

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
GREEN BAY PROFESSIONAL POLICE ASSOCIATION

and

CITY OF GREEN BAY

Case 383
No. 66763
MA-13623

(Powell Grievance)

Appearances:

Parins Law Firm, S.C., **Attorney Thomas J. Parins**, 422 Doty Street, P.O. Box 817, Green Bay, Wisconsin 54305, on behalf of the Association.

Ruder Ware, L.L.S.C., **by Attorney Dean R. Dietrich**, 550 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the City.

ARBITRATION AWARD

The Green Bay Professional Police Association (herein the Union) and the City of Green Bay (herein the City) are parties to a collective bargaining agreement dated October 10, 2006 and covering the period from January 1, 2005 to December 31, 2006, which provides for binding arbitration of certain disputes between the parties, and which was in effect at the time of the events at issue herein. On February 26, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning access to overtime allegedly wrongfully denied to Officer Shawn Powell. The undersigned was appointed to hear the dispute and a hearing was conducted on October 10, 2007. The proceedings were transcribed. The parties filed initial briefs by December 5, 2007, and reply briefs by December 19, 2007, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

1. Is Officer Powell entitled to be paid for all hours worked outside of his normally scheduled work day and week at the overtime rate as called for in CBA Section 6.01?
2. Did the City fail to meet its burden of establishing the necessity to deny Officer Powell any of the overtime assignments he was denied based upon Officer Powell's knowledge of the subject of the overtime worked or the training and expertise of Officer Powell, and if so what is the appropriate remedy?

The City would frame the issues, as follows:

Whether the City violated the Labor Agreement in the manner in which it assigned Officer Powell to work shifts upon his return from military leave?

If so, what is the appropriate remedy?

The Arbitrator frames the issues, as follows:

Was the grievance timely?

If so, did the City violate the collective bargaining agreement in not paying Officer Powell overtime for hours he was scheduled to work outside his normal shift during his retraining period?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 1. RECOGNITION/MANAGEMENT RIGHTS

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1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kinds and

amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personnel by which the City operations are to be conducted. The City agrees that it may not exercise the above rights, prerogatives, powers, or authority in any manner which alters, changes, or modifies any aspect of the wages, hours, or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

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ARTICLE 3. GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS

3.01 GRIEVANCE DEFINITION. A grievance is defined as any complaint involving wages, hours and conditions of employment of members of the bargaining unit, other than proceedings conducted pursuant to Section 62.13, Wis. Stats. A grievant may be an employee or the Union. Upon mutual agreement of the parties hereto, grievances involving the same issues may be consolidated in one proceeding.

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3.06 STEPS AND PROCEDURE

(1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she knew or should have known of the event giving rise to such grievance. The Chief shall furnish the grievant and the Union representative an answer within five (5) working days after receiving the grievance.

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ARTICLE 5. SHIFT ASSIGNMENTS

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5.03 TRAINING OF NEW PERSONNEL. The training of new officers shall be conducted pursuant to the departmental field training program under the provisions of this contract, excepting that while in training, the department shall have the right to assign shifts, groups, jobs, and duties as is necessary or proper under the training program, and all selection rights in regard to the same

contained in this contract will not apply to such officers; provided that in all instances the provisions regarding the length of the work day, the work week, provisions regarding pay, including overtime (except such officers may not bid, or be inverted, for normal overtime) shall apply.

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ARTICLE 6. OVERTIME

6.01 OVERTIME PAYABLE. Employees will be compensated at the rate of time and one-half (1½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8½ hours on a regular workday or for hours worked outside the normally scheduled workweek. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours. No change in the amount of overtime claimed by an employee shall be made unless the employee is notified of such proposed change within seven (7) days of the employee turning in an overtime card.

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6.03 ALLOCATION OF OVERTIME.

