

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF GERMANTOWN

and

THE LABOR ASSOCIATION OF WISCONSIN, INC., for and on behalf of
THE GERMANTOWN COMMUNICATIONS OFFICERS' ASSOCIATION

Case 67
No. 66703
MA-13604

(Bowen Overtime/Staffing Grievance)

Appearances:

Kyle J Gulya, Attorney at Law, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, WI 53201-3262, appeared on behalf of the Village of Germantown.

Benjamin M. Barth, Labor Consultant, The Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, WI 53022, appeared on behalf of The Labor Association of Wisconsin, Inc., The Germantown Communication Officers' Association and Pat Bowen.

ARBITRATION AWARD

The Village of Germantown and The Labor Association of Wisconsin, Inc., for and on behalf of its affiliate local, The Germantown Communication Officers' Association, are Parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association concerning one of its local members, Pat Bowen, herein Bowen or Grievant, as to overtime and the staffing of vacancies. From a panel the Parties selected Paul Gordon, commissioner, to serve as arbitrator. Hearing was held on the matter on July 20, 2007 at Germantown, Wisconsin. No transcript was prepared. A briefing schedule was set, and extended by request of the parties, and the record was closed on November 14, 2007.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did the employer violate the collective bargaining agreement and the scheduling changes memorandum dated March 19, 2004 when it failed to offer overtime to the grievant on December 1, 2006?

If so, what is the appropriate remedy?

The Village states the issues as:

Did the Village violate the collective bargaining agreement by not offering available overtime to the grievant?

If so, what is the appropriate remedy?

The Party's statements of the issues are very similar. The Association's statement is selected as that which more closely reflects the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

Section 3.01: The Village possesses the right to operate the Police Department and all management rights repose in it. These rights include, but are not limited to, the following:

- A. To direct all operations of the Police Department.
- B. To establish reasonable work rules and schedules of work consistent with the terms of this Agreement.
- C. To hire employees and to schedule and assign overtime for employees.
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause.
- E. To lay-off employees from their duties because of lack of work or any other legitimate reasons.
- F. To maintain efficiency of Police Department operations.
- G. To take whatever action is necessary to comply with State or Federal law.
- H. To introduce new or improved methods or facilities.
- I. To change existing methods or facilities.
- J. To determine the methods, means, and personnel by which Police Department operations are to be conducted.
- K. To determine the kind and amount of training to be provided to employees.
- L. To take whatever action is necessary to carry out the functions of the Police Department in situations of emergency.
- M. To determine the kinds and amounts of services to be performed as pertains to Police Department operation; and the number and kind of classifications to perform such services.

ARTICLE V – GRIEVANCE PROCEDURE

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Section 5.05: The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any

issue presented that is proper for final and binding arbitration. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall confine himself to the precise issue(s) submitted for arbitration. The decision of the arbitrator within the limits of his authority shall be final and binding on the parties.

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ARTICLE VI – SENIORITY CLAUSE

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Section 6.03 – Shift Preference: Dispatchers shall be assigned shifts by seniority preference. During the month of October of each calendar year, but no later than the 1st of the month, the Employer shall post shifts for the forthcoming calendar year. Posting will close November 1st. The employees shall bid for the shifts, and where more employees bid for a shift than there are openings, the most senior employee(s) bidding for the shift shall be awarded their shift selection. Employees whose initial selection is not approved shall be given an opportunity to bid on the shifts that remain open until all shifts are filled. Employees shall be advised of the shift assignments as soon as possible, but not later than November 15th. The shift assignments shall go into effect as of January 1st of each year, or as soon as practicable, thereafter.

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ARTICLE XII – WORK DAY AND WORK WEEK

Section 12.01 – Work Day: A normal work day for all employees shall consist of working eight (8) consecutive hours on an established shift. All employees shall be entitled to a thirty (30) minute paid lunch break during the tour of their shift. Employees shall have at least sixteen (16) hours off between shifts except for the employees on relief shift or if mutually agreed otherwise between the employee and the Employer. The shifts shall be as follows:

First Shift will commence at 6:00am and end at 2:00pm.

Second Shift will commence at 2:00pm and end at 10:00pm

Third shift will commence at 10:00pm and end at 6:00am

Section 12.02 – Work Week Cycle: The normal work week cycle for dispatchers shall be five (5) days on duty followed by two (2) days off, followed by four (4) days on duty followed by two (2) days off and then repeating the cycle.

Section 12.03 – Work Day and Work Week: There shall be no change in the starting times of the shifts during the term of this Agreement.

ARTICLE XIV – OVERTIME

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Section 14.03 – Call-in Time: Employees who are called in to work on other than regularly scheduled time shall be entitled to at least two (2) hours of work, or pay therefore, at time and one-half (1-1/2) regardless of the length of time less than two (2) hours which they may work. An employee is not entitled to the two (2) hour call-in when the employee is instructed to report early for a particular shift, is required to remain after the close of his shift, or is called in for an entire eight (8) hour shift.

