

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

PUBLIC SAFETY PROFESSIONAL DISPATCHERS' ASSOCIATION

Case 425

No. 69471

MA-14618

Appearances:

Anna M. Pepelnjak, Attorney at Law, Weiss Berzowski Brady LLP, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin, 53202, appearing on behalf of Winnebago County.

Benjamin M. Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin, appearing on behalf of the Public Safety Professional Dispatchers' Association.

ARBITRATION AWARD

The Public Safety Professional Dispatchers' Association (hereafter "Association") and Winnebago County (hereafter "County") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On January 8, 2010, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a premium pay dispute. The filing requested that the Commission provide a list of commissioners and staff members available to serve as arbitrator, from which the undersigned was selected. A hearing was held on April 19, 2010, in Oshkosh, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties' discretion, no transcript of the proceeding was made. Each party filed a post-hearing brief, the last of which was received on June 2, 2010, whereupon the record was closed.

ISSUE

The parties were unable to agree to the issue and stipulated to allow the undersigned to frame the issue based on the evidence and arguments presented. The Association proposed that the issue be stated as follows:

Is the County violating the expressed or implied terms and conditions of the collective bargaining agreement when it denied the request of Gina Paulson, Karla Bricco and Brian Smith to receive Dispatcher in Charge (DIC) pay?

If so, what is the correct remedy?

The County proposed the following statements of the issue:

1. Was this grievance filed in a timely manner, under Art. 20, Section 20.1, Step 1 of the 2007/08/09 Winnebago County and the Public Safety Professional Dispatchers Assn. collective bargaining agreement?
2. Did the Winnebago County Sheriff's Office violate Art. 24, Section 24.2 of the 2007/08/09 [collective bargaining agreement] between Winnebago County and the Public Safety Professional Dispatchers Assn. collective bargaining agreement by denying "DIC" premium pay to Dispatchers Karla Bricco (08/13/09), Dispatcher Gina Paulson (08/20/09) and/or Dispatcher Brian Smith (08/31/09)?

The undersigned adopts the following statement of the issue:

Was the grievance filed in a timely manner?

If so, did the County violate the Agreement by refusing to provide the premium pay available under Section 24.2 of the Agreement to Grievants Gina Paulson, Karla Bricco, and Brian Smith?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS

The following provisions from the Agreement between the County and the Association are relevant to this matter:

ARTICLE 3 – MANAGEMENT RIGHTS

3.1 Except as otherwise specifically provided herein, the management of the Communication Center and the direction of the work force including, but not limited to, the right to hire, to discipline and discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, together with the right to determine the methods, equipment, process and manner of performing work, are vested exclusively in the Employer.

3.2 Nothing contained herein shall divest the Association of any of its rights under Wisconsin Statute 111.70.

ARTICLE 20 – GRIEVANCE PROCEDURE

...

Step 1. If an employee has a grievance, he shall first present the grievance orally to the Communications Manager or his designee within ten (10) calendar days of the occurrence or event which gave rise to the grievance. In presenting the grievance the employee may be accompanied by a representative of the Association at his option. If such grievance is not presented within the specified time period, it shall be deemed abandoned and shall not, thereafter, form the basis of a grievance between the parties hereto.

The Communications Manager or his designee shall respond orally to the grievance within ten (10) calendar days of the presentation of the grievance.

...

ARTICLE 24 – PREMIUM PAY: DISPATCHER IN CHARGE

24.1 The Employer may designate personnel to serve in the capacity of Dispatcher-In-Charge on various shifts. Such assignments shall be at the discretion of the Employer and shall be for indefinite periods of time.

24.2 Persons serving in such capacity shall be eligible for premium pay at the rate of seventy-five cents (\$0.75) per hour for each hour worked in such capacity. Effective January 1, 2008, increase premium pay to one dollar (\$1.00) per hour.

BACKGROUND

Winnebago County operates, as a division of its Sheriff's Department, a twenty-four hour communications center ("Center") that receives 911 emergency calls. The Center is staffed by dispatchers, who are members of the bargaining unit represented by the Association.

The general operation of the Center is overseen by Cheryl Eischen ("Eischen"), a Sheriff's Department administrative captain. More direct supervision of the Center is carried out by Kathy Biggar ("Biggar"), a communications manager at the Sheriff's Department. In the past, during the course of every shift at the Center, one of the dispatchers also would be assigned to act as the "dispatcher in charge" ("DIC"). The DIC position description summarized the purpose of the position as follows:

Acts as lead person coordinating the day-to-day operation of the communication center personnel under the supervision of the communications manager and the administrative captain.

