

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

JACKSON COUNTY

Case 190
No. 67888
MA-14049

Appearances:

Attorney Andrew D. Schauer, Staff Counsel, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, on behalf of the Union.

Simandl & Murray, S.C., by **Attorney John J. Prentice**, 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, on behalf of the Employer.

ARBITRATION AWARD

At all times pertinent hereto, the Wisconsin Professional Police Association (herein the Union) was the exclusive bargaining representative for the bargaining unit representing the Jackson County Correctional Officers and Dispatchers and was a party to a collective bargaining agreement with Jackson County (herein the County) dated December 05, 2007 and covering the period from January 1, 2007 to December 31, 2008. On April 2, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the failure of the County to pay overtime to Dispatcher Teresa Andersen for hours worked on November 4, 2007, November 10, 2007 and November 19, 2007, allegedly in violation of the contract. The undersigned was jointly requested and a hearing was conducted on November 19, 2008. The proceedings were not transcribed. The parties filed initial briefs by January 14, 2009, notified the Arbitrator that they would not file replies on January 19, 2009, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues:

The Union would frame the issues, as follows:

Was Teresa Andersen denied time and one-half for hours worked in excess of eight hours (i.e., doubleback pay) in accordance with Article VII, Section 3 of the collective bargaining agreement when she was not paid on many occasions time and one-half for hours worked in excess of eight hours.

If so, what is the remedy to Teresa Andersen?

If so, how should other similarly situated documented occurrences for other bargaining unit members since the date of the grievance be treated and compensated?

Subsequently the Union withdrew the third issue.

The County would frame the issues, as follows:

Did the County violate the collective bargaining agreement when it failed to pay the Grievant overtime for hours worked in excess of eight per day during the month of November 2007?

If so, what is the appropriate remedy?

The Arbitrator adopts the issues as framed by the County.

PERTINENT CONTRACT LANGUAGE

ARTICLE VII – HOURS OF WORK

SHIFTS

Section 1: The normal work schedule for Correctional Officers and Dispatchers shall be (5-2, 5-3): five (5) days on duty followed by two (2) days of duty, followed by five (5) days on duty, followed by three (5) days off duty.

Correctional Officers and Dispatchers

- A. 7:00 A.M. to 3:00 P.M.
- B. 3:00 P.M. to 11:00 P.M.
- C. 11:00 P.M. to 7:00 A.M.
- D. B/A This is a split shift on which an employee works the first half (1/2) of his/her cycle on “B” shift and the last half (1/2) on “A” shift.
- E. A/B This is a split shift on which an employee works the first half (1/2) of his/her cycle on “A” shift and the last half (1/2) on “B” shift.

Floaters

There will be up to three (3) floater positions in each division. These positions are utilized to fill vacancies in the regular monthly work schedule to accommodate the agencies [sic] staffing needs and benefited time for all employees covered under this collective bargaining agreement.

Floater positions will be on the same rotation as currently outlined in the contract. The scheduling cycle will not be disrupted to affect regular days off. The Floater positions are created for roving and subject to being changed on the schedule by a supervisor based upon the scheduling needs of the agency. Employees in these positions shall be given a five (5) day notice in the event of a schedule change. The floater positions are not subject to the 18-day rule as outlined in Article VII, Section 5 or any other portion of the contract where the 18-day rule language is applied.

Section 2: Employees shall be granted a thirty (30) minute paid meal period, as close as reasonably possible to the middle of the shift and shall also be granted two (2) ten (10) minute breaks, one in each half of the shift.

Section 3: All employees shall receive time and one-half (1½) pay for all work in excess of eight (8) hours per day, and for all hours worked in excess of their regularly assigned schedule. Time and one-half (1½) shall not be paid in such cases upon mutual agreement of the affected employee and the Employer. Overtime shall be worked only with the prior approval of the Sheriff or his designee. All overtime worked shall be compensated for at time and one-half (1½) or compensatory time off at the time and one-half (1½) rate, at the discretion of the employee, subject to the approval of the Sheriff or his designee. No employee shall accumulate more than twenty four (24) hours of compensatory time.

Section 4: Employees covered by this Agreement who are called to duty, per supervisory authority, outside their regular schedule of hours, or who report to work as scheduled and are sent home, shall receive a minimum of two (2) hours of pay at time and one-half (1½).