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ARTICLE XV – STAFFING PROCEDURE

Section 15.01: Communication Officer staffing vacancies shall be resolved by the Communications Supervisor or supervisor on duty, through following these sequential steps:

1. Fill the vacancy with the regular full-time dispatcher working a relief shift, with a practicable change of reporting time.
2. Assign the off-duty dispatcher normally scheduled to work the hours which require a replacement.
3. Assign on a seniority basis the full-time dispatchers not scheduled to work.
4. Assign extended hours equally to the dispatcher on duty and the dispatcher next scheduled to work. With the concurrence of the supervisor and the individuals involved, extended hours may be assigned on an other than equal basis.
5. However, at the employee's option, he/she can work both of their off-days.

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ARTICLE XXXIV – CONDITIONS OF AGREEMENT

Section 34.01: This Agreement constitutes an entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

BACKGROUND AND FACTS

The Communications Officers in the Village of Germantown are scheduled to work in three eight-hour shifts: First, 6:00am to 2:00pm; Second, 2:00pm to 10:00pm, and; Third, 10:00pm to 6:00am.¹ The Village, through the Chief of Police, sets the minimum staffing

¹ By agreement of the Parties these shift times now have an additional half-hour added to the ending times.

levels. First shift is one, Second shift is two and, Third shift is one. Pursuant to Section 6.03 of the Parties' collective bargaining agreement, shifts are assigned by seniority preference, with the employees bidding of shifts prior to the start of the calendar year. Sometimes the shifts are staffed above the minimum levels. Overtime opportunities are assigned by management. Staffing vacancies are resolved pursuant to Section 15.01 of the collective bargaining agreement.

On Thursday, November 30, 2006 there was a weather forecast for a possible sever snowstorm in the Germantown area on Friday, December 1, 2006. On Thursday Captain Snow decided to alert certain Communications Officers, other than the one who was already scheduled to work First shift on Friday, about the possibility of working on First shift the next day in addition to the Communications Officer already scheduled for First shift. The Communications Officers contacted were the one who would already be working the third shift (the shift from 10:00pm Thursday to 6:00am Friday) Tracy Drew, and Joyce Schweitzer, who was scheduled to work Second shift on Friday. Drew would stay over and work, Schweitzer would come in early and work, were it determined that one or both were needed. Drew worked her regularly scheduled Third shift which started at 10:00pm Thursday. At the end of Drew's shift she was sent home by the Lieutenant in Charge, and she did not work after the end of her shift on Friday morning. Schweitzer had not yet been contacted to actually come in to work by the time Captain Snow arrived, which was after Drew had already left. Snow then checked the weather radar and at about 7:00am discussed with Chief Hoell the worsening weather conditions. After that discussion Snow then had Schweitzer contacted to report to work early Schweitzer came in and worked from 9:00 am on Friday to the beginning of her regular shift at 2:00pm, which she also worked. She was paid for working overtime on Friday, December 1st. Snow's reasoning for calling in Schweitzer early was because she was already scheduled to come in for the Second shift, she would then be the only one needing to travel during the snowstorm in that Drew had already left, and she had already been contacted about the possibility of coming in early. Snow did not consider Section 15.01 of the agreement to be applicable because, in his view, he was not filling a vacancy that was part of minimum staffing. Rather, he felt he was adding additional personnel above that.

Grievant is a Communications Officer. Grievant lives closer to the Department than does Schweitzer, with travel time in ideal conditions being about seven minutes and thirty minutes, respectively. Grievant's regularly assigned shift is First shift, and December 1, 2006 was a regularly assigned off-day for her. She had not been contacted on Thursday about the possibility of working on Friday during the First shift. She was not contacted on Friday or called to report in to work during the First shift, and she did not work during the First shift that day. When she became aware that Schweitzer had worked from 9:00 a.m. to 2:00 p.m. on Friday in addition to her regular shift, Grievant then submitted an overtime card for the eight hours of 6:00am to 2:00pm for Friday, December 1, 2006. She feels that a vacancy is when the Department needs another dispatcher. She felt that the Department's use of Communications Officers in addition to the one already scheduled to work First shift on December 1st was a vacancy governed by Section 15.01 of the collective bargaining agreement. She felt that had the sequence in that provision been followed, she would have been

assigned the overtime hours because a relief shift Officer was not available and she would then be called in as an off-duty dispatcher normally scheduled to work those hours. She would have accepted the hours if she had been contacted pursuant to the procedures in Section 15.01. This overtime card was denied by the Department.

A very similar procedure under Section 15.01 of the Communications Officers' agreement has been in the Parties' agreements since at least 1994.

