

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
VILLAGE OF TWIN LAKES (POLICE DEPARTMENT)

and

**TWIN LAKES POLICE OFFICERS ASSOCIATION,
LOCAL 322, LAW, INC.**

Case 23
No. 69204
MA-14523

(Overtime Grievance)

Appearances:

Mr. Luis Arroyo, Attorney, Michael, Best & Friedrich LLP, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, on behalf of the Village of Twin Lakes.

Mr. Benjamin M. Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, on behalf of Local 322.

ARBITRATION AWARD

Village of Twin Lakes, hereafter Village or Employer, and Twin Lakes Police Officers Association, Local 322, LAW, Inc., hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising there under. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to serve as arbitrator of the instant dispute. A hearing, which was transcribed, was held on February 4, 2010, in Twin Lakes, Wisconsin. The record was closed on April 28, 2010, following receipt of the parties' post-hearing written argument. Having considered the record as a whole, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to stipulate to a statement of the issues. The Association frames the issues as follows:

Did the Employer violate the expressed or implied terms of the collective bargaining agreement, long-standing past practice and/or call-in procedure when it removed Officer Gavahan from the overtime assignment of September 15, 2008 and replaced him with Sergeant Santelli?

If so, what is the appropriate remedy?

The Village frames the issues as follows:

1. Is the grievance arbitrable?
2. If so, did the Employer violate the terms of the collective bargaining agreement or past practice when it allowed a more senior officer [Sgt. Santelli] to bump the Grievant [Officer Gavahan] from an overtime sign-up sheet?

RELEVANT CONTRACT LANGUAGE
(2006-2008 Agreement)

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ARTICLE III - MANAGEMENT RIGHTS

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

- A. To direct and maintain the efficiency of all operations of the Village of Twin Lakes;
- B. To determine the kinds and amounts of services to be performed as pertains to B. Village operations and the number and kind of classifications to perform such services;
- C. To determine the methods, means and personnel by which operations are to be conducted;
- D. To introduce new or improved methods of operations, work practices or facilities, and to modify existing departments, methods of operation, work practices, or facilities;
- E. To establish reasonable work rules and schedules of work and overtime when required;
- F. To determine the size and composition of the work force and the work to be performed;
- G. To hire, promote, transfer, lay off, schedule and assign employees in positions;

- H. To determine employee competence and qualifications for positions;
- I. To suspend, demote, discharge and take other disciplinary action, subject to the provisions of this agreement;
- J. To contract out for goods or services, so long as no employee suffers layoff due to subcontracting;
- K. To take whatever action is necessary to comply with state or federal law;
- L. To take whatever action is necessary to carry out the functions of the Village in situations of emergency.

ARTICLE IV - WORK SCHEDULE / OVERTIME

Section 4.01 - Work Period: Pursuant to Section 7(A) of the Fair Labor Standards Act and 29 CFR Part 553, there is hereby established a work period of eighty-two and one-half (82.5) hours in fifteen (15) consecutive days. During the fifteen (15) day work period, employees shall be scheduled to work five (5) days with two (2) days off during the seven (7) day period; and five (5) days with three (3) days off in the eight (8) day period in the fifteen (15) day cycle. Employees who are employed in excess of eighty-two and one-half (82.5) hours during the fifteen (15) day work period shall be entitled to one and one-half (1-1/2) of the employee's regular rate of pay for those hours worked over eighty-two and one-half (82.5). Each employee shall be paid on an hourly plus overtime basis.

Section 4.02 - Work Day: Each shift shall be eight and one-quarter (8.25) consecutive hours, including a one-half (1/2) hour paid lunch period. Employees shall remain within the Village limits during the lunch period unless official business requires the employee's presence elsewhere. Employees shall be considered to be on call and subject to the performance of work during the paid one-half (1/2) hour lunch period.

Section 4.03 - Overtime: All full-time and part-time employees who work in excess of