The DIC position description associates the following duties with the position:

1. Maintains security in the Communications Center.
2. Checks on supplies and reports deficiencies to the Communications Manager or the Administrative Captain.
3. Tests and maintains Communication Center equipment according to an established schedule, checks equipment test log, arranges for equipment repairs when necessary.
4. Prepares monthly work schedules, checks and corrects time sheet, checks schedule for time off, sick leave and calls in people to work when necessary.
5. Acts as first-line supervisor on the shift reporting any personnel problems to the Communications Manager or Administrative Captain, acts as mediator in case of dispute, initiates disciplinary action when required.
6. Monitors radar weather and takes charge of severe weather procedures.
7. Briefs the incoming shift regarding status of current incidents, problems, etc.
8. Oversees the training of new employees, trains shift personnel on new department policies and procedures.
9. Disseminates information from DIC meetings to employees, appoints Acting DIC when no regular DIC is on duty.
10. Acts as liaison between various police, fire and EMS agencies and the Communications Center to resolve problems when necessary and facilitate communication.
11. Performs all the duties of the dispatcher in addition to those stated above.
12. Performs other related duties as assigned.

Further, the position description associates the following “accountabilities” with the DIC position.

1. Ensures all forms of oral and written communication received are understood and are accurately and efficiently relayed to the appropriate public service agency and/or personnel.
2. Provides accurate general information to the public in response to inquiries.
3. Ensures the operations of the Communications Center are carried out efficiently and according to procedure.
4. Ensure that there are an adequate number of personnel to cope with the situation at hand in an emergency.

Under Article 24 of the Agreement between the County and the Association, a dispatcher assigned to serve in the capacity of DIC is to receive premium pay for the hours worked in that role.

At some point, the County decided to cease the routine use of DICs to oversee shifts at the Center. Testimony at hearing by the County sheriff indicated that this decision was fueled in part by the fact that the DIC position had been a source of grievances in the past. The decision not to regularly designate a DIC also saved money for the County, by avoiding the contractual obligation to provide premium pay in that area to dispatchers. On July 14, 2009, the County sheriff issued a memorandum to the dispatchers that stated the following:

Effective July 20, 2009, the position of Dispatcher-In-Charge (DIC) will be discontinued.

The duties of the DIC’s have been reassigned to the Communications Manager and Patrol Supervisors. Kronos duties will be completed by the Sheriff’s Office Accountant.

All questions are to be directed to the Communications Manager. If the Communications Manager is not available, all questions should be directed to the Patrol Supervisor.

Before the issuance of the memorandum, many of the twelve duties identified in the DIC position description already were being performed by Biggar in her role as communications manager. With the issuance of the memorandum, the DIC duties were formally distributed primarily among certain management employees at the Sheriff’s

Department. Duties 2, 3, 8, 9¹, and 10 from the DIC position description were assigned to Biggar; also, the handling of monthly work schedules and time off requests from duty 4 were assigned to Biggar. Duties 1 and 5 were assigned to the Sheriff's Department patrol supervisors; also, the handling of calling-in people to work when necessary from duty 4 was assigned to the patrol supervisors. The handling of the kronos cards, also identified as part of duty 4, was assigned to the Sheriff's Department office accountant. Duties 6, to monitor radar weather and take charge of severe weather procedures, and 7, to brief the incoming shift, were to continue to be performed by dispatchers at the Center. It was obviously not necessary to redistribute duties 11 and 12.

On August 20, 2009, Gina Paulson, a dispatcher at the Center and one of the Grievants in this case, spent thirty minutes placing phone calls to find last-minute fill-in employees for a shift at the Center. On August 22, 2009, Karla Bricco, also a dispatcher and Grievant here, performed the same task for thirty minutes. And on August 31, 2009, another dispatcher and Grievant, Brian Smith, did the same. Subsequent to having done so, each of these individuals submitted a request to the County for DIC premium pay pursuant to Section 24.2 of the Agreement. The County denied the requests, which denials led to the current case.

At hearing in this proceeding, Grievant Smith testified that, since the date when the memorandum was issued by the County discontinuing the regular use of DICs at the Center, he has performed several other tasks that he believes are also DIC tasks. Specifically, he asserts that he has continued to maintain the "flip-file" at the Center, which is a periodically updated file with contact information; he has acted as the time agency coordinator; he has done some training; he has answered questions posed by less senior employees at the Center; and he has turned off the water when the water sprinklers at the Center have malfunctioned. Smith testified that he did not request premium pay for having carried out these tasks, at least in part because he was aware that the current grievance already had been filed with regard to the issue of DIC premium pay.