(1) Posting. All overtime of the department schedule, where practicable, shall be posted. If more persons qualified for such overtime work sign for such than are needed, allocation of the overtime shall be on a seniority basis among those qualified for the work. (It is contemplated that at times it will be necessary to determine the qualifications of an employee to work overtime based upon the employee's knowledge of the subject of the overtime work or the training and expertise of the employee. However, in the event of a dispute as to the same, the City shall have the burden of establishing the necessity.) In allocating overtime the department shall ask for volunteers on the basis of seniority regardless of whether the officer is on a work or off day. In the event sufficient volunteers are not found, the balance of the overtime shall be assigned on the basis of inverse seniority among those on their workdays and then by inverse seniority among those on off days. Management may refuse overtime where there is a legitimate safety concern. Practicability of posting shall be determined in light of time available for posting and departmental or public security, or other relevant and sufficient factors. This paragraph shall not apply to overtime resulting from an extension of a person's normal workday duty, nor shall it apply to overtime not assigned by the City of Green Bay.

BACKGROUND

Officer Shawn Powell was hired as a patrol officer by the Green Bay Police Department on November 18, 2002 and was, at all relevant times, a member of the bargaining unit represented by the Green Bay Professional Police Association. Prior to June 7, 2004, Officer Powell was assigned to the day shift. On June 7, 2004, Powell was deployed for military service in Iraq and he did not return to work in the Police Department until December 5, 2005. While deployed, Powell posted into a night shift position, which is scheduled from 10:15 p.m. until 6:45 a.m.

Upon his return, Powell was initially assigned to the Field Training Officer program for a retraining course under the direction of the Training Coordinator, Lieutenant David Wesely. Wesely and Commander Lisa Sterr scheduled Powell to different shifts during the retraining period in order to accommodate Powell's retraining needs and to pair him with available Field Training Officers. As such, he was frequently scheduled to work outside his normal night shift schedule. Also, during his retraining period Powell was not permitted to post for overtime assignments, in particular for Green Bay Packers football games that occurred during his retraining, on the basis that he had not completed his FTO program and was not yet qualified for a solo assignment. On January 17, 2006, the Union filed a grievance on Powell's behalf seeking overtime pay for hours worked outside his normal schedule and for overtime assignments denied him during the retraining period. The grievance was denied and the matter proceeded through the contractual process to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that, under Section 6.01, Officer Powell should receive overtime pay for all hours worked outside his regular work day and work week. The City maintained that he was scheduled outside his normal shift due to a shortage of Field Training Officers. The City has the management right to assign employees to work outside their normal schedule, but the contract requires that it pay time and one-half if it does so. This principle was upheld in CITY OF BROOKFIELD, DEC. NO 19822-C (WERC, 11/84). Here, Powell could have been assigned to his normal schedule if the City had, instead, assigned FTOs to the night shift for retraining purposes, which it could have done.

The City did not meet its burden under Sec. 6.03 of establishing a necessity for denying Powell overtime opportunities during his retraining. The Powell's schedule was determined by Commander Sterr and Lieutenant Wesely, both of whom testified. Sterr testified that she based her decision to not allow Powell to work overtime on her understanding of the department's Field Training and Evaluation Program, along with the language of Sec. 6.03. She was mistaken. The program's restriction on overtime applies to newly hired officers, not officers going through a retraining program. Sterr also wrongly assumed that the contract allows

management to determine qualifications for overtime assignments. It actually required management to prove lack of qualifications if it wishes to restrict access to overtime. The City made no showing that Powell was not qualified to work any overtime assignment according to the requirements of Sec. 6.03. Instead, it instituted a blanket policy of denying overtime to officers going through retraining by deeming them unqualified in an effort to get around the requirements of the contract. Overtime cannot be denied as a matter of policy, but the denial must be based on meeting the specifications of the contract.

The Union requests that the Arbitrator award Powell 66.9 hours of overtime for hours worked outside his normal schedule during retraining. Additionally, because the City did not meet the burden of proving that Powell was unqualified for overtime, it should pay him for any overtime assignment posted during his retraining that he had the seniority to bid for and receive.

