

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)**

and

**MILWAUKEE COUNTY DEPUTY SHERIFF'S ASSOCIATION**

Case 629

No. 67172

MA-13788

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**Appearances:**

**Matthew L. Granitz**, Cermele & Associates, S.C., Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, appeared on behalf of the Association.

**Timothy R. Schoewe**, Deputy Corporation Counsel, 901 North 9<sup>th</sup> Street, Milwaukee, Wisconsin, appeared on behalf of the Employer.

**ARBITRATION AWARD**

Milwaukee County Deputy Sheriff's Association, herein referred to as the "Association," and Milwaukee County (Sheriff's Department), herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Milwaukee, Wisconsin on December 20, 2007. Each party filed a post-hearing brief, the last of which was received February 19, 2008. On February 21, 2008, the Association moved to strike the Employer's primary brief because it was filed late. The parties were afforded an opportunity to argue the motion and I issued a decision allowing the brief on February 29, 2008, and the record was closed as of that date.

**ISSUE**

The parties stipulated to the following statement of the issues:

1. Did the Employer violate Section 3.02 of the Agreement when it did not assign Deputy Sawczuk to overtime on January 24, 25, and 26, 2007?
2. If so, what is the appropriate remedy?

**RELEVANT AGREEMENT PROVISIONS**

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**3.02 OVERTIME**

- (1) All time credited in excess of eight (8) hours per day or forty (40) hours per week shall be paid in cash at the rate of one and one-half (1½) times the base rate, except that employees assigned to continuous jury sequestration shall be paid sixteen (16) hours at their base rate and eight (8) hours at the rate of time and one-half (1½) times the base rate for each 24-hour period of uninterrupted duty, and except that first shift hours worked in excess of forty (40) per week shall be paid at the rate of one and one-half (1½) times the base rate.
- (2) Overtime needs and required staffing levels shall be determined by the Sheriff.
- (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.
  - (c) In the event an employee refuses to accept an overtime assignment or there are insufficient volunteers for the work unit where overtime is required, the least senior employee in the classification in the work unit shall be required to work the overtime assignment.
  - (d) Employees will not be scheduled for overtime when they are liquidating accrued time off or during an approved leave of absence or disciplinary suspension.
  - (e) For an event identified by the Sheriff as a Special Event, the above procedure shall be utilized on a departmental basis. In the event there are insufficient volunteers for a Special Event overtime assignment the Sheriff shall rotate in the inverse order of seniority among all employees in the department in the classification.

- (f) Employees shall not be permitted to volunteer to work during a period of scheduled vacation, personal time, holiday time or compensatory time unless approved to work by the Sheriff. However, for Special Events as defined in (e) above, employees shall have the opportunity to work overtime hours in accord with the above procedures when they are on vacation, on their normal off-days, or are using holiday or personal days only under the condition that the Sheriff's Department is under contract to be reimbursed for the non-tax levy overtime expense incurred for the Special Event.
- (4) Employees shall have the option of accumulating one hundred twenty (120) hours of compensatory time, exclusive of holidays, in lieu of cash, within twenty-six (26) pay periods, provided that such compensatory time may be liquidated only with the consent of the department head and if the County determines staffing is adequate and if no overtime assignment will result employees will be allowed to liquidate their accrued compensatory time. If, because of the needs of the department, such compensatory time is not liquidated within the time limited, the unliquidated balance shall be compensated in cash.
- (5) Any overtime in excess of thirty-two (32) additional hours worked in a pay period will require the advanced approval of the Sheriff or his designee.

### **3.03 CALL IN PAY**

Any employee called in to work outside of regular shift hours or responding to subpoenas shall receive a minimum of three (3) consecutive hours of pay at overtime rates. Multiple call-ins shall not result in the payment of the minimum for each call when more than one response is within the three (3) hours until the actual hours worked exceed three (3) hours.

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### **FACTS**

The Department is headed by the Sheriff of Milwaukee County and performs the law enforcement function at the county level. The Association represents sworn personnel of the Department. Deputy Mary Sawczuk is a sworn sheriff's deputy and is a member of the bargaining unit represented by the Association. She has been a deputy for 13 years. She was assigned to the courts division at all relevant times, including January, 2007. She was normally assigned to work 9:30 a.m. to 5:30 p.m., Monday through Friday.

She signed an overtime posting pursuant to Section 3.02 of the agreement. For the purposes of decision, she was the senior employee to sign the posting for, among other dates, January 24, 25, and 26, 2007. She was not assigned any overtime on those dates.

Sergeant Gary Coleman is the supervisor of the courts division. He makes the decision as to who will be called for overtime. On each of January 24, 25, and 26, 2007, he had 4 hours of overtime, 8:00 a.m. to 12:00 a.m. which he determined to fill. He decided to call in less senior deputies from other divisions to perform the overtime. They were:

	Deputy	Time	Division	Duty
Jan. 24	Mickelson	8:00 -12:00		holding cell
Jan. 25	Avila Kveen Davis Bloomberg Gerasopoulos	10:00 to 12:00 <sup>1</sup>		Hon Flanagan Hon. Yamahiro holding cell holding cell Reserve Judge
Jan. 26	Mickelson Avila Desotell Villwock Thrower			holding cell Hon. Flanagan Hon. Murry Hon. Van Grunsven Reserve Judge

While they worked continuously in their assignment, there was no dispute that the work could theoretically have been divided with Deputy Sawczuk performing overtime 1.5 hours from 8:00 a.m. to the beginning of her shift 9:30 a.m. each day and non-division off-duty deputies to perform the work 9:30 to 12:00 a.m. He choose not to do so because the deputy called in with less than 2.5 hours work would have received 3 hours call-in pay under Section 3.03 of the Agreement.

