

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LABOR ASSOCIATION OF WISCONSIN, LOCAL 108

and

ST. CROIX COUNTY, WISCONSIN

Case 216
No. 66854
MA-13660

Appearances:

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Labor Association of Wisconsin.

Stephen L. Weld, Weld, Riley Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint one of three members of its staff to serve as Arbitrator to hear and decide this grievance and, pursuant to this request, Coleen A. Burns was so appointed. Hearing on the matter was conducted on June 14, 2007 in Hudson, Wisconsin. The hearing was not transcribed and the record was closed on August 3, 2007, following receipt of the parties' post-hearing briefs.

ISSUES

The parties stipulated to the following statement of the issues:

Did the Employer violate Articles 3 and 6 of the parties' collective bargaining agreement when the Employer failed to offer available overtime hours to the Grievant on January 20, 2007?

If so, what is the appropriate remedy?

CITED CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

Section 1: The County possesses the sole right to operate County government and all management rights repose in it. The County agrees that in exercising any of these rights it shall not violate any provisions of this Agreement. These rights include, but are not limited to, the following:

1. To direct all operations of County government.
2. To establish reasonable work rules, providing that same are distributed to each member of the bargaining unit at least thirty (30) days prior to implementation.
3. To hire, promote, schedule and assign employees in positions within the bargaining unit.
4. To suspend, discharge, or take other disciplinary action against employees for just cause as hereinafter provided.
5. To increase or reduce the work force.
6. To take action necessary to comply with Federal or State Law.
7. To introduce new or improved methods or facilities or to change existing methods or facilities.
8. To create new job classifications.
9. To take whatever action is necessary to carry out the functions of County government in situations of emergency for so long as said emergency exists providing that no member of the bargaining unit shall suffer economic loss from said action.
10. To contract out for goods and services, provided, however, that enforcement of this right shall not result in any reduction of normal bargaining unit work nor in layoff of bargaining unit personnel.

Section 2: The County agrees that no employee covered by this Agreement shall be changed in classification or reduced in rate of pay through the exercise of said rights unless as otherwise provided herein. The parties agree that this Section does not apply to layoff, discipline or discharge.

ARTICLE 4 – MAINTENANCE OF STANDARDS

Except as provided by this Agreement, the County agrees that all reasonable conditions of employment in existence at the signing of this Agreement shall be maintained at not less than the highest minimum standards and the conditions of employment shall be improved wherever specific provisions for changes are made elsewhere in this Agreement.

The parties unqualifiedly agree to bargain regarding any changes which occur in the wage, hours or conditions of employment which may arise out of application of this Article during the term of this Agreement. If Agreement cannot be reached, the issue may be submitted by either party to arbitration in accordance with the procedure as outlined in Article 8, Section 5.

...

ARTICLE 6 – WORK WEEK – CALL-IN PAY – OVERTIME

Section 1: The scheduling of the workweek shall be determined by the Department Head subject to the following:

...

F. Filler Shifts: Shift fillers are used within several classifications to fill vacant shifts that occur due to vacations, compensatory time, schooling, sick leave, leaves of absence, and other related times. Filler shifts are part of the usual shift pick rotations and are chosen in the usual manner, by seniority.

Employees who are shift fillers shall be notified of the different shifts they will be filling when the schedule is completed. However, the schedule only covers previously-arranged times off. Occasionally, there are times when shifts open up on short notice due to illness, injury, last-minute vacation requests, or unforeseen circumstances. When this happens, shift fillers will be required to change their shifts accordingly. These changes will be done with a minimum twenty-four (24) hour notice, except as noted below.

For example, sick leave is not usually pre-scheduled, so a shift filler would have his/her schedule re-arranged to fill that shift opening, when available. In cases of sick leave, the shift filler would be called to change

his/her shift at a minimum of twenty-four (24) hours notice before the start of the scheduled shift time. If someone calls in sick for a shift and it is not possible to fill with a shift filler, other extensions may be made to cover the time. If there are no shift fillers available, the shift will be filled by extending the hours of those already working or calling in an off-duty employee, at the Employer's discretion.