The City

The City contends, first, that the grievance is untimely. Section 3.06(1) provides that a grievance must be brought within fifteen days of the time when the Grievant or Union knew or should have known of the circumstances giving rise to the grievance. Officer Powell's schedule was set on November 22, 2005. He began retraining and working other shifts on December 5, 2005. He last worked a shift other than night shift on December 15 and did not receive overtime. His complaint about overtime opportunities concerns his disqualification for overtime for the Packers game on December 25. He was told in November that he could work the game, but only in conjunction with an FTO and he would only be paid straight time. The grievances were filed January 17, well past the fifteen day deadline, which was noted by Chief Van Schyndle in denying the grievances on January 18. Powell did not testify, but other evidence establishes that he knew in November that he would be scheduled outside his normal schedule and that he would not be offered overtime. The grievances were untimely and should be denied.

On the merits, the City should not be required to pay overtime for retraining officers who are returning to duty from an extended leave. Retraining in certain areas is required for an officer to be deemed qualified to act as a patrol officer in solo situations. The Union admits it has no similar concerns with not paying overtime to new officers during training, but insists that returning officers must be paid, yet it gives no justification for its position. The City must have flexibility in scheduling to meet its training requirements and inherent in that flexibility is an exemption from paying overtime for training. Commander Sterr and Lieutenant Wesely scheduled Powell in such a way as to pair him with FTOs suited to retrain him. This has been done with other officers in the past without paying overtime and these instances were not grieved. Here, the City had limited options because there was a shortage of FTOs. It could have postponed his retraining until FTOs were available in night shift, or it could have scheduled him in such a way as to retrain him at once with an FTO with whom he was familiar, which it did.

The record reveals that during retraining Powell worked 8.5 hours more than he would have if he had only been assigned to night shift, yet the Union requests 66.9 hours of overtime. This restrictive reading of the contract language obviously would lead to an absurd result. To adopt the Union's position would put the City in a situation where it would have to postpone retraining officers in the future until FTOs are available on their shifts. This would not be a reasonable result and would benefit no one. In fact, because Powell was not qualified to work in a solo capacity until he was retrained, he did not have a regular work week during his retraining period and so the City was permitted to schedule him as it saw fit.

During retraining, the City has the right to determine if an employee is qualified to work a Packers game. Powell had not completed retraining by December 25, so the City was permitted to deny him the opportunity to work overtime at the game scheduled that day. The City has inherent power to manage its operations and determine the schedules of its employees unless its exercise of that power is arbitrary or capricious. The City has not been shown to have acted arbitrarily or capriciously in this instance. As of December 25, Powell was not qualified to work a solo shift and the City was entitled to deny him an overtime shift that day. The grievances should be denied.

The Union in Reply

The Union does not challenge the City's policy of requiring a retraining program for officers returning from extended leave, nor its assertion that Powell had to be scheduled outside his normal shift in order to undergo the retraining. The only question is whether he is entitled to overtime because it did so. The evidence offered by the City about the retraining of Officers Halverson and Sundstrom does not support the existence of a past practice on this point. While Halverson did receive retraining outside his regular shift, there is no evidence that he was not paid overtime. Further, the evidence reveals that in Sundstrom's case there was a specific agreement between the City and the Union regarding his compensation. Thus, neither situation supports the City's case. Further, the City cannot argue by extension from its ability to schedule newly hired officers, because they are covered by a specific provision in the contract, whereas returning officers going through retraining are not. The City's argument about the inappropriateness of paying overtime in this situation has no merit, nor is there a basis for it in the contract or the record. The City retains the right to schedule FTOs on the shift of officers going through retraining, or paying overtime, without impairing its ability to retrain officers.

The Union notes that Officer Powell did not testify at the hearing and that the record indicates that he may have voluntarily decided to withdraw his request to work at the December 25, 2005 Packers game. The Union is unaware of any other overtime opportunity denied to him. Thus, the Arbitrator may determine that there was no violation of the contract based on the City's refusal to schedule him for overtime. Nevertheless the Union believes the City has the burden to show that an officer is unqualified to work overtime, which it did not do, and requests the Arbitrator to rule on this issue.

The Union disputes that the grievance is untimely. The grievance was filed in January 17, 2006. The City argues that Powell knew of the grounds upon which the grievance was based more than fifteen working days prior to that date. The triggering event for the grievance would have been the date of the issuance of his first paycheck on which his overtime would have been reflected. The City put in no evidence as to when the paycheck was issued, therefore, it has not proven its timeliness defense. Further, the Grievant in this matter is not Powell, but the Union, so the trigger for the grievance is not when Powell became aware of the claim, but when the Union became aware of it.

The City in Reply

The City has the right to schedule officers for short-term retraining programs. The Union has offered no evidence that any officer so scheduled has ever been paid overtime. The Sundstrom case cannot be distinguished. The Union admits it agreed to Sundstrom's retraining without overtime being paid and fails to explain why it would not do so here. The Union also fails to explain how the City could move an FTO to Powell's shift without paying him overtime, but the same rule shouldn't apply to Powell. The Brookfield case cited by the Union is distinguishable because there the employer attempted a permanent schedule change without bargaining, whereas here the change was temporary.

The City is entitled to deny overtime to an officer who is not capable of working a solo assignment. The City asserts that a returning officer can work Packers games at straight time with supervision from an FTO. While an officer is undergoing retraining, he is being evaluated to determine if he is capable of working as an office again. It would be premature, therefore, to evaluate an officer for fitness to work overtime before the retraining is completed. The City asserts, therefore, that the necessity for denying overtime is established by the fact that Powell had not yet completed retraining.

DISCUSSION

In this arbitration, the City has raised procedural as well as substantive defenses to the claim by the Union. The City argues that the grievance should be dismissed as untimely brought and also that there was no underlying contract violation in the way in which it scheduled and compensated Officer Powell during his retraining period in December 2005.

Timeliness

The City points out that the contract required grievances to be brought within fifteen working days of the time the grievant or Union knew or should have known of the event giving rise to the grievance. Officer Powell was scheduled for his retraining program in early December 2005, but the grievance was not brought until January 17, 2006, well beyond fifteen working days later. As I view the grievance, however, the "event giving rise to the grievance" was not the City's act of scheduling Powell outside his normal shift for retraining, but rather its failure to pay him overtime such time. As the Union points out, the record is silent as to

when Officer Powell was paid for his hours worked in December 2005, but fifteen working days prior to January 17, 2006 would have been December 26, 2005. It is unknown whether Powell received a paycheck prior to December 26 for hours worked after his return on December 5 and, therefore, I am unable to ascertain with any degree of certainty whether the grievance was brought more than fifteen days after Powell or the Union had knowledge that he would not be paid overtime for his hours worked outside his normal shift. I find, therefore, that the grievance is not untimely.

The merits

At the outset, I note that, as the parties agree, the only evidence in the record on the question of whether Officer Powell was wrongfully denied overtime opportunities was that he was available to work overtime at the Packers game on December 25, 2005, was told by Lieutenant Wesely that he could work at the game on straight time paired with a Field Training Officer and ultimately declined to work at the game, electing instead to spend Christmas Day with his family. The Union concedes, therefore, that Powell was not denied any overtime opportunities during his retraining, but requests that I still decide the question of whether the City may deny overtime opportunities to officers during retraining assignments without making a specific finding that they are unqualified. I decline to do so. In my view, the establishment of the fact that Officer Powell was not denied overtime during his retraining resolves that question before me. Whether he was deemed by the City to be unqualified to work overtime, or how that determination was made are, therefore, moot points not germane to this dispute.

The remaining issue is whether the City violated the contract by not paying Powell time and one-half for all hours worked outside his regular shift during his retraining. The record indicates that Powell had been a police officer in the department for approximately nineteen months when, in June 2004, he was called up for military service and deployed to Iraq, where he remained for the next eighteen months until December 2005. Initially, he was assigned to the day shift, but during his deployment he posted for the night shift under Section 5.01. Thus, upon his return he was assigned to the night shift. The Department determined that due to the length of his absence, and the relatively short term of his employment prior to the deployment, before Powell could return to active duty he needed to undergo a period of retraining under the Department's Field Training and Evaluation program, which lasted approximately four weeks. The Union does not contest the appropriateness of this determination. It is undisputed that upon his return Powell was scheduled to work a variety of different shifts during his retraining period, primarily in order to pair him with a Field Training Officer with whom he was familiar, or to provide him with certain specific training that was not available on the night shift due to a shortage of Field Training Officers at that point in time. According to Union President William Resch, however, Powell's schedule remained within the 8½ hour regular work day, although not always on the night shift.