The Association also represents the Village of Germantown Professional Police Officers' Association, which has a collective bargaining agreement with the Village. Section 5.07 of that agreement, which has remained essentially unchanged since at least 1993, is similar to, but not exactly the same, as Section 15.01 of the Communication Officer's agreement. The Police Officer agreement Section 5.07 states:

Section 5.07 – Officer Staffing Procedure: Officer staffing problems shall be resolved by the supervisor on duty by following these sequential steps:

1. Assign the relief-shift officer next scheduled to work with a practicable change of reporting time.
2. Assign an officer not scheduled to work but normally scheduled during the hours which require a replacement on a seniority basis.
3. Assign on a seniority basis the officers not scheduled to work.
4. Assign extended hours either or both to an officer on duty and to an officer next scheduled to work on a seniority basis

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This provision was the subject of two prior grievance arbitration awards between the Professional Police Association and the Village: the Yaeger 1995 award, and; the Bielarczyk 2001 Award. Under the facts and circumstances of those particular cases, the Village was found to have not been in violation of Section 5.01.

After the 1995 grievance arbitration award both the Communications Officers Association and the Village submitted different proposals for what is now Section 15.01, for interest arbitration of the 1996/1998 agreement. Both proposals, one of which was optional as submitted by the Village, differ from the current language. There were several different proposals other than those for Section 15.01 which were part of the interest arbitration process.

As to Communications Officers, the Village has followed Section 15.01 when filling what it perceives as vacancies below the minimum staffing levels. If the minimum staffing level for any given shift is already filled, the Village does not consider it to be filling a vacancy if additional Officers are worked above the minimum staffing levels. In those situations the Village has not followed Section 15.01. It has used the Department's Management's discretion. The Department does not use Section 15.01 in staffing special assignments, such as municipal court duty.

The Village often, but not always, fills available overtime hours above normal staffing levels through shift extensions rather than calling in the most senior bargaining unit member or following the provisions of Section 15.01. Also, in emergency situations the Village sometimes extends the shift of an Officer already scheduled to work. An example of this is for the evening of December 1, 2006, when Drew was called to work two hours before the start of her regular shift because another Communications Officer who would otherwise be working then had become injured at work. The Village has called in Grievant early to work overtime as an extension of her regular shift on the occasion of a snow storm that occurred on February 16, 2006. Sometimes the Village does contact the most senior member if there is available overtime. The Department has a calendar which Officers can sign to indicate their availability to work overtime which the Department knows will be available. This sometimes includes vacant shifts that the Department knows it need to fill. Communications Officers can sign this calendar to note their willingness to work the overtime on the various days and shifts available. The Department makes some use of the calendar to fill vacancies at step 3 of section 15.01 when it is filling vacancies below the minimum staffing levels. The Department does use the calendar to see who is available for other overtime opportunities, such as short notice overtime.

On March 19, 2004 the Communications Supervisor sent a memorandum to the Association President to attempt to clarify questions concerning scheduling. It provided in pertinent part:

SUBJECT; Scheduling Changes

Here is a list of items I would like you to discuss with you in regards to scheduling guidelines/clarifications:

For all overtime, a Communications Officer volunteering to work a full shift will get priority over someone volunteering for less than a full shift regardless of seniority.

On a call in basis for short notice overtime, every available Communications Officer will be called and offered the full shift prior to the shift being split by others wanting to work less than the full shift. It may be necessary to call back a Communications Officer who requests a half shift after no one else volunteers to work the full shift.

Regardless of the date, a Communications Officer having three shifts in a row off is considered to have the day off when being considered for an overtime call in. Example: If you work 1st shift on Monday, but are off on Tuesday, you would be offered a Monday night 3rd shift overtime opening.

The limit on two Communications Officers off per day includes vacation, comp, or personal days.

On a case by case basis, additional personnel would be allowed to use comp time on days when two people are already scheduled off, provided minimum staffing levels are met. This type of approval is based on activity level at the time of the request and is only available at the end of a shift. The approval can be rescinded if the activity level increases prior to the Communications Officer leaving.

Comp time is available in any increment at the beginning or the end of a shift, provided it does not require overtime to fill it. Comp time is not allowed to be used for a portion of the middle of a shift.

Overtime shifts will be assigned two weeks (14 days) in advance when possible. If a shift is posted less than 14 days in advance, it will be assigned as soon as it has been determined that everyone who is available to sign up for it has worked a scheduled shift and should have seen it, or has been notified of the opening.

Any Communications Officer trading shifts with another Officer who is working the relief shift position must be available to change work hours as would be necessary of the relief shift schedule.

Any vacation requests submitted less than 48 hours in advance will be granted only if the shift can be filled voluntarily.

If you have any questions or other items you would like to discuss, please let me know. Thank you.