Section 5: Correctional Officers and Dispatchers shall have the opportunity to rotate their respective shifts, based on seniority, on a yearly basis, changing during the first full pay period of February of each calendar year. Not less than ten (10) days prior to shift change, said officers shall be given an opportunity to select which shift they wish to work. The work schedule for the fifteen (15) day period the annual shift change [sic] of each calendar year may be adjusted by the employer in order for the transitions to occur. The employer will schedule all employees for no more than ten (10) and no less than nine (9) shifts at the

straight time rate during the fifteen (15) day periods. Any shifts scheduled beyond ten (10) shifts shall be at the overtime rate with the exception of the first day of the fifteen (15) day periods, wherein an assignment may be more than an eight (8) hour shift due to the transition. Shift assignments shall be made consistent with said selections. However, the Employer may reassign employees for up to eighteen (18) days per calendar year to fill shifts which are temporarily vacant. Reassignments beyond eighteen (18) days per calendar year shall be compensated pursuant to Article VII, Section 4. In the event more officers select a shift than there are openings on such shift, seniority shall be the deciding factor.

Section 6: Probationary employee's [sic], while in training programs, are waived from the 18 day shift assignment provision above.

BACKGROUND

In this case, the Union represents a bargaining unit of Correctional Officers and Dispatchers. Prior to 2004, the Correctional Officers and Dispatchers were in a bargaining unit that also included Sheriff's Deputies, but the divisions split at that time into separate bargaining units. Initially, the work hours of the Correctional Officers and Dispatchers were divided into two twelve hour shifts.

The twelve hour shift concept proved to be unpopular and in the 2007-08 contract negotiations the parties agreed to change the hours of work language in Article VII to provide for three daily shifts of eight hours each. In addition, there was language allowing for scheduling employees to work overlap shifts, consisting of the last four hours of one shift and the first four hours of the next, which are referred to in the contract as A/B and B/A shifts. Language was also added creating up to three Floater Dispatcher positions, which were intended to give the County flexibility in scheduling and to provide coverage for vacant shifts when regular Dispatchers were off on vacation or various types of leave.

Article VII also contains language providing for overtime for employees for all hours worked beyond eight per day or worked in excess of their regularly assigned schedule. The contract does not define what constitutes a day. Further, there is language in Section 5 that permits the County to reassign employees to fill vacant shifts for up to eighteen days per year to fill temporarily vacant shifts. Reassignments beyond eighteen per year are subject to Section 4, which provides for a minimum of two hours pay at time and one-half for employees called to duty outside of their regular schedule. Floaters, because they don't have a regular schedule, are exempted from what is known as the "18-day rule."

Subsequent to the approval of the contract, situations would arise where Floater Dispatchers would be assigned to fill two shifts without a minimum of sixteen hours off in between the shifts, a practice known as "double-backing." In November 2007, Floater Dispatcher Teresa Andersen was assigned to work "double-back" shifts on three different

occasions. She requested overtime pay, which was denied. She grieved the denial of the overtime and the matter was processed to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Union

The Union's position is that the overtime language of Article VII, Sec. 3 applies to Floater Dispatchers as well as regular Dispatchers. A day, for the purposes of this language, should properly mean a rolling twenty four hour period. Thus, "double-backing," by definition, entitles Floater Dispatchers to overtime because it requires them to work more than eight hours in a given twenty-four hour period. The fact that Floater Dispatchers are specifically exempted from the 18-day rule, but not the overtime provision, is evidence that they were intended to be covered by it.

The bargaining history shows that when the new language of Article VII was negotiated the parties discussed at length the fact that Floater Dispatchers would not be covered under the 18-day rule language, but nothing was said about the applicability of the overtime. The maxim *expressio unius est exclusio alterius* is applied by arbitrators in such cases and holds that when parties list certain items in a contract such language works to exclude things not listed. There is no evidence that the listing of the 18-day rule as an exception was intended to exclude all other forms of overtime. Thus, the listing of the 18-day rule as an exception to the Floater Dispatcher position, works to exclude unlisted exceptions, such as the overtime language. Extrinsic evidence also reveals that the County has proposed language for the successor agreement that would exclude Floater Dispatchers from eligibility for overtime, which it would not do if the exclusion already existed under the current language.

The County argues that to find that Floater Dispatchers are eligible for daily overtime would defeat the purpose of having the positions and render the language creating them pointless. This is untrue because the record reveals that Floater Dispatchers do not typically work doubleback shifts and do provide the County with the flexibility in scheduling and coverage of temporarily vacant shifts that were the stated reason for creating them. The County further argues past practice in that this is the first grievance challenging this practice although it had been employed previously. The fact is, however, that this contract had only been in place a short while when the grievance was filed, so any practice was not well established. Further, there was evidence that the Grievant was the first employee to approach the Union about grieving the overtime issue. The Union asks that the Grievant be made whole by awarding her twelve hours of additional pay to compensate her for the unpaid overtime.

The County

The County asserts that before the Floater Dispatcher positions were created there was no issue regarding the agreed definition of a "day" because the previous language provided

overtime for all hours worked outside an employee's regular schedule. Thus, any hours worked beyond the regular workday automatically qualified for overtime. The County has now proposed language defining a day because of the ambiguity of the current language when applied to the Floater Dispatchers. Thus, even though the language of Article VII, Sec. 3 has existed since 2003, it never became an issue until the Floater Dispatcher position was created. The fact is, however, that the County witnesses all testified that it was understood when the Floater Dispatcher position was created that it would not be eligible for daily overtime.

Article VII, Section 1 makes it clear that no provision applying the 18-day rule applies to Floater Dispatchers. The 18-day rule applies to several provisions in the contract, including Article VII, Sec. 3. Thus, this case does not really involve Art. VII, Sec. 3, but actually turns on the proper interpretation of the 18-day rule language contained in Article VII, Section 5, which excepts Floater Dispatchers from the application of Art. VII, Sec. 3. In contract interpretation, specific language governs general language and so the language excepting Floater Dispatchers from the 18-day rule overrules the general provision that employees are entitled to overtime for hours worked beyond eight per day.

The County further notes that the evidence indicates that, prior to the Grievant, several employees had been scheduled to work doubleback shifts and had not grieved it. This suggests the existence of a past practice and, what is more, the existence of a general understanding that Floater Dispatchers are not entitled to daily overtime. The Union tried to suggest that the employees did not come forward because they were intimidated, but they did not produce any evidence supporting the claim.

DISCUSSION

In this case, the positions of the parties are predicated upon the proper interpretation of Article VII of the contract as it applies to the Floater Dispatcher position. The position is described in Art. VII, Sec. 1. As stated in the contract, the positions are intended to "...fill vacancies in the regular monthly work schedule to accommodate...staffing needs and benefited time for all employees..." As such, the positions are "...subject to being changed by the supervisor based upon the scheduling needs of the agency." It is clear, therefore, that these positions are not designed to operate on a regular schedule, but rather are intended to fill open slots created when other employees are absent or when positions are temporarily vacant.

It seems clear that because of the nature of the position, and because there are only three Floater Dispatchers in the bargaining unit, that the possibility exists that Floater Dispatchers might be called upon from time to time to fill two shifts within the same twenty four hour period as a result of regular employees being on vacation, or utilizing sick leave, funeral leave, or personal days. In fact, the parties acknowledge this reality and even have a specific term of art for it – doublebacking. The Union contends that doublebacking is subject to the requirement under Art. VII, Sec. 3 that employees be paid overtime for all hours worked in excess of eight per day, defined as a rolling twenty-four period. The County maintains that Floaters are excluded from daily overtime because they are excepted from what is known as the 18-day rule and any other provisions to which the rule applies.

The 18-day rule is defined in Art. VII, Sec. 5, which states, in pertinent part: “Shift assignments shall be made consistent with (employees’) selections. However, the Employer may reassign employees for up to eighteen (18) days per calendar year to fill shifts which are temporarily vacant. Reassignments beyond eighteen (18) days per calendar year shall be compensated pursuant to Article VII, Section 4.” Art. VII, Sec. 4 states, in turn: “Employees covered by this Agreement who are called to duty, per supervisory authority, outside their regular schedule of hours, or who report to work as scheduled and are sent home, shall receive a minimum of two (2) hours of pay at time and one-half (1½).”

The 18-day rule clearly exists to balance the County’s need for scheduling flexibility with the desire of the regular Dispatchers to work a regular schedule. Thus, it provides the County with the ability to reassign the regular Dispatchers to fill vacant shifts up to eighteen times per year without penalty. After that, reassigned employees are guaranteed a minimum of two hours pay at time and one-half under the provisions of Art. VII, Sec. 4. Since, from the employees’ standpoint, the benefit of the 18-day rule is schedule continuity, or, in the alternative, compensation for excessive schedule disruption, it makes sense that the rule would not apply to Floater Dispatchers, who do not work regular schedules.