Nothing in this Section abrogates the Employer's right to decide to fill or not fill, part or all of a shift.

...

Section 4: For the duration of this contract, the County agrees to utilize bargaining unit members when filling vacancies for entire regular, full-time shifts. If the County chooses to fill a vacant shift or part thereof, it shall utilize people in the classification in which the vacancy occurs. This shall be done on a rotating seniority basis for employees who are available. The County shall make a good faith effort to reach employees to offer the assignment; this shall constitute a telephone call to the residence of the employee. The County will document all "attempts to contact" employees and make that information available to employees upon request. If the County cannot find an employee within the classification who volunteers for the assignment, it may go outside the bargaining unit to fill the position. Nothing in this Section abrogates the County's prerogative to determine whether or not to fill the shift. Nothing contained herein shall preclude the County from calling an employee early or extending an employee's shift to cover a vacant regular full-time shift or part thereof.

...

BACKGROUND

Jessica Zupfer, hereafter Grievant, is employed by the County as a Correctional Officer. On or about January 20, 2007, the Grievant filed a grievance alleging that she should have been offered the opportunity to work overtime from 6:00 a.m. to 2:30 p.m. on January 20, 2007 to fill a shift vacancy caused by Correctional Officer Wedell calling-in sick. In her grievance, the Grievant alleges that the County's failure to offer her the available overtime violates Articles 3 and 6 of the parties' collective bargaining agreement and seeks, as a remedy, that the County make her whole by compensating her for 8½ hours at her overtime rate of pay, or compensatory time off at the rate of one-half, at the Grievant's option, for the overtime denied the Grievant on January 20, 2007.

In denying the grievance on February 1st, 2007, Sheriff Dennis D. Hillstead states, *inter alia*:

Deputy Zupfer is claiming violation of Article 3 – Management Rights and Article 6, workweek, call in pay, overtime. In that on January 20th, 2007, employer failed to offer available overtime hours to Deputy Zupfer who is senior to the two deputies assigned to work the open shift.

Deputy Zupfer cites Article 6, Section 4 and Section 5 of the current LAW Contract as having been violated by employer in not offering her the open shift.

Grievance is denied. Article 6, section 1, paragraph F, clearly states that is someone calls in sick for a shift, and it is not possible to fill that open shift with a shift filler, other extensions may be made to cover the time. If there are no shift fillers available, the shift will be filled by extending the hours of those already working or calling in an off-duty employee, at the employer's discretion. There was less than 24 hour notice of the open shift and employer chose to fill the open shift by extending the hours of those already scheduled to work.

Following the denial of the grievance, the parties submitted the grievance to arbitration.

POSITIONS OF THE PARTIES

Association

Article VI, Section 4, states in pertinent part that overtime, should the County decide to fill the vacancy, must be offered “.. on a rotating seniority basis for employees who are available. The County shall make a good faith effort to reach employees to offer the assignment; this shall constitute a telephone call to the residence of the employee.”

The Grievant was available to work the overtime resulting from Officer Wedell's absence. She is more senior than either Officer who worked this overtime. By failing to offer the available overtime to the Grievant, the County has violated Article VI, Section 4, of the parties' collective bargaining agreement.

According to Sgt. Simacek, he decided to split the shift because he wanted to avoid a late night call which could wake-up available bargaining unit employees and no one answers the telephone when he calls. Sgt. Simacek's concerns do not excuse the County from complying with the parties' collective bargaining agreement.

In remedy of the County's violation of the collective bargaining agreement, the Arbitrator should order the County to cease and desist from violating the terms and conditions of the collective bargaining agreement and to make the Grievant whole by compensating her at eight and one-half (8½) hours at her overtime rate of pay, or compensatory time off at the rate of time and one-half. The remedy requested by the Association is reasonable.

County

Article 6, Section 4, relied upon by the Association, is not the exclusive method of filling shifts. Article 6, Section 1(F), explicitly allows the use of shift extensions to fill an unexpected shift opening such as that which resulted from Officer Wedell calling-in sick.