(Emphasis supplied)

This memorandum never became memorialized as an agreement in any collective bargaining agreement between the Parties or as a side letter to any collective bargaining agreement.

After the Village denied payment of the overtime on the timecard Grievant filed for December 1, 2006, the Association filed a grievance over the matter. The Grievance raised an issue of whether the Grievant should have been offered the available overtime on December 1, 2006. It alleged a violation of Section 15.01 of the Party's agreement, particularly step 2 therein. The Grievance also alleged this was an unreasonable exercise of the employer's management rights. The Village denied the grievance and this arbitration followed. Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Association

In summary, the Association argues that the Grievant is entitled to eight hours of overtime pay for the error the Department made when it did not offer the available overtime to her on December 1, 2006 in accordance with Section 15.01 of the agreement. The language in the collective bargaining agreement is clear and unambiguous. The arbitrator cannot ignore clear cut contract language, since to do so would usurp the role of the labor organization and

the employer, citing arbitral authorities. The Grievant's entitlement to eight hours of overtime is supported by the clear language in the contract. Section 15.01 mandates that any staffing vacancies be offered to members of the Association based on steps 1-4, as listed in Section 15.01. Contrary to the Village argument about applying only to minimum staffing levels, nowhere in Section 15.01 does it state that that Section is only to fill vacancies below the minimum staffing levels. It doesn't mention staffing levels. It mentions staffing vacancies. Section 15.01 requires the Department to fill all staffing vacancies pursuant to the procedure that was bargained by the parties.

The Department failed when filling the vacancy and must be held accountable. The first option in the language did not exist as the relief shift employee could not be moved. The second option was to call the off-duty dispatcher who normally works the shift in which a vacancy occurs. This never happened. Grievant works First shift, was off-duty and available to work the overtime. When the Department made the decision the night before to staff First shift on December 1st with two dispatchers, they had enough time to contact employees pursuant to Section 15.01. The Department was required to contact all off-duty employees who normally work First shift to offer the staffing vacancy to them. This is where the Department failed. It went from step 1 to step 4 when it contacted Schweitzer to come in early for her shift to cover a vacancy.

The Association argues that the crux of the case is how to compensate Grievant for the lost opportunity to work overtime. Arbitral authority requires the remedy to be an award of compensatory pay.

The Association also argues that there is no bona fide past practice which would provide support for the Village interpretation of the language over several contracts. In order for a past practice to be valid several conditions must be met, including mutual understanding and agreement. As to understanding, there has not been a meeting of the minds as to how the Department uses Section 15.01 to fill staffing vacancies. The Department has never informed the Association of their interpretation of Section 15.01 as only applying to minimum staffing levels. Grievant and Drew testified the Department follows Section 15.01 when filling all staffing vacancies. Without the Association's mutual understanding of the Village position, there cannot be any mutual agreement that the Village's interpretation is correct. The Village does not have a qualified past practice.

The Association also argues that the past Police grievance arbitration decisions have no merit to the present grievance. These both related solely to the Germantown Professional Police Association and both deal with special assignments. This case deals with an assignment that all members could handle. This was predictable and certain. It was not a special assignment. Any argument that the two Police grievance arbitrations relate to this instant case should be rejected because this overtime assignment was not considered a special assignment.

The Association further argues that several facts in the Village arguments are distorted and irrelevant to the issues. The Village has more than one bargaining unit within the Police Department. The language in Section 5.07 of the Police agreement is not the same as Section 15.01 in this case. The Village has used the other arbitrations with the Police language

to try to prove a past practice. This falls short for Communications Officers overtime. And, the existence of the scheduling changes memorandum substantiates that the Village does not have a consistent past practice in how it administers Section 15.01. If the prior arbitration awards were controlling then the memorandum would not be necessary. The contract is clear that all staffing vacancies must follow the guidelines set forth in Section 15.01. Nowhere in the language does it state this section only applies for vacancies to meet minimum staffing and will not apply for vacancies that are above the minimums. It does not require the Department to only fill staffing vacancies by seniority. For the Village to state that it is the Association's position that all staffing vacancies must be filled by seniority is a gross misunderstanding of the Association's position, which is that all staffing vacancies must be filled following the clear and unambiguous guidelines set forth in Section 15.01. Further, the Village did not provide evidence that any of the factors listed by Captain Snow were used in the decision not to contact the Grievant for the call in overtime. Grievant would have been able to respond rather quickly. Schmidt takes seniority into account in some circumstances. Management witnesses testified that any Communications Officer could have performed the work. The factors used to administer overtime to Communications Officers are not consistent within the Department. And, the interest arbitration award has no indication that the Village offer was selected because of language changes related to Section 15.01. The Village inference is preposterous. Statutory criteria were analyzed and the Village argument is simplistic. Finally, the Association notes that specific contract language outweighs general contract language, and the Village is asking that more general language as to efficiency should override the specific language in Section 15.01. This was not an emergency. The only reason this became a last minute issue was because of the decision made by the Department to send home the Communications Officer who was put on notice that she may have to stay to cover a vacancy that the Department created. The Association should not be held accountable for poor decisions that the Department makes.

