

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MANITOWOC COUNTY SHERIFF'S DEPARTMENT EMPLOYEES,
LOCAL 986-B, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

MANITOWOC COUNTY (SHERIFF'S DEPARTMENT)

Case 422

No. 67457

MA-13904

(Supervisors Covering Call-Ins)

Appearances:

Mr. Joseph Guzynski, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2602 College Street, Manitowoc, Wisconsin 54220, appearing on behalf of the Manitowoc County Sheriff Department Employees.

Mr. Steven J. Rollins, Corporation Counsel, Manitowoc County, 1010 South Eighth Street, Manitowoc, Wisconsin 54220 appearing on behalf of the County of Manitowoc.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Manitowoc County Sheriff Department Employees, Local 986-B, AFSCME (hereinafter referred to as the Union) and Manitowoc County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute regarding the decision to have a supervisor cover portions of a shift for an absent employee. The undersigned was so assigned. A hearing was held on February 19, 2008, at the Manitowoc County Administration Building in Manitowoc, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted briefs which were exchanged through the undersigned on March 6, 2008, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

ISSUES

While there was no substantial disagreement, the parties were unable to stipulate to a statement of the issue, and agreed that the Arbitrator should frame the issue in his Award. The Union believes the issues to be:

Did the Employer violate the collective bargaining agreement when it utilized nonunion personnel to fill a Telecommunicator partial shift on January 18, 2007 and March 6, 2007? If so, what is the appropriate remedy?

The County believes the issue to be:

Did the Employer violate the collective bargaining agreement on January 18, 2007 and on March 6, 2007 when a Supervisor worked the first half of a shift instead of calling in a union employee following the procedure in Article 23-1-3 to replace a dispatcher who called in sick? If so what is the remedy?

The County's statement accurately sets forth the issue and is adopted as the Statement of the Issue.

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE 3- MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

...

ARTICLE 23-OVERTIME - COMPENSATORY TIME - HOLIDAY PAY

1. The employees and Union acknowledge that reasonable overtime which is assigned must be accepted. It is further understood and agreed that overtime shall be distributed as follows:

...

3. . . . For positions in PSJS, when there is a need to fill vacant shifts, the Employer will first call those employees, in order of greatest seniority, for whom the additional hours will not result in overtime. If unfilled work hours remain, employees for whom the additional work time would be overtime shall be called in order of greatest seniority. PSJS employees may waive their right to being called for overtime by submitting a written request to not be called for overtime to their supervisor. This is an annual election which cannot be rescinded. Such a request does not apply to situations when overtime is being mandated.
4. Once overtime for union employees has been offered to and refused by all union employees, it may be offered to and accepted by non-union employees. Subsequently, once non-union overtime has been offered to and refused by all non-union employees, it may then be offered to and accepted by union employees.
5. Except for unusual circumstances, when scheduling overtime to be worked, employees will not be allowed to work more than eight (8) consecutive work days. Exceptions to this are Emergency Government, and training. These may be scheduled at any time regardless of the number of consecutive days being worked either prior to or after ~ ~ these assignments.
6. When overtime is mandated it shall be done on a rotational basis, from least senior employee to most senior employee.

...

BACKGROUND

The Employer provides general governmental services to the people of Manitowoc County, Wisconsin. Among these services is the operation of a Sheriff's Department and Jail. The Union is the exclusive bargaining representative for, among others, the County's Telecommunicators. These grievances concern the performance of dispatch work by a supervisor on two occasions. On January 18, 2007, a second shift employee called in sick for the 2:00 p.m. to 10:00 p.m. shift. A supervisor performed the absent employee's work from 2:00 to 5:30. A similar situation occurred on March 6, 2007, again on the second shift, when a supervisor covered the first four hours of an absent employee's shift. These grievances challenge the failure of the County to use the call-in procedures of Article 23 to fill these partial shifts.

Additional facts, as necessary, are set forth below.

THE POSITION OF THE UNION

The Union argues that management surely retains the right to determine staffing levels, and can elect not to fill in for absent employees. Here, however, management did elect to fill vacancies due to sick call-ins, and chose to ignore the plain terms of the contract in doing so. The contract could not be clearer: "when there is a need to fill vacant shifts, the Employer **will first call those employees**, in order of greatest seniority, for whom the additional hours will not result in overtime. If unfilled work hours remain, **employees** for whom the additional work time would be overtime **shall be called in order of greatest seniority.**" Only when there are no unit employees available or willing to work the overtime may the work be offered to non-unit employees. This procedure dictates how a vacant shift is to be filled. It does not require that the person filling it themselves be working overtime. Thus the fact that the supervisor who worked these shifts did not earn overtime is beside the point.

The arbitrator should dismiss as irrelevant the supervisor's testimony at hearing that she and other supervisors have performed bargaining unit work sometimes to cover employee breaks. That is an entirely different situation than a call-in and does not somehow create an exception to the contract's clear terms. The more telling testimony came from long-time dispatcher Laurie Sales, who testified that these are the only two instances in her memory in which a supervisor has failed to call-in coverage for a sick call-in, and has instead performed the work herself. Neither the contract language, nor any past practice, allows for this. The arbitrator should, accordingly, sustain the grievances and order that the Employer make the affected employees whole.

THE POSITION OF THE COUNTY

The County takes the position that Article 23 has no application to this situation and, as that is the provision relied upon by the Union, there is no contractual basis for a grievance. In both of these instances, an employee called in sick. The supervisor determined that there was no need to call-in another employee immediately, because between the available bargaining unit personnel and the supervisor, the Joint Dispatch Center was adequately staffed for the first half of the shift. That is obviously a decision within the discretion of management. In both instances, the supervisor also determined that additional staffing was needed for the second half of the shift. The contractual overtime call-in procedure was used, and a bargaining unit member was called in. Given that no one was called in for overtime for the first half of these shifts, there can be no violation of Article 23. Thus the arbitrator must conclude that the grievance lacks merit, and should deny it.

DISCUSSION

Both parties agree that the County may choose not to fill a vacant shift, as part of its management right to determine staffing levels and levels of service. The County's defense of its actions depends upon the arbitrator's acceptance of its explanation that it did not fill the vacant shift on either January 18 or March 6, because it was able to cover the work with a supervisor without paying overtime to anyone. That argument, although ingenious, is largely an exercise in semantics. The County obviously filled the vacant shift. It did so by having the supervisor perform the absent employee's duties rather than her own for the first half of the shift. Providing intermittent break coverage is part of a supervisor's responsibilities, and supervisors will occasionally pick up a ringing line if the Telecommunicators are all busy. That does not make working a console for half a shift as a unit Telecommunicator part of the supervisor's normal duties.

The lack of an overtime payment to the supervisor for these partial shifts is beside the point. While Article 23 is titled "Overtime", the substance of subsection 3 is devoted to how vacant shifts will be filled, if the County chooses to fill them. It is a procedure, and the obligation to follow the procedure does not turn on whether overtime is paid. Indeed, the first option under the provision is to call in employees for whom the extra hours would not result in overtime.

Article 23, Section 3 dictates the procedure for filling vacant shifts if the County chooses to fill them. By shifting a supervisor from her normal duties to covering a console for the first half of the shift on January 18 and March 7, 2007, the County filled those shifts without following the negotiated sequence of offering extra hours to bargaining unit employees before the hours are offered to non-unit employees. I therefore conclude that the County violated the collective bargaining agreement.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer violated the collective bargaining agreement on January 18, 2007 and on March 6, 2007 when a Supervisor worked the first half of a shift instead of calling in a Union employee following the procedure in Article 23-1-3 to replace a dispatcher who called in sick.

The appropriate remedy is to pay the senior available employee who would have been called in for the three and one half hours worked on January 18 and the senior available employee who would have been called in for the four hours worked on March 6, had the County followed the procedures specified in Article 23, at the appropriate rate of pay.

Dated at Racine, Wisconsin, this 8th day of April, 2008.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator