

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**VILLAGE OF MENOMONEE FALLS
(POLICE DEPARTMENT)**

and

MENOMONEE FALLS POLICE ASSOCIATION INC., LOCAL 813

Case 89
No. 68214
MA-14161

(Overtime Grievance)

Appearances:

Sean Scullen, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of the Village.

Benjamin M. Barth and Jason E. Ganiere, Labor Consultants, Labor Association of Wisconsin, N116W16033 Main Street, Germantown, Wisconsin, appearing on behalf of the Association.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and Village (or Employer), are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Following notification from the parties that they had selected the undersigned from a panel of staff arbitrators, the Wisconsin Employment Relations Commission appointed the undersigned to hear and decide this grievance. A hearing, which was transcribed, was held on April 9, 2009 in Menomonee Falls, Wisconsin. The record was closed on June 3, 2009, following receipt of post-hearing written argument. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties were not able to agree upon a stipulated statement of the issues. The Association frames the issues as follows:

Did the Village of Menomonee Falls violate the expressed or implied terms of the collective bargaining agreement, or past practice, when it rescinded its own decision to have Officer Walter work overtime on May 31, 2008, and Officer Infalt work overtime on June 1, 2008?

If so, what is the appropriate remedy?

The Employer frames the issues as follows:

Did the Village violate the collective bargaining agreement when it rescinded its own decision to have Officer Walter work overtime on May 31, 2008, and Officer Infalt work overtime on June 1, 2008?

If so, what is the appropriate remedy?

**PERTINENT PROVISIONS OF
THE PARTIES' 2007-2008 AGREEMENT**

ARTICLE V – MANAGEMENT RESPONSIBILITIES

Section 5.01: The normal functions of management and the direction of working forces including, but not limited to, the hiring of employees, suspending, discharging, or otherwise disciplining of employees, establishing reasonable rules and regulations, scheduling of work, the determination of methods and means of operation, and the control and regulation and use of all equipment are exclusive functions of the Village; provided, however, that in the exercise of such functions, the Village shall observe the provisions of this Agreement and applicable State and local laws.

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ARTICLE VII- OVERTIME

Section 7.01: Any employee in the classifications included in this Agreement, who is required under proper departmental authorization to perform overtime work beyond or prior to the employee's normal eight (8) hour workday, shall be compensated at time and one-half (1-1/2) the employee's regular rate either in cash or in compensatory time off. The hourly pay used in the computation of such overtime shall be based upon one-eightieth (1/80) of the employee's bi-weekly rate.

The Chief of Police, in administering this Section of this Agreement, shall have the authority to promulgate such rules and regulations as may be necessary. At the discretion of the Chief of Police, such overtime compensation

may be provided in the manner deemed most practical from an administrative point of view.

Section 7.02 - Call Back Time: An employee recalled shall receive a minimum of two (2) hours pay at time and one-half (1-1/2) the employee's regular salary. Employees recalled to begin work prior to their scheduled tour of duty will receive actual time worked plus thirty (30) minutes, not to exceed two (2) hours unless actual time worked exceeds two (2) hours. This time will also be compensated at time and one-half (1-1/2) the employee's regular salary.

Section 7.03 - Court Time: An employee appearing at a deposition pursuant to a subpoena or court proceeding or other proceedings or meeting for court or meeting with the District Attorney or Village Attorney upon request or order and provided that in all such instances the matter specifically relates to the employee's duties as a Menomonee Falls police officer and provided said officer is on his or her regular off-duty time, shall be paid a minimum of two (2) hours at time and one-half (1- 1/2) for all time necessarily spent for such appearances. (This clause shall not be applicable to employees on paid sick or disability leave.)

One (1) hour's pay at time and one-half (1-1/2) shall be paid to any employee who has their appearance before the court, district attorney or village attorney canceled less than twenty-four (24) hours before the scheduled meeting time; provided, however, that such appearance was scheduled during the employee 's regularly scheduled work hours.

Section 7.04: Any employee receiving minimum compensation provided under Sections 7.02 or 7.03 above shall perform any other work related duties during that minimum period when so ordered. No employee may claim overtime compensation for other duties performed during those minimum periods provided above for which overtime compensation is provided.

Section 7.05: No employee shall be eligible for overtime compensation while on authorized meal breaks unless the employee is subject to immediate recall to perform duties for the Village or is required for court testimony.

Section 7.06 - Overtime Minimum: Overtime is distinguished as being either scheduled or unscheduled. Scheduled overtime is that which is posted and scheduled at least forty-eight (48) hours in advance of the hours to be worked; unscheduled overtime is that which is not posted and scheduled forty-eight (48) hours in advance of the hours to be worked. These categories are further distinguished as being either voluntary or ordered overtime which would occur if there were no volunteers. Overtime for training or court are exempt from this provision.