Village

The Village argues, in summary, that the contract was not violated when the Department offered these overtime hours. Section 15.01 only applies to vacant shifts that are part of the Chief's minimum staffing requirement and the Section does not apply to general over time opportunities - only to vacant shifts. Bargaining history demonstrates the parties understood this limitation. To construe Section 15.01 any other way creates inefficiency. And the two prior arbitration awards for Section 5.07 of the Police contract have presidential value, which the Village relied on for many years. The Village argues that the language of Section 15.01 only applies to filling vacancies in regularly scheduled shifts. The Department is not restricted in how it offers available overtime hours that are not part of normal minimum staffing levels. "[S]taffing vacancies", when read in conjunction with all of Section 15.01 and Section 12.01 rationalized the Departments application. Section 12.01 establishes shifts. The Section 15.01 term "staffing vacancies" implies a shift that is vacant. Such vacancies are filled according to the sequential four-step procedures. The language implies making a decision concerning meeting the minimum staffing requirements for that shift or the next shift. Otherwise, the language would not specify who is to apply the procedure. Both Drew and the

Grievant were unaware of the exact standard used by the Supervisor to make the decision to fill shifts. If Section 15.01 were designed to apply to all overtime opportunities the steps would be dramatically different. The dispatcher working a relief shift in step 1 has meaning. The purpose is to ensure easier continuity of the staffing level. And this allows the Communications Officers to have a say in which other shift they must be available to fill in the event a replacement is needed. This is similar to the Police contract. The term “requires a replacement” in Section 15.01 implies that something existed before that needs to be substituted with something else. That is a shift that is part of the minimum staffing level. This language contemplates the process will apply when the regularly scheduled Communications Officer is not available to fill her regularly scheduled shift and must therefore be replaced. This is not substituting for something that did not previously exist. The reference in step 2 to “normally scheduled” implies that the over time be assigned to that person who normally works that shift. It implies a defined shift is vacant. Otherwise the reference would have no meaning. And step 4 is only applicable to a regularly scheduled shift. Otherwise it would be drafted to only apply to one Officer rather than Officers scheduled during the shift before and after the vacant shift. The Yaeger arbitration award supports this.

The Village argues that bargaining history of the Parties clearly indicates Section 15.01 only applies to filling vacant shifts that are part of the minimum staffing levels. To side with the Association will rob the Village of its victory in the 1997 interest arbitration. There the Association attempted to broaden the application of Section 15.01. The interest arbitration award has analysis of both Parties’ understanding that Section 15.01 only applies to filling vacant shifts, not to general overtime opportunities. The Association presented no evidence to distinguish its proposed staffing language changes from current Section 15.01, nor evidence suggesting it had somehow had or retained the broad overtime assignment right.

The Village also argues that application of Section 15.01 to all over time opportunities would be administratively inefficient and impractical. Arbitrators reject impractical or absurd results. The management rights clause retains for management the right to make decisions to maintain efficiency. Section 3.01(L) indicates the Village may take actions it believes necessary in case of an emergency. The Parties considered these concepts in conjunction with the limited application of Section 15.01. The Chief testified to the need to have flexibility above minimum staffing levels. There are different situations where additional staff is needed. Consistent with this flexibility, the Parties have never agreed, and there is no evidence they ever applied the language of Section 15.01 to routine overtime assignments outside minimum staffing levels. The Village typically does not follow Section 15.01 or seniority to take over for a Communications Officer who cannot stay beyond their regularly scheduled shift. Use of the four step process would be impractical under some circumstances. This could place an Officer in harms way given certain weather conditions. Here, the decision to call another Officer in was not made until after 6:00 a.m. It was entirely possible that no additional staffing would have been sought. There is no inequitable result. This is a dispute between bargaining unit members over overtime.

The Village further argues that internally consistent application of Section 15.01 with the prior arbitration awards between the Village and the Police Association demands serious consideration. Similar language has twice been subject to grievance arbitration and the Village

prevailed. Prior awards have presidential value and are significant. The Department has operated under these decisions for many years without disruption and acted consistently with both bargaining units. That has helped in bargaining and settling disputes between the parties. The prior awards should not be undermined. That would raise the risk of mistake, question the validity of those awards, and encourage collateral grievances. Precedent needs to be upheld to discourage this conduct.