There also was testimony presented at hearing establishing that dispatcher Linda Rasmussen ("Rasmussen") has performed some DIC work since the sheriff's memorandum was issued. Smith testified that he has observed Rasmussen handling duties related to the "kronos" time-keeping cards used at the Center, as well as duties related to the preparation of the Center's monthly schedule. The County acknowledged at hearing that Rasmussen has functioned as a DIC since the time when regular use of the position was discontinued. Eischen testified that, at some point after the sheriff's memorandum was issued, Biggar took a leave from her position. Believing that Biggar's leave could be lengthy, Eischen asked the sheriff to allow a former DIC to assist with some of the DIC duties that had been shifted over to Biggar's position. Eischen intended to have Rasmussen handle scheduling duties, some kronos card duties, and Biggar's e-mail. Eischen testified at hearing that she did not believe Rasmussen deserved premium pay for performing these tasks, because Rasmussen would not be supervising employees. Eischen asserted that Rasmussen received premium pay, however,

¹ The DIC meetings referenced under duty 9 were discontinued.

because the sheriff believed Rasmussen would be performing supervisory functions. Rasmussen handled these duties for approximately four days.

The facts surrounding the processing of this grievance are relevant to the County's timeliness argument, but somewhat convoluted. On August 24, 2009, Association president Ian Hertel ("Hertel") spoke with Biggar and verbally grieved a denial of premium pay for DIC duties allegedly performed. Dispatcher Deb Reimer, who is not a grievant in the present case but who claimed to have performed DIC duties on August 12, 2009, for which she was not compensated, was the subject of that grievance. The work performed on August 20 and 22 respectively by Grievants Paulson and Bricco might also have been the subject of this verbal filing, but that is not clear. In response to the verbal filing, Biggar indicated to Hertel that she believed the grievance was untimely. Biggar documented this exchange between herself and Hertel in the following memorandum:

August 24, 2009
4:47 PM

Ian Hertel came into my office and said he wanted to present Step 1 of a Grievance of dispatchers doing "DIC" work at being denied payment for such.

I told him I believed that his 10 days had elapsed since the Memo came [sic] out saying that there would no longer be DIC's. He said he was counting the 10 days from the first denial of DIC pay which was Aug. 12. I explained that it would still be past that 10 days as 10 days would have been Aug. 22. He said that he believed it was 10 business days. I got my copy of the contract out and showed him where it said 10 calendar days.

He said he still wanted to file the Grievance and would be taking that matter up further with Ben Barth of LAW, Inc.

I denied the Grievance at Step 1.

Kathy Biggar, Communications Manager
Winnebago Co. Sheriff's Office

Subsequent to that, on September 11, 2009, Hertel presented Biggar with a written copy of a grievance also related to the DIC premium pay issue. The written grievance that was submitted to Biggar either added only Smith to the list of grievants, or it added Paulson, Bricco and Smith - that also is not clear. When Hertel submitted this document to Biggar, she indicated that she understood the grievance was a "done deal" because of the timeliness problem that had been discussed at the verbal filing of August 24. Hertel responded that the Association was filing the grievance anyway, each time a dispatcher was denied premium pay despite having performed DIC duties. Biggar also documented this conversation, in a memorandum to Eischen:

9/21-09

Capt. Eischen:

I received this “hard copy” from Ian Hertel on Friday, Sept. 11, 2009.

I told him I thought it was a “done deal” and that their verbal had not been time appropriate. Ian insisted they were filing it anyway as a continuous thing each time someone gets time denied for doing “DIC duties”.

I accepted this from him and told him I would pass along to you.

This would be the 10th day for the written response.

Any questions, let me know

Kathy Biggar

On September 21, Eischen wrote a letter to Hertel, denying the grievance that had been submitted on September 11, stating the following:

I have received and reviewed the grievance regarding premium pay for Dispatcher in Charge. I find no contractual basis for the grievance as we are within management rights. The grievance is denied.

DISCUSSION

The question presented here is whether the three Grievants should have received DIC premium pay for performing the call-in task in August of 2009. Before the merits of this case can be discussed, it is necessary to address the County’s timeliness objection.

Timeliness

As the County contends, the Agreement contains clear language limiting the timeframe within which a grievance may be raised. The Agreement unequivocally indicates that if the established timeframe is not followed, a grievance shall be deemed abandoned. The County argues that the Association has failed to satisfy this requirement and the grievance, therefore, is not arbitrable on procedural grounds. It is well-established, however, that doubts as to whether contractual time limits have been met should be resolved against forfeiture of the right to process a grievance. *How Arbitration Works*, Elkouri & Elkouri, 5th Ed., p. 277. There are several issues related to the County’s timeliness claim that make dismissal of the grievance, under this standard, inappropriate. First, it is simply not clear from the record that the County raised, with regard to one or more of the Grievants, its timeliness objection prior to the

hearing. One interpretation of the record is that the County raised that objection with regard to Reimer's claim, but not with regard to the claims only later presented relating to Paulson, Bricco and Smith. Moreover, the events at issue here arguably represent a continuing violation. The real significance of this observation, aside from the fact that it saves the present grievance from being dismissed as untimely, is that this same dispute will emerge again between the parties, at additional considerable expense, if it is not resolved on the merits here.