The Union filed a grievance and pursued the same through the grievance procedure to arbitration.

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<sup>1</sup> Deputy Gerasopoulos is on the bomb squad. He had an unexpected bomb call that day and was late. He was scheduled to start at 8:00 a.m. Sergeant Coleman did not have enough time to make other arrangements after he first learned of the emergency

## **POSITIONS OF THE PARTIES**

### **Association**

The Employer violated Section 3.02 when it did not award Deputy Sawczuk the overtime in question. Section 3.02 is clear and unambiguous as to who should be awarded overtime. If there were any question, the language contains express exceptions to seniority. The expression of certain exclusions should be taken to eliminate other potential exclusions. There is no dispute in this case that deputies not assigned to the court division worked the overtime in dispute. The Association relies upon a decision by the Employer's labor relations division and a prior arbitration award relating to support its position. The Association notes that the Employer's reason for its action, that Deputy Sawczuk was not available to work the full four hours of overtime called for in this situation, is not one of the reasons listed in the agreement. The Association asks that the arbitrator sustain the grievance and order the Employer to make Deputy Sawczuk whole for all lost wages.

### **Employer**

The Employer takes the position that it did not violate Sec. 3.02 of the agreement. While the facts are in dispute, the application of the provision is in dispute. To have granted her overtime would have engendered another search for a deputy to complete the assignment when the grievant returned to her regular duties. She would have had to return to her regular duties 1.5 hours into the overtime and the Employer would, therefore, have had to find a second person to complete the overtime. There is no requirement to let her start her normal shift early in order to allow her to work overtime. Association president Felber agreed on this point in his testimony. Accordingly, the grievance should be dismissed.

## **DISCUSSION**

It is the responsibility of the arbitrator to interpret the parties' collective bargaining agreement. In this regard, the arbitrator uses the method of analysis recognized by arbitrators and the courts and well known to the parties herein. The Association's main argument is that Article 3.02 is clear and unambiguous in that it specifies the only exceptions to assigning overtime by seniority. I don't agree. For example, Article 3.02 has one exception that is so obvious that no one bothered to list it. The Employer does not have to assign overtime to an employee while that employee is working his or her normal work hours. The parties agree the Employer ordinarily does not have to reschedule an employee's regular hours in order that an employee be able to exercise his or her seniority right to work overtime.

Section 3.02 (2) gives the Sheriff the authority in good faith and for legitimate management reasons to determine when overtime is needed, the duties to be performed, the amount of overtime and the number of deputies needed to perform the work. It is unclear whether this provision gives the Sheriff the right to schedule a block of overtime for an assignment and insist that it be performed by the same deputy. The remainder of Section 3.02

specifies how a deputy is selected to perform overtime. The conflict between that right and the potentially conflicting rights of the Sheriff in Section 3.02 (2) makes this provision ambiguous.

The parties have agreed that the work in question could have been divided between Deputy Sawczuk and another deputy. The Employer has not articulated any management reason why the work would have had to have been performed by a single deputy.<sup>2</sup>

The sole reason for the Employer's decision to use only one deputy is that the deputy other than Deputy Sawczuk would have received a minimum three hour call in pay under Article 3.03. Article 3.03 exists for the purpose of discouraging the Employer from calling deputies for less than three hours of overtime. The policy of this provision is that the Employer is generally entitled to structure overtime so that an employee who is called in does work three hours. The specific policy of this provision is entitled to weight when it is significantly implicated. There was no evidence in this case as to the extent to which the Employer has avoided call-in overtime of less than three hours in other situations.

The remaining question is whether Article 3.03 is significantly implicated. The additional call-in pay which the Association's view would have entailed less is than one hour additional pay for the second deputy on each day. In the scope of the nature of overtime in policing, this amount of call-in penalty is minimal. I conclude that Article 3.03 is not significantly implicated. Therefore, since the Employer has not articulated an applicable exception to calling the grievant for overtime, the grievance is properly sustained.

### AWARD

That since the Employer violated Article 3 by failing to grant Grievant the disputed overtime, the grievance is sustained. The Employer shall make Grievant whole for all lost wages and benefits.

Dated at Madison, Wisconsin, this 3rd of March, 2008.

Stanley H. Michelstetter II /s/

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Stanley H. Michelstetter II, Arbitrator

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<sup>2</sup> No decision is expressed or implied if there had been a legitimate management reason falling within Section 3.02(2) to use a single deputy. The result in this case is based upon an interpretation of the agreement as a whole and not the "legitimate management" concept. While it is generally easier for a supervisor to deal with scheduling one employee rather than two for overtime, Section 3.02(2) does not confer authority to disregard the overtime selection merely because it is easier to do so. It is confined to "overtime needs" and "staffing levels."