The Village argues that the scheduling changes memorandum was not violated by the Village. The Association asks if the memorandum was violated. This assumes seniority is a paramount characteristic of the agreement. It isn't, and the agreement contains no such paramount consideration. Under Section 15.01 seniority isn't applicable until step 3. The Association can't have it both ways - require the Village to skip steps 1 and 2 in place of seniority in the memorandum. The collective bargaining agreement does not support such an interpretation, and the memorandum does not support an interpretation that seniority is of binding consideration. The memorandum is not entitled to binding contractual status. The Department has the right to schedule, limited only by Section 15.01. Article 34 of the agreement limits it to the four corners of the document. Section 5.05 limits the scope of the arbitrator's authority. The memorandum is not part of the agreement and can't be relied upon to circumvent the agreement. The memorandum was a list of items to discuss, and not signed, sealed delivered or discussed in depth between the Parties. It is a statement of application of seniority to a full shift offered under step 3 of Section 15.01. Even if the memorandum is binding, it does not apply to these facts. Section 15.01 would be subsumed in its entirety since seniority would be the first consideration. Step 3 of Section 15.01 requires the Department to offer the available vacant shift to an Officer who is not working based on seniority. The memorandum only applies to how that shift is offered and to whom preference will be given when a full shift is to be filled. The term shift implies a recognized first, second or third shift. Those shifts are defined in Section 12.01. And reliance on the calendar evidence as to following Section 15.01 for routine overtime opportunities is misplaced. These are over time opportunities known well ahead of time, and may involve empty shifts to bring staffing to the minimum, but included opportunities in excess of the minimum. The calendar serves as a volunteer system for overtime in excess of the minimum levels. It is not a binding practice and no evidence was presented demonstrating a mutually agreed upon process to use.

The Village argues the staffing decision was not made on November 30th as the Association suggests, but on December 1st. There was no vacancy to alert Schweitzer to. Drew and Grievant testified they were unaware of the process the Department follows when filling staffing vacancies, and merely assumed it was Section 15.01. And the bargaining history demonstrates the Association was well aware of the Department's application of Section 15.01 only to vacant shifts. The Village provided clear analysis and rationale for Section 15.01. The Association only argued that it was clear and unambiguous, and walked through each step. The operative term in dispute is "staffing vacancies". The term cannot be read standing alone, as the Association apparently does. The surrounding language and the collective bargaining agreement determines the meaning of the language before determining if it is ambiguous and the need for reverting to external guides. Even so, bargaining history shows the mutual intent

of Section 15.01. The Association ignores bargaining history and the interest arbitration. The grievance arbitration awards address regularly scheduled officers and replacements being needed. The same rationale applies here to nearly identical language. The situation here was unpredictable and uncertain. It is the consistent application of those decisions by the Village that is significant. Moreover, the Association ignores all the other examples presented involving Communications Officers who were asked to report early or stay late rather than following Section 15.01. The Village expresses its concern about the Association waiting until its reply brief to flesh out its arguments about the scheduling changes memorandum. The Village stands on its original arguments.

DISCUSSION

The issues in this case center on the application of Section 15.01 of the Parties' collective bargaining agreement and the possible effect of the scheduling changes memorandum. The minimum staffing level for First shift is one Communications Officer and the person regularly scheduled for that shift did work the shift on December 1, 2006. Schweitzer, who was regularly scheduled to work Second shift on December 1st was called in early that day because of a developing snowstorm and worked from 9:00 a.m. through her regularly scheduled shift. The Association argues that Section 15.01 should have been followed which would have resulted in Grievant getting First shift overtime on December 1, 2006. The Village argues that Section 15.01 only applies to staffing vacancies, not all overtime, and the First shift overtime worked by Schweitzer on December 1, 2006 was not a staffing vacancy.

The Parties' arguments present one material fact question which has to do with when the decision was made to have more than one Communications Officer on duty for the First shift on December 1, 2006. As indicated in the Background and Facts portion of this award, that question is resolved in the Village's favor. The clear and uncontroverted evidence is that in the late afternoon or early evening of November 30, 2006, Communications Officers Drew and Schweitzer were only notified of the potential to be held over and called in early, respectively. At that point they were not told that they would be working that additional time. The decision to add a second Communications Officer during First shift was not made until approximately 7:00 a.m. on December 1st after Captain Snow and Chief Hoell reviewed weather radar and forecasts after Snow drove in to work, observing worsening conditions on the way. That morning is when they actually decided to call in Schweitzer and had her contacted again. Not only is this what the evidence demonstrates, but the fact that Drew left work after the end of her normal shift and Schweitzer had to be called that morning to come in undermines any argument that they had been definitively notified the day or evening before because a decision had already been made. This is consistent with Drew being sent home by the Lieutenant on duty at the end of her normal shift because there was no decision at that time to hold her over. The import of this factual determination has to do with whether or not there was an emergency situation the morning of December 1st and what, if any, impact that has in the case. These matters are discussed later.

