overtime. Where the wording is clear and conveys a distinct idea, there is no need to resort to interpretation. Elkouri and Elkouri, *How Arbitration Works*, (6th Ed.) p. 434.

As the parties stipulated that Byers and Haas were both assigned to the Airport, that the Airport is a separate work unit, that Byers is senior to Haas, and that Haas was awarded the overtime, the grievance should be resolved in Byers' favor, based on the plain language of the Agreement.

Since the language of the Agreement is clear and unambiguous, it is not necessary to consider past practice. However, even if the wording were found to be ambiguous, the County has not sufficiently established that there is a past practice of awarding overtime by seniority within a shift. The only evidence offered was Captain Jaskulski's testimony. He testified that

due to being short a sergeant on the third shift at the Airport, he created a swing shift. As no one wanted it and Haas was the least senior sergeant, Haas was assigned to the swing shift. When he was asked how overtime on the swing shift would be awarded, Captain Jaskulski was not sure and called the County's Human Resource office and was told to make a decision and that they would need to "get a ruling" on it. Even if it is found there was a practice, one party's unilateral interpretation, without evidence of acquiescence by the other party, does not bind the other party.

Last, if a binding practice of awarding overtime by seniority on the shift is found, the swing shift implemented by the County is not authorized by the Agreement. The County's use of a swing shift, and assigning overtime in accordance thereto, leads to a nonsensical result that conflicts with provisions of the Agreement. Thus, the County's interpretation regarding swing shifts should be avoided.

County

The County asserts that the Association raised an issue as to the implementation of a swing shift at the Airport for the first time at hearing. It was not grieved by Byers and the Agreement is silent as to shifts and contains no limitations on the Sheriff's authority to establish the Department's operations. Section 5.01(11) precludes the Association from raising a new issue at this point and limits consideration to "the precise issues arising out of the original grievance as filed."

As to the issue of overtime, the County concedes that the Agreement provides that overtime is awarded on the basis of seniority, but asserts that the Association bases its case on a rigid reading of the contract. The County also notes that the Agreement does not define seniority.

According to the County, contract language is given meaning by the manner and means by which the parties carry out its terms. Captain Jaskulski testified that over his 18 year career, overtime has been allocated in the same manner as he handled this matter, i.e., the employee on the shift "owned" the shift and had the first opportunity for overtime on that shift, regardless of seniority. This was true throughout the Department and had been the case at the Airport as to sergeants when he was there in the late 1980's and early 1990's. Jaskulski's testimony was un rebutted.

Thus, the grievance should be denied.

Association Reply

The Association responds that it is a principle of contract law that where the language is clear, as in Section 3.02, a "rigid" reading of that language is the only one appropriate, and there is no occasion to resort to interpretation. The County's citation of past practice is misplaced, as it is only necessary to look for other evidence of the parties' intent where the

language is ambiguous and unclear. Elkouri and Elkouri, p. 623. Since the County concedes the language of Section 3.02 is clear and unambiguous, there is no need to look at past practice.

If it is concluded that it is appropriate to consider past practice, the County failed to establish a past practice sufficient to overcome the language of the Agreement. The only evidence the County offered in this regard was Captain Jaskulski's testimony. While he testified he has assigned overtime based on shift for many years, in clear violation of Section 3.02, he conceded that when questioned about the allocation of overtime involving personnel assigned to a "swing shift", he was unsure how to handle such a situation and resorted to calling the County's Human Resources Department for guidance. That Department was also unable to clarify how to handle the situation. Thus, the issue in this case was quite novel and far from being resolved by past practice.

Last, if it is determined that the claimed past practice exists of assigning overtime by shift, the Association asserts that a "swing shift" was not a valid assignment under the terms of the Agreement. The County's contention that this issue cannot now be raised lacks merit for two reasons. First, the grievance specifically protested the "swing shifts" and the County, in its denial of the grievance, relied upon the swing shift. Thus, the Arbitrator has jurisdiction over the swing shift issue.

The Association requests that the County be found to have violated Section 3.02 and ordered to reimburse Sergeant Byers for the 16 hours of overtime she would have earned on February 18 and 19, 2004, and to distribute overtime by seniority within the work units. In the alternative, if it is determined that the overtime was properly distributed by seniority within a shift, based on past practice, the Association asks that the Arbitrator find that a swing shift was not an appropriate shift from which to determine overtime assignments and order the County to reimburse Byers for the 16 hours of overtime she would have earned.

County Reply

The County responds that contrary to the assertion it has not adequately proved a past practice exists, Captain Jaskulski's testimony was uncontroverted. The County reiterates that the terms of a contract are given meaning not only by strict dictionary definition, but also by the manner and form the parties give them. Byers' case was handled the same way such assignments have been handled throughout Captain Jaskulski's career with the Department. As such, there has been acceptance over the course of that time by the Association over the method by which the contract terms have been administered, as evidenced by the Association's acquiescence to the long-standing practice.

The County asserts the grievance should be denied.

DISCUSSION

Sections 3.02(3)(a) and (b), of the Agreement, set forth the procedure for assigning overtime. Employees within each work unit can volunteer for overtime and their names are then placed on a list in order of seniority. Scheduled overtime is then assigned by seniority among those volunteers on a rotating basis in that work unit. The parties stipulated that the Airport is a separate work unit.

The County claims there is a long-standing practice that differs from that contract language. However, while Captain Jaskulski testified there had been a practice in Traffic and with the Dogs unit, he acknowledged that when he implemented the swing shift among the Sergeants at the Airport he was asked how the allocation of overtime that occurred on the swing shift would be handled. He conceded that he was unsure of the answer and contacted the County's Human Resource Department in that regard, and the response was that he would have to figure it out, as there was nothing in the Agreement that addresses that situation, so they would have to "get a ruling on it".

Hence, while there may be a practice of giving preference to employees on the shift where the overtime occurs in work units without a swing shift, Captain Jaskulski conceded he was sufficiently unsure that this was the case in a work unit with a swing shift that he contacted Human Resources for guidance and that when he did so, the County's Human Resource Department was equally unsure. That being the case, assuming *arguendo* that the practice could supplant the seemingly clear language of Section 3.02(3), the County has failed to sufficiently establish that such a practice applied in work units with a swing shift. Thus, it is concluded that the County violated Section 3.02(3), of the Agreement when it awarded the overtime on both February 18th and 19th to Sergeant Haas on the basis that she "owned" the shift for purposes of overtime. Having found a violation in this regard, it is unnecessary to address the issue of the implementation of a swing shift.

The parties stipulated that the Arbitrator is to decide the appropriate remedy if the County is found to have violated the Agreement. Section 3.02(3)(b) states that scheduled overtime is to be rotated by seniority among those who volunteer for overtime in the work unit. The record does not address how the parties have applied this language in terms of whether the overtime on February 18th and 19th would be considered one opportunity, or two opportunities, to work overtime for purposes of rotating the overtime by seniority.¹ However, the Association requested in its initial brief that Byers be awarded the overtime for both February 18th and 19th (16 hours) and the County did not object to this as the appropriate remedy in its reply brief or argue for a different remedy. Therefore, a violation having been found, and no objection having been raised to the requested remedy, the remedy requested by the Association is awarded.

¹ In other words, would Byers be entitled to both days or just the first day.

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

AWARD

The grievance is sustained. Milwaukee County is directed to immediately pay the Grievant, Sergeant Byers, sixteen (16) hours of overtime for February 18 and 19, 2004.

Dated at Madison, Wisconsin, this 24th day of May, 2006.

David E. Shaw /s/

David E. Shaw, Arbitrator