- A. Ordered scheduled overtime which is canceled with less than forty-eight (48) hours notice shall result in the employee receiving overtime pay for the originally scheduled overtime. In this instance, the employee may be required to perform job related duties during the originally scheduled overtime period. If mutually agreed to by the employee and authorized department representative, the employee will be excused from any work and will receive overtime pay for twenty-five percent (25%) of the originally scheduled overtime hours.
- B. Voluntary scheduled overtime which is canceled with less than forty- eight (48) hours notice shall result in the employee receiving pay for twenty-five percent (25%) of the originally scheduled overtime hours.
- C. There will be no payment for scheduled overtime canceled with more than forty-eight (48) hours notice.

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BACKGROUND

On May 20, 2008, Sergeant Bautch sent an e-mail to “PD Patrol Days” which states as follows:

The following days in May, that the shift is short of staffing are: May 24 and 31. The following days in June, that the shift is short of staffing are: June 1, 6, 7, 10, 12, 13, 19, 20, 26, & 27. Any help in filling these days would be greatly appreciated.

When Officers Brian Walter and Jackie Infalt received this email, each understood that the intent of this email was to obtain coverage by asking officers to voluntarily change days off. When an Officer voluntarily changes a day off to provide shift coverage, the provided coverage is not paid at the overtime rate.

As of the morning of May 28, 2008, Sgt. Bautch had not received volunteers for an eight (8) hour shift on May 31 and an eight (8) hour shift on June 1, 2008. At that time, Sgt. Bautch made the decision to offer these shifts to officers who were not working on May 31 and June 1, 2008. Pursuant to this offer, Officer Walter agreed to work eight hours of overtime on May 31, 2008 and Officer Infalt agreed to work eight hours of overtime on June 1, 2008. Thereafter, on May 28, 2008, Captain Waters observed that Officers Walter and Infalt had been scheduled to work this overtime and discussed this overtime scheduling with Lieutenant VonBank; who then discussed this overtime scheduling with Sgt. Bautch.

Following Sgt. Bautch's discussion with Lt. VonBank, Officers Walter and Infalt were notified that the overtime offer that had been made to Officers Walter and Infalt was being rescinded. The overtime hours were then offered in four-hour increments to officers who worked the shifts preceding and following the overtime shift. The offered overtime was worked by these officers.

Thereafter, the Association filed a grievance that includes the following:

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Date of Grievance: May 28, 2008

Article or Section of Contract Violated:

Article V – Management Responsibilities

Article VII - Overtime

as well as any other Article, Section, Work Rule or Past Practice that may be applicable

Issue:

Did the Village of Menomonee Falls violate the expressed or implied terms of the collective bargaining agreement when it rescinded its' own decision to have Officer Walter work overtime on May 31, 2008 and Officer Infalt work overtime on June 1, 2008?

If so, what is the appropriate remedy?

Facts:

1. That the Village of Menomonee Falls and the Menomonee Falls Police Association, Local 313 of the Labor Association of Wisconsin, Inc. have a collective bargaining agreement in full force and effect during all times pertinent to this grievance
2. That on May 28, 2008, Sgt. Bautch offered an overtime shift on May 31, 2008 to Officer Walter.
3. That on May 28, 2008, Officer Walter accepted the May 31, 2008 overtime shift.
4. That on May 28, 2008, Sgt. Bautch offered an overtime shift on June 1, 2008 to Officer Infalt.

5. That on May 28, 2008, Officer Infalt accepted the May 31, 2008 overtime shift.
6. That on May 28, 2008, Lt. Von Bank, after the overtime shifts had been approved by Sgt. Bautch, informed Officer Walter and Officer Infalt that the previously approved overtime shifts were being rescinded.
7. That by rescinding the approval for Officer Walter to work overtime on May 31, 2008 and Officer Infalt to work overtime on June 1, 2008, the employer has exercised its' management rights in an unreasonable manner.

Remedy: The Association respectfully requests that the Village cease and desist from violating the terms of the collective bargaining agreement. Further, the Association is requesting that the Village compensate Officer Walter and Officer Infalt for eight hours at the rate of time and one-half for the overtime shifts they both were approved to work on May 31, 2008 and June 1, 2008, respectfully.

If this request is denied by the employer, the grievant respectfully requests the Arbitrator to award the above remedy in addition to any other remedy deemed appropriate by the Arbitrator.