The language of Section 6.01 specifies, in pertinent part, that:

“Employees will be compensated at the rate of time and one-half (1½) based upon their normal rate of pay for all hours worked in excess of the scheduled work day or work week. Overtime shall commence after 8½ hours on a regular workday or for hours worked outside the normally scheduled workweek. For purposes of calculating overtime, compensation for the hourly rate shall be based on a bi-weekly schedule of 75.6 hours and an annual schedule of 1964.5 hours.”

The provision above creates a system whereby overtime is payable under either of two circumstances: 1) if an officer works in excess of 8½ hours on a given day or 2) if an officer works more hours than would be scheduled in a normal workweek. Officers work a 5-3 schedule, so in any given week their normal work week would be either 42½ or 34 hours. The Union, however, asserts that this language also creates an entitlement to overtime even if the workday and workweek remain within normal time limits. It contends that the meaning of this language is that if an officer is required to work outside his or her normal shift, he/she is entitled to overtime pay for all hours worked outside the regular shift even if the total hours worked do not exceed 8½ per day or the total that would be worked in a normal week. As applied to Powell’s situation, the Union contends that since much of his retraining was conducted outside of the night shift, he is entitled to overtime for all such hours under the above provision. I disagree. Overtime is typically defined as “time worked in addition to an employee’s normal work period, calculated on a daily or weekly basis.” Timothy Heinsz & Terry Bethel, “Wages and Hours” in *Common Law of the Workplace*, 1st ed., Theodore St. Antoine ed. (1998), Chapter 7. Thus, in order to qualify for overtime, an employee typically would have to work in excess of the hours normally scheduled in a workday or workweek. That is consistent with the language set forth above. It would also be possible, however, to interpret the above language in the way the Union suggests. The parties do not ask me to address this ambiguity, however, and, since it is not necessary to my decision herein, I decline to do so.

The Union makes a valid point in asserting that management cannot arbitrarily schedule employees to work different shifts than those for which they bid. Such a practice would be a clear violation of the contract. That is not the situation here, however. Here, management had a legitimate interest in providing retraining to Officer Powell, and authority to do so under its management rights, which the Union concedes. In order to accomplish that purpose, management had the implied right to schedule Officer Powell during the retraining to work with a Field Training Officer or, in the alternative, to schedule an FTO to the night shift to work with Officer Powell. The record indicates that the practice with new officers is to schedule them to accommodate the FTOs’ shift schedules, rather than the other way around and that this has also been done in retraining situations. There is no evidence of any officer, who has been rescheduled during retraining receiving overtime for hours worked outside his or her normal shift. Further, as the City points out, until Powell completed his retraining he was unqualified to work alone as a Patrol Officer. Up to that point, therefore, since he was not qualified, he did not have a “normally scheduled workweek” and the language of Article 6.01 regarding hours worked outside the normal workweek, if interpreted as the Union contends,

did not apply unless Powell worked in excess of a normal workday or workweek during that period. For the limited purpose of providing retraining to a returning officer, therefore, I find the City did not violate the contract by not affording Officer Powell compensation at the overtime rate of time and one-half for hours worked outside the night shift during his retraining. To the extent that he worked more than 8 ½ hours on any given day, or beyond the number of hours normally scheduled during a workweek, he is entitled to compensation at time and one-half for all such hours. Testimony of Officer Resch, in conjunction with Union Ex. #1, indicated that Powell worked 8 ½ hours of such overtime during his retraining due to schedule changes. The record does not reflect if he was paid overtime for these hours. If he was not, he should have been.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The grievance was timely. The City did not violate the collective bargaining agreement in not paying Officer Powell overtime for hours he was scheduled to work outside his normal shift during his retraining period. If, however, Powell was not paid overtime for hours worked in excess of a normal workday or workweek during his retraining, he shall be paid one and one-half times his normal rate of pay for all such hours.

Dated at Fond du Lac, Wisconsin, this 10th day of April, 2008.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc

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