The difficulty arises in the County’s assertion that the 18-day rule applies, by extension, to Art. VII, Sec. 3 and thereby also deprives Floater Dispatchers of access to daily overtime. Sheriff Duane Waldera and Personnel Director Tam Burgau testified that the County’s understanding of the 18-day rule was that it restricts access to overtime. There is, however, no direct reference in the 18-day rule language to Art. VII, Sec. 3 or to overtime, generally. Further, the testimony of Communication Systems Manager John Ross and Sheriff Waldera reveals that, while the County may have assumed that the language exempted Floater Dispatchers from premium pay for doubleback shifts, there apparently was no specific agreement to that effect with the Union.

In my view, a linkage between the 18-day rule and access to daily overtime cannot be inferred from the contract language. The premium of two hours pay at time and one-half referred to in Art. VII, Sec. 4 is not overtime, because it applies whether or not an employee works in excess of eight hours on a given day, but is more akin to call-in pay, which is paid to the employee for the inconvenience of being scheduled outside regular hours. If Floater Dispatchers are ineligible for daily overtime, therefore, it must be based upon something other than the contract language. Bargaining history, as testified to by the witnesses, reveals that indeed there was much discussion about exempting Floater Dispatchers from the 18-day rule, but, as indicated above, that did not result in a mutual understanding of the effect of the 18-day rule on eligibility for daily overtime. The County believed the Floater Dispatchers were exempted. Clearly, the Union did not see it the same way. Past practice also does not support the County’s position. The County asserts that this is the first grievance ever filed for overtime by a Floater Dispatcher for a doubleback shift. The Floater Dispatcher language was added in the 2007-2008 contract, however, which was signed on September 17, 2007. The dates for which the Grievant seeks compensation are November 4, 10 and 19, 2007, so for a period commencing roughly six weeks after adoption of the contract. I cannot say on this record,

therefore, that there is sufficient evidence of a mutually agreed practice of denying daily overtime to Floater Dispatchers to bar the Grievant's claim.

The record reflects that the Dispatchers work around the clock on three eight hour shifts. Daily overtime is paid to Dispatchers for all work in excess of eight hours per day. Since Dispatchers work different shifts, a day for purposes of overtime must be construed as a twenty-four hour period commencing with the beginning of an employee's shift. As stated, there is nothing in the contract, the bargaining history, or the practice of the parties that suggests that this language should not apply to Floater Dispatchers, as well. Teresa Andersen was scheduled to work doubleback shifts on November 3-4, 2007, November 9-10, 2007 and November 18-19, 2007. On the first occasion, she worked from 3:00 p.m. to 11:00 p.m. on November 3 and from 7:00 a.m. to 3:00 p.m. on November 4. Thus, in the 24-hour period from 3:00 p.m. November 3 until 3:00 p.m. November 4, she worked sixteen hours, which was paid at straight time. On the second occasion, she worked from 11:00 p.m. to 7:00 a.m. on November 9 and 10 and from 3:00 p.m. to 11:00 p.m. on November 10. Thus, in the 24-hour period from 11:00 p.m. November 9 until 11:00 p.m. November 10, she worked sixteen hours, which was paid at straight time. On the third occasion, she worked from 3:00 p.m. to 11:00 p.m. on November 18 and from 7:00 a.m. to 3:00 p.m. on November 19. Thus, in the 24-hour period from 3:00 p.m. November 18 until 3:00 p.m. November 19, she worked sixteen hours, which was paid at straight time. In all, therefore, she worked 24 hours on the days in question which should have been paid out as overtime, but was not. The 24 hours of halfpay to which she was entitled is the equivalent of 12 hours of pay at straight time, which is reflected in the remedy.

For the reasons set forth above, therefore, and based on the record as a whole, I hereby issue the following

AWARD

The County violated the collective bargaining agreement when it failed to pay the Grievant overtime for hours worked in excess of eight per day during the month of November 2007. The County shall, therefore, make the Grievant whole by paying her 12 hours backpay at her rate of pay in effect at the time.

The Arbitrator will retain jurisdiction for a period of thirty days to resolve any disputes which may arise in the implementation of the remedy.

Dated at Fond du Lac, Wisconsin, this 19th day of May, 2009.

John R. Emery /s/

John R. Emery, Arbitrator

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