In the present case, there was less than 24-hours notice of the vacancy. Accordingly, under Article 6, Section 1 (F), the Shift Filler was not required to change his/her shift and the County had the discretion to either extend the hours of those already working or call-in an off-duty employee. This right is consistent with the final sentence of Article 6, Section 4 that expressly recognizes:

. . . Nothing in this Section abrogates the County's prerogative to determine whether or not to fill the shift. Nothing contained herein shall preclude the County from calling an employee early or extending an employee's shift to cover a vacant regular full-time shift or part thereof.

The parties' collective bargaining agreement must be interpreted in a manner that gives meaning to all of the provisions. The Association's interpretation voids one of the shift filling options expressly given to the County in Article 6, Section 1(F) and ignores the final sentence of Section 4.

As Sgt. Simacek testified, filling shift vacancies on a seniority basis is the preferred method. Rather than calling and waking officers through the night to see if they wanted to come in at 6:00 a.m. and to ensure that there would be coverage, Sgt. Simacek chose to use an option permitted under the provisions of the parties' collective bargaining agreement.

Contrary to the assertion of the Association, the procedure used by the County to fill Officer Wedell's shift is not an unreasonable exercise of the County's Article 3, Management Rights. Rather, it is permitted under the clear contract language. The grievance should be dismissed. Inasmuch as the grievance is frivolous, the County should be awarded the extraordinary remedy of attorney's fees.

DISCUSSION

The parties do not dispute the underlying facts. At approximately 9:00 p.m. on January 19, 2007, Sgt. Simacek received a telephone call from Officer Wedell advising Sgt. Simacek that Officer Wedell was calling in sick for his January 20, 2007 6:00 a.m. to 2:30 p.m. shift. Sgt. Simacek filled Officer Wedell's shift by first seeking a volunteer from those who were currently working the 2:30 p.m. to 10:00 p.m. shift. Officer Mark, who was scheduled to work from 2:30 p.m. to 10:00 p.m. on January 20, 2007, volunteered to come in early and work the 10:00 a.m. to 2:30 p.m. portion of Officer Wedell's vacant shift. Sgt. Simacek then sought a volunteer from those currently working the night shift, *i.e.*, 10:00 p.m. to 6:00 a.m., to work 6:00 a.m. to 10:00 a.m. and, when he did not receive a

volunteer, Sgt. Simacek filled the remainder of Officer Wedell's shift by forcing Officer Dykes, who was scheduled to begin work at 10:00 p.m. on January 19, 2007 and end work at 6:00 a.m. on January 20, 2007, to extend his shift to 10:00 a.m.

The Grievant, who is more senior to Officer Mark and Dykes, states that she was available to work Officer Wedell's vacant shift. The record does not establish otherwise. The parties agree that Sgt. Simacek did not call the Grievant, or any other off-duty Officer, to offer the opportunity to work the shift vacancy resulting from Officer Wedell's absence on January 20, 2007.

The County argues that it retains the right to decide whether or not to fill a vacant shift. Sgt. Simacek's conduct clearly establishes that the County decided to fill the shift vacancy caused by Officer Wedell's absence. Thus, as set forth in the parties' stipulated issue, the question to be determined is whether or not Sgt. Simacek violated either Article 3 or 6 of the parties' collective bargaining agreement when he did not offer the Grievant the opportunity to fill the shift vacancy caused by Officer Wedell's absence.

The County notes that Article 3, Management Rights, Section 1, expressly recognizes that the County has the right to "direct all operations of County government" and "hire, promote, schedule and assign employees in positions within the bargaining unit." Article 3, however, also expressly recognizes that the County will not exercise these rights in violation of any provision of the parties' collective bargaining agreement.

In arguing that the County has violated the parties' collective bargaining agreement, the Association relies upon Article 6, Section 4. In arguing that there has been no contract violation, the County relies upon Article 6, Section 1(F), as well as the final sentence of Article 6, Section 4. As the County argues, under well-established arbitral principles, these provisions must be construed in a manner that gives effect to the language of each provision.