In a letter dated June 18, 2008, Chief of Police Anna M. Ruzinski denied the grievance as follows:

On Wednesday, June 11, 2008, I returned to work following a scheduled vacation. At that time I received Grievance # 2008-35, listing Police Officer James Bowen, on behalf of the Menomonee Falls Police Association, as the grievant. The grievance was dated May 28, 2008, and alleges Article V, Management Responsibility, and Article VII, Overtime, to have violated. In reviewing the circumstances which led to the grievance being filed I do not believe the contract was violated for the following reasons.

On May 20, 2008, Sergeant Eugene Bautch sent an e-mail to all Police Department Patrol Days personnel. In the e-mail he listed several days coming up where staffing was short and asked if anyone could help filling these days. The intent was to see if any officer was willing to change his/hers off day to accommodate the shortage and enable the officer to have off a different day. This type of strategy is generally of mutual benefit to both management and the officer. Nobody wanted to switch in order to alleviate the shortage for May 31 and June 1, 2008. This is a sign to management that the officers value that day as an off day and therefore shouldn't be asked to fill the shortage on overtime.

On May 28, 2008, Sgt. Bautch still had to fill the shortages for May 31 and June 1, 2008. Sometime between 7:00 am — 8:00 am, Sgt. Bautch offered Police Officer Brian Walter to work the May 31 shift on overtime. He likewise offered June 1 to be worked on overtime by Police Officer Jackie Infalt. Both officers stated they would.

In less than four hours after the officers stated they would work the overtime, Captain Mark Waters was checking the schedule for that upcoming weekend, as he does under his management responsibilities. He noticed the two officers scheduled to work eight hours of overtime each. This is unusual in that the officers had valued their off days enough not to change that day, but then agreed to work it on overtime. Captain Waters immediately approached Lieutenant Von Bank and advised him that Officers Walter and Infalt would not work the overtime. Instead the overtime would be given in four hour blocks for the late shift to extend, and the early shift to come in early.

I believe Captain Waters had done his managerial responsibilities reasonably by checking the schedule for any upcoming issues. Then as soon as he identified a problem, he reacted without delay to correct the problem. In fact, the issue was resolved in less than four hours after the officers were asked to work the overtime. He counseled Sgt. Bautch regarding the value of the officers' off days and if they are asked to switch a day and they value their off day too much to change for mutual benefit, they should not be put in a position to put a price on that off day by being asked to work it on overtime. Therefore, I do not agree that Article V, Management Responsibilities was violated.

In regards to Article VII, Overtime, it states, "At the discretion of the Chief of Police, such overtime compensation may be provided in a manner deemed most practical from an administrative point of view." It is most practical to have the other shifts extend, than it is to have someone come in on an off day to work the shift. Again, it was apparent the officers valued their off days because they chose not to switch the day for the mutual benefit to all. They should not have been asked to work it on overtime. As soon as this error in judgment by the sergeant was discovered, Captain Waters corrected it. For this reason I do not agree that Article VII was violated.

On Monday, June 16, 2008, I met with Officer James Bowen, Menomonee Falls Police Association President to explain management's view and come to some resolution. After discussion on the issue, Officer Bowen conferred with at least one officer involved. He still feels he should be compensated for the overtime lost. That compensation is denied.

Following this denial, the Association's grievance was submitted to the parties' contractual grievance arbitration provision.

POSITIONS OF THE PARTIES

Association

In the absence of a written agreement, a “past practice,” to be binding upon the parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. The Employer has not established a binding past practice of offering overtime in four (4) hour blocks. Rather, the Employer arbitrarily determines how it offers overtime to employees.

Association exhibits document a contrary practice; in which officers were allowed to work (8) hours of overtime on there off day. The Employer has unilaterally changed the overtime practice of offering overtime in eight (8) hour blocks. If the Employer would like to change the overtime practice, then it must do so at the bargaining table.

The Employer violated the collective bargaining agreement when it exercised its management rights in an unreasonable manner. In remedy of the Employer violation of the collective bargaining agreement, the Employer should be ordered to:

1. Cease and desist from violating the past practice as it relates to the terms and conditions of the collective bargaining agreement.
2. Compensate Officers Walter and Infalt for eight (8) hours each at the rate of time and one-half for the overtime shifts they both were approved to work on May 31, 2008 and June 1, 2008, respectively; and
3. Award any other remedy that the Arbitrator may deem is appropriate in the instant case.

Village

The Association filed a grievance alleging that, in rescinding its offer of overtime, the Employer exercised its rights in an unreasonable manner. The Association specifically stated, during the processing of the grievance, that the grievance was not about the way in which the Department assigned overtime, but about the fact that the Department took overtime away from Officers Walter and Infalt.

During the course of the grievance process, the Association never claimed the Department’s method of assigning overtime as a basis for the grievance. The Association cannot raise arguments at the arbitration hearing that have not been raised in its grievance and, thus, any Association argument regarding the Department’s process for assigning overtime should be denied.

As the Employer stated during the grievance process, Sgt. Bautch's offer of overtime to Officer's Walter and Infalt was a mistake and this mistake was corrected as soon as Captain Walters discovered the error. The Association has not alleged, nor does the record establish, that the Employer had any prohibited reason for its decision to reassign the overtime.

The overtime was reassigned in four-hour increments to officers before and after the shifts on both May 31 and June 1; consistent with the Department's usual practice. The evidence does not establish that either Officer was prejudiced by this reassignment of overtime.

The only time that the Department is contractually required to compensate an employee following cancellation of a scheduled overtime assignment is when it fails to cancel the scheduled overtime within 48 hours of its commencement. Officers Walter and Infalt were each notified more than 48 hours before the planned overtime.

The Association has not met its burden to show that, under the plain language of the contract, either Officer was entitled to work the claimed overtime. Nor has the Association overcome the plain language by establishing the existence of a binding past practice that obligated the Employer to assign the overtime to Officers Walter and Infalt. The grievance should be denied in its entirety.

DISCUSSION

Issue:

The parties were unable to stipulate to a statement of the issues. The most appropriate statement of the issue is that which is set forth in the written grievance form and, thus, this statement of the issue has been adopted by the undersigned.

Procedural Arbitrability

According to Chief Ruzinski, the Association never raised the issue of the manner in which overtime is assigned as a basis for its grievance prior to hearing. However, the written statement of the grievance is sufficiently broad to encompass the Association argument that the Village's avowed procedure of assigning overtime violates the expressed or implied terms of the parties' collective bargaining agreement.

Chief Ruzinski recalls that she met with Association President Bowen in her office "to see if we could come to some agreement in regards to this grievance" and "He explained to me that the grievance was not in effect, that the overtime - - how the overtime was given out but that it was taken away from Officer Infalt and Officer Walter and given to other officers." Officer Bowen, who testified at hearing, did not dispute the Chief's testimony regarding their meeting.

The Chief's testimony reasonably suggests that the focus of the referenced meeting was to reach an agreement that would resolve the grievance. It is not evident that the Association was asked to confirm its litigation position. Contrary, to the argument of the Village, the record does not warrant the conclusion that the Association has waived any right to argue that the Village's avowed procedure of assigning overtime violates the implied or expressed terms of the parties' collective bargaining agreement.

Merits

Essentially, the Association is arguing that Officers Walter and Infalt have an enforceable right to work the offered overtime. In the present case, the parties have bargained contract language that specifically addresses overtime rights, *i.e.*, Article VII.

The first sentence of the first paragraph of Sec. 7.01 recognizes that overtime compensation, in the form of pay or compensatory time, is due to employees who are required to perform overtime work "under proper departmental authorization." The second paragraph of Sec. 7.01 states as follows:

The Chief of Police, in administering this Section of this Agreement, shall have the authority to promulgate such rules and regulations as may be necessary. At the discretion of the Chief of Police, such overtime compensation may be provided in the manner deemed most practical from an administrative point of view.

The plain language of Sec. 7.01 does not dictate that overtime will be offered in eight hour blocks to officers who are on a scheduled "off day." Nor does the plain language of Sec. 7.01 dictate that overtime will be offered in four hour increments to officers who work prior and subsequent to the available overtime shift. Rather, this provision is silent with respect to the manner in which overtime will be offered to bargaining unit employees. The most reasonable construction of the plain language of Sec. 7.01 of the parties' collective bargaining agreement is that the Chief of Police (or her designee) retains discretion to determine the manner in which overtime will be offered to bargaining unit employees.

With respect to the type of overtime at issue, *i.e.*, eight hours of "voluntary scheduled overtime," there is little dispute regarding the Village's "past practice." All of the witnesses agree that there have been times in which management has offered an eight hour overtime shift to employees who were scheduled off that day. However, the testimony of Association and Village witnesses, as well as documentary evidence, establishes that, since 2003, the more common procedure has been to offer this overtime to employees who were working the day on which the overtime was available. Under this more common procedure, four hours of overtime have been offered to employees who work the shift preceding the overtime shift and four hours of overtime have been offered to employees who work the shift preceding the overtime shift. Officer Bowen, who has been the Association President "on and off" for most

of his career, states that he is not aware of any prior grievance that has challenged this procedure of offering overtime in four hour increments.