Grievant is normally scheduled to work the First shift. December 1st was a regularly scheduled day off for her. Although scant, the only evidence in the record is that the regular full-time dispatcher working a relief shift was not available for First shift on December 1st. Thus, Grievant argues she would have gotten the overtime hours under Section 15.01 Step 2 if that Section was required to be followed in these circumstances. The Section reads:

Section 15.01: Communication Officer staffing vacancies shall be resolved by the Communications Supervisor or supervisor on duty, through following these sequential steps:

- 1 Fill the vacancy with the regular full-time dispatcher working a relief shift, with a practicable change of reporting time.
- 2 Assign the off-duty dispatcher normally scheduled to work the hours which require a replacement.
- 3 Assign on a seniority basis the full-time dispatchers not scheduled to work.
- 4 Assign extended hours equally to the dispatcher on duty and the dispatcher next scheduled to work. With the concurrence of the supervisor and the individuals involved, extended hours may be assigned on an other than equal basis.

However, at the employee's option, he/she can work both of their off-days.

The parties disagree whether this section applies, with the Village contending it only applies to filling staffing vacancies for minimum staffing levels, and that was not the case here.

Both Parties understandably focus on the "staffing vacancies" phrase in their arguments. The Village, as indicated, contends that phrase only applies to actual vacancies in the minimum staffing levels and not to other overtime opportunities. Because the regularly scheduled Communications Officer for First shift on December 1st worked the shift, there was no staffing vacancy to apply the Section 15.01 sequential steps to. The Association argues all staffing vacancies must be filled following Section 15.01 and this situation presented a staffing vacancy. The question is what is a Section 15.01 staffing vacancy?

Both parties contend that the language of Section 15.01 supports their position. It is the responsibility of the arbitrator to interpret the collective bargaining agreement as it is written by the parties. Accordingly, if the language of a collective bargaining agreement is clear and unambiguous, the arbitrator must apply it as it was written by the parties. Language is ambiguous if it is fairly susceptible to more than one meaning. It is important to note that words are given their ordinary meanings unless they are technical. If they are technical, they are given their technical meaning. When language is ambiguous, it is the responsibility of the arbitrator to interpret the language, by looking at the context of its usage, the purpose of the provision, the usage of similar phrases in the agreement, the history of the language, and the

“past practices” of the parties. Arbitrators also use the rules of contract construction ordinarily used by arbitrators and the courts. The Parties here have also referred to several of these interpretive methods in their arguments in support of their positions.

Before addressing the staffing vacancy question it is important to remember this is an overtime claim being made by the Grievant through the vehicle of a staffing vacancy provision. Section 3.01C of the Management Rights Article in the collective bargaining agreement retains in the Department the right to “hire employees and to schedule and assign overtime for employees.” On first reading this would give the Village the right to assign the First shift overtime on December 1st in its discretion as it did. But management rights clauses are limited by other provisions in a collective bargaining agreement. Here, Section 14.01 – Overtime, sets out pay for overtime, but does not mention how overtime will be scheduled or opportunities for overtime are filled. Similarly, Section 14.03 – Call-in Time, sets out how employees called into work on other than regularly scheduled times shall be paid, but it does not mention how those called in to work are to be selected. Neither of these two provisions limit the Department’s right to schedule overtime at its discretion.

Turning to the staffing of vacancies question, staffing, although not specifically mentioned, is impacted by Section 6.03 – Shift Preference. That section sets out a bidding procedure whereby the Department posts shifts for the forthcoming calendar year and employees bid for those shift openings, dispatchers being assigned by seniority preference. Through the process, employees are notified of shift assignments not later than November 15th, with shift assignments going into effect January 1st of each year or as soon as practicable thereafter. The Department has the management right to set staffing levels and can thus designate its minimum staffing levels. Also, the normal workday under Section 12.01 – Work Day, consists of working on an established shift. The shifts, which have varying staffing levels, are required to be posted so that they may be filled pursuant to Section 6.03. The bidding process under Section 6.03 goes on until all shifts are filled. The shifts are thus filled, or staffed, by the beginning of each year and employees know what their regular shifts will be.

Should one of these shifts encounter a vacancy because a Communications Officer is absent due to vacation, illness or other reason, the plain language of Section 15.01 would apply. In such situations the Village does apply Section 15.01, according to the testimony. However, that is not the circumstance faced by the parties for December 1, 2006 in this grievance arbitration. First shift that day involved staffing above the minimum levels. The Association maintains that calling in another Communications Officer to work was making a vacancy that needed to be staffed, and staffed pursuant to Section 15.01. So, if a shift is staffed at its normal. minimum level as was First shift here, and the Department then calls in another person which then exceeds the minimum staffing level, is there a vacancy to staff? Is so, Section 15.01 would apply by its very terms. If not, Section 15.01 would not apply by its very terms.

The plain meaning of the language in Section 15.01 must be considered as to what is a vacancy. Vacancy is not defined in the collective bargaining agreement. Neither Party argues that it is a technical term. THE AMERICAN HERITAGE DICTIONARY, second COLLEGE EDITION defines vacancy as

1. The state or condition of being vacant or unoccupied; emptiness.
2. An empty or unoccupied space; gap.
3. A position, office, or accommodation that is unfilled or unoccupied.
4. Emptiness of mind; inanity.
5. *Archaic*. A period of leisure; idleness.

Vacant is defined as

1. Containing nothing; empty.
2. Without an incumbent or occupant: *a vacant position*.
3. Not occupied or put to use: *a vacant lot*.
- ...6. Not filed with activity: *vacant hours*.

Here, the calling in of Schweitzer is not so much the filling of an otherwise unfilled or unoccupied office or position as it is making an addition to the number of people working at that time. There is no incumbent occupying the additional hours. This was not a gap in personnel; it was an addition of personnel. The additional hours are to be filled with activity, rather than not filled with activity. This indicates that the Schweitzer hours were not a vacancy.

Determining the Parties intent for the meaning of vacancy is also aided from its context in Section 15.01 and in conjunction with other relevant portions of the collective bargaining agreement, all read together as it must be. Specific guidance is gained by looking at step 2 of Section 15.01, the step that Grievant says entitles her to the hours. It reads:

2. Assign the off-duty dispatcher normally scheduled to work the hours which require a replacement.

Replacement implies that Grievant would be replacing, or working in place of, someone else normally scheduled to work. If so, this would be consistent with or analogous to taking the place of an incumbent in something (a shift) that is vacant. But that is not the situation here. No one was being replaced. Someone was being added. This does not indicate that a vacancy is being filled in this case. This does not indicate that the Parties intended step 2 to be filling a vacancy in a situation such as the instant one because a replacement is not required. These are additional hours that are required, not vacant ones needing someone to work as a replacement. This indicates the Parties did not intend vacancies to mean adding hours in addition to those already covered by regularly scheduled Communications Officers. Given the plain meaning of the language in Section 15.01, the phrase staffing vacancy does not present an ambiguity. It is not in conflict with any other provision in the collective bargaining agreement. It means a

vacancy in an established shift which needs to be staffed because the Communications Officer who would otherwise be working during that shift is not available. It does not mean the addition of more Communications Officers to work during a shift that is already being worked by the Officer regularly scheduled to do so.

Having made the above determination from the plain language of Section 15.01, it is not necessary to resort to the other arguments made by the Parties as to whether there was a past practice favoring one side or the other, bargaining history, the overtime calendar, and the application of the interest arbitration and grievance arbitration awards, some of which involved a different bargaining unit and different language. Neither is it necessary to determine if the timing of the decision to call in Schweitzer (the fact issue dealt with above) in the face of developing weather conditions presented an emergency situation which might afford the Village some leeway. It is noted that even though the Village maintains it is a necessary exercise of management rights to take actions to maintain efficiency, such management right is still subject to the other terms of the collective bargaining agreement. As seen, the operative terms in Section 15.01 have been resolved in the Village's favor.

The statement of the issues does bring into question whether the scheduling memorandum of March 19, 2004 was violated. Grievant argues that the third paragraph of the memorandum was not followed and that would have required her to be called to work a full shift. The language in the memorandum states:

On a call in basis for short notice overtime, every available Communications Officer will be called and offered the full shift prior to the shift being split by others wanting to work less than the full shift. It may be necessary to call back a Communications Officer who requests a half shift after no one else volunteers to work the full shift.

The record shows that the memorandum was not strictly adhered to by the Village in staffing over the minimums. Sometimes staffing was done at the complete discretion of the Supervisors, sometimes seniority was followed and, sometimes the overtime calendar was used. The memorandum was not followed in this case. Even so, and regardless of the fact that Schweitzer was not called in for a full shift, the simple fact is that the memorandum and its terms never became part of the collective bargaining agreement. There is no evidence that the Association considered the terms to be mutually understood, agreed to and acted on so as to memorialize a binding past practice. There is no evidence that its terms were agreed to by the Association or any document was signed by anyone in authority for the Association and the Village so as to make the memorandum a binding part of the collective bargaining agreement. Even if it was not followed, this does not constitute a breach of the collective bargaining agreement so as to afford Grievant the relief she seeks.

The Village did not violate the collective bargaining agreement and the scheduling changes memorandum when it did not offer overtime to the grievant on December 1, 2006. Accordingly, based on the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and dismissed. No remedy is ordered.

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

Paul Gordon /s/

Paul Gordon, Arbitrator