Article 6, Section 1(F) and Article 6, Section 4, each contain language that addresses the filling of shift vacancies. Article 6, Section 1(F), entitled "**Filler Shifts**," provides for and addresses the use of "Shift fillers." Under the plain language of this provision, shifts that become vacant due to previously arranged time-off that is known at the time that the schedule is prepared, are "filler shifts" that are part "of the usual shift pick rotations." Employees who are "shift fillers" are notified of the different shifts that they will be filling when the schedule is completed. This provision also specifically addresses cases of sick leave which are not pre-scheduled. A "shift filler" may have his/her schedule rearranged to fill such an opening, with a minimum of twenty-four (24) hours notice prior to the start of scheduled shift.

Officer Wedell's call provided less than twenty-four (24) hours notice of a shift opening due to sick leave. Article 6, Section 1(F) states:

. . . If someone calls in sick for a shift and it is not possible to fill with a shift filler, other extensions may be made to cover the time. If there are no shift

fillers available, the shift will be filled by extending the hours of those already working or calling in an off-duty employee, at the Employer's discretion.

In the present case, neither party argues nor does any witness assert, that it was possible to fill Officer Wedell's vacant shift with a "shift filler." Thus, the plain language of Article 6, Section 1(F), standing alone, provides the County with discretion in deciding how to fill the shift vacancy resulting from Officer Wedell's sick leave absence. This discretion permits the County to call-in an off-duty employee, such as the Grievant, but also permits the County to extend the hours of those already working.

As noted above, Article 6, Section 4, also addresses the filling of shift vacancies. Under the language of Article 6, Section 4, if the County chooses to fill a vacant shift or part thereof, it shall use employees in the classification in which the vacancy occurs "on a rotating seniority basis for employees who are available." The language of Article 6, Section 4, also requires the County to make a "good faith effort" to offer the assignment by telephone contact. Any inference that this procedure takes precedence over the procedure set forth in Article 6, Section 1(F), *supra*, is rebutted by the final sentence of Article 6, Section 4, *i.e.*, "Nothing contained herein shall preclude the County from calling an employee early or extending an employee's shift to cover a vacant regular full-time shift or part thereof."

At hearing, the Grievant, who has been with the County for more than three and one-half (3½) years, testified that overtime in the County is filled in two ways, *i.e.*, selecting available shifts from the schedule on the basis of rotating seniority or, if there is short notice, offering the overtime to available officers on the basis of rotating seniority. According to the Grievant, if the vacancy remains unfilled, then the County may force an employee. Sgt. Simacek responded that this was not the first time that he had filled a shift vacancy by splitting the overtime between shifts, but that this is not his preferred method. According to Sgt. Simacek, his preferred method is to call and offer available overtime on the basis of the seniority list.

Assuming *arguendo*, that the Grievant is correct when she states that the County has filled short-notice vacancies, such as Officer Wedell's, by calling-in employees on the basis of seniority, such a fact would create neither a binding past practice, nor a condition of employment required to be maintained under Article 4, Maintenance of Standards. Given the discretion granted to the County under Article 6, Section 1(F), discussed above, as well as the rights recognized in the last sentence of Article 6, Section 4, the County's past conduct reflects nothing more than a choice of a contractual option. By choosing one contractual option in the past, the County has not waived its right to choose another contractual option in the future.

Conclusion

In filling Officer Wedell's vacant shift, the County has exercised rights granted to the County under the language of Article 6 of the parties' collective bargaining agreement. It follows, therefore, that the County has exercised its management rights consistent with the

provisions of Article 3. Article 4, Maintenance of Standards, cited by the Association, does not provide the Grievant or the Association with any right that supersedes those granted to the County in Article 6.

Contrary to the assertion of the County, the record does not establish that this grievance is frivolous. The record provides no reasonable basis to grant the County's request for the extraordinary remedy of attorney's fees. Accordingly, this request has been denied.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate Articles 3 and 6 of the parties' collective bargaining agreement when the Employer failed to offer available overtime hours to the Grievant on January 20, 2007.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 15th day of November, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