As the Association argues, the Village's monetary cost of one officer working eight hours of overtime is the same as the cost of two officers each working four hours of overtime. However, contrary to the argument of the Association, the record does not establish that the Chief of Police arbitrarily determines how overtime will be offered. Rather, as the testimony of the Chief of Police demonstrates, she favors the "four hour increment procedure" because it preserves the Officer's "off day" and "off days" are important given the stresses of the job. Additionally, management has the view that, by not providing eight hour overtime opportunities to employees who are scheduled off, employees are more likely to work available hours by trading "off days;" which in the long-run would reduce the need to staff by use of overtime.

In summary, there is no binding past practice which requires the Village to offer the overtime available on May 31 and June 1, 2008 in eight hour shifts to Officers Walter and Infalt. Rather, the evidence of "past practice" supports the construction of the plain language of Article VII, *i.e.*, the Police Chief (or her designee) has the discretion to offer the overtime available on May 31 and June 1, 2008 in eight hour shifts to employees who are on an "off day" or in four hour shifts to employees who are working shifts that immediately precede or follow the available overtime shift.

In the present case, the Village exercised its Article VII discretion by first offering the overtime to Officers Walter and Infalt; then rescinding this offer of overtime; and then offering the same overtime to employees working shifts that immediately preceded and followed the available overtime shift. As discussed above, the Village does not have a contractual obligation to offer Officers Walter and Infalt the disputed overtime. At issue, however, is whether, having offered the disputed overtime to Officers Walter and Infalt, the Village exercised its management rights in an unreasonable manner by rescinding this offer.

As the testimony of Sgt. Bautch establishes, at the time that he offered the overtime to Officers Infalt and Walter, Sgt. Bautch knew that his offer was inconsistent with the Chief of Police's normal overtime procedures. According to Sgt. Bautch, he made this offer to expedite the process of obtaining coverage. Given Sgt. Bautch's responsibility for scheduling and his knowledge of normal overtime procedures, his overtime offer to Officers Walter and Infalt was not a "mistake."

Lt. VonBank states that he and Sgt. Bautch "rescinded the overtime" after Lt. VonBank had been contacted by Capt. Walters. According to Lt. VonBank, Capt. Waters contacted Lt. VonBank at approximately 8:00 a.m. on May 28th to discuss the fact that two officers (Infalt and Walter) had been scheduled for eight hours of overtime on their off days; Lt. VonBank responded that he was unaware of that situation; Capt. Waters then asked Lt. VonBank to address this situation; Lt. VonBank then contacted Sgt. Bautch because he was the day shift supervisor; and that, after receiving Sgt. Bautch's explanation of why Officers Infalt and

Walter were scheduled for the eight hours of overtime, Lt. VonBank reminded Sgt. Bautch that this was not the Department's practice.

It is not evident that the Village's decision to rescind the overtime offer was motivated by any reason other than senior management's desire to comply with the Police Chief's normal overtime policy. It is not an unreasonable exercise of management discretion to rescind overtime offers that are not in compliance with the Police Chief's normal overtime policy.

The overtime in dispute is "voluntary scheduled overtime" within the meaning of Sec. 7.06 of the parties' collective bargaining agreement. As a review of this provision reveals, the parties have considered and agreed upon the remedy for the cancellation of "voluntary scheduled overtime." Under the parties' agreement, if such overtime is cancelled with more than forty-eight (48) hours notice, then there will be no payment for the cancelled scheduled overtime.

By rescinding the overtime offer to Officers Walter and Infalt, Sgt. Bautch cancelled their "voluntary scheduled overtime." As discussed above, the parties' collective bargaining agreement permits such cancellation, without any monetary recompense to either Officer, if the Officers have been provided with more than forty-eight (48) hours notice. It is undisputed that each Officer was provided with the more than forty-eight (48) hour notice required under Sec. 7.06.

In summary, the Village exercised its management rights in a reasonable manner when it rescinded its offer of overtime to Officers Walter and Infalt. Inasmuch as Officers Walter and Infalt received more than forty-eight (48) hours notice of the cancellation of their "voluntary scheduled overtime," the Association's claim that each should receive compensation for the overtime shift that had been offered, but not worked, is without merit.

Conclusion

The Village has not violated the expressed or implied terms of the parties' collective bargaining agreement as argued by the Association. The grievance is without merit and, thus, has been denied.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Village of Menomonee Falls did not violate the expressed or implied terms of the collective bargaining agreement when it rescinded its own decision to have Officer Walter work overtime on May 31, 2008, and Officer Infalt work overtime on June 1, 2008.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 4th day of September, 2009.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc

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