Merits

It is worth noting at the outset that the question here is not whether the County has an obligation under the Agreement to appoint DICs to cover shifts at the Center. The Association does not seem to dispute that the County has the discretion to designate or not designate DICs. Indeed, the record shows that the Association did not grieve the Sheriff's issuance of the memorandum that stated that DICs would no longer routinely be used at the Center. Rather, the Association's position in this case is that the County cannot claim to discontinue the use of DICs and then require dispatchers in the bargaining unit to perform, in a piecemeal fashion, the duties of the DIC position without compensating them as required in Section 24.2.

My decision denying this grievance is based not on a conclusion that the Grievants were performing a non-DIC task. It is apparent to me that the call-in task the Grievants performed for one-half-hour each was a DIC duty. Grievant Smith credibly testified that the duty was one he had performed when he had been assigned to act as a DIC in the past. Further, it seems clear that the task is explicitly identified under item 4 of the duties set forth in the DIC position description as "calls in people to work when necessary".

Rather, the denial of this grievance is based on the conclusion that, even though the Grievants were performing a DIC task, they were not acting as DICs. Article 24 guarantees premium pay to dispatchers who "serve in the capacity" of DIC. Thus, the fundamental question here is what it means to "serve in the capacity" of a DIC. The record in this case offers very little insight into what it has meant in the past to serve as a DIC. It does not paint a clear picture of what typical day was like for a DIC, including how much time was spent on any given task. The Association's witnesses asserted that the call-in task performed by the Grievants has been one of the most important tasks carried out in the past by the DICs. The County's witnesses asserted that it is not administrative tasks such as the call-in work that are most important, but rather the tasks that involve direct supervision of other dispatchers. The DIC position description, which lists a set of seemingly equally-weighted tasks and accountabilities, does not support either of these distinctions. Neither does any other documentary evidence on the record.

As a practical matter, it seems fair to understand that the activities performed by the DIC appointed to any given shift were driven purely by the specific, unique demands of that shift. If there were many DIC-specific tasks to attend to on a shift, the DIC would attend to them. If there weren't, the DIC presumably would use his or her time performing regular

dispatcher work. Inasmuch as the record establishes that every hour of every shift at the Center used to be covered by a designated DIC and resulted in premium pay, it is clear that a DIC's ability to receive the premium was not contingent on what types of tasks had been performed. Even an appointed DIC who happened to not be called upon to perform a single DIC-related task was still compensated with the premium.

Thus, the factor that set the DIC apart from the other dispatchers does not appear to have been related to the performance of any one of the specific DIC tasks on the position description. Rather, the factor that set the DIC apart appears to have been the general, continuous obligation to exercise oversight at the Center. The DIC position description states that the purpose of the position is to act as "lead person" who coordinates the operations of the Center. A cumulative reading of the duties and accountabilities set forth in the position description also conveys such overarching responsibility. The essence of what the County was getting in exchange for the premium pay appears to have been the DIC's obligation to be in charge.

The work performed by the Grievants in this case was, as acknowledged, DIC-type work, but there is nothing on the record that indicates that the Grievants assumed overall responsibility for the Center on any of the dates for which they are claiming premium pay. Rather, they performed the discrete task of making calls to find shift replacements. From my view of the position, the performance of this task did not cause the Grievants to be acting as DICs, even for the brief period of time that the call-in work was being done. The Grievants simply were not functioning as lead workers with the responsibility that such a distinction entails.

This is not to say that the only occasion on which DIC premium pay would be appropriate is when a dispatcher employed by the County is formally put in charge by the County. For now, the County apparently has chosen to disassemble the DIC position, distribute its specific tasks among County employees, and shift general oversight responsibility for the Center away from the dispatchers. It is possible to imagine a scenario, however, wherein a sufficient quantity and combination of the DIC tasks could be assigned to a dispatcher so as to cause that person to become a DIC-type lead worker, in a *de facto* sense, and warrant the premium set forth in the Agreement.

It must be specifically noted, however, that this does not appear to be the case with Grievant Smith. Smith testified at hearing that he believed he also has been performing several other DIC tasks: he maintains the "flip-file" at the Center, performs time agency coordinator tasks, has conducted some software training, answers questions posed by less senior employees, and has turned off the water at the Center when the sprinklers have malfunctioned. Putting aside the dispute between the parties as to whether each of these tasks constituted a DIC duty, I have drawn the conclusion that these disparate responsibilities do not add together to give Smith oversight responsibility and, therefore, do not further the Association's argument with regard to that Grievant.

Further, it is apparent from the testimony provided at hearing that the sheriff, who approved the premium pay for Rasmussen in the recent past, did so believing that she would be undertaking the DIC duties in a more complete sense than she actually did. That being the case, the situation involving Rasmussen is not inconstant with the conclusion I have drawn in this case.

On the basis of the foregoing, I make the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 7th day of October, 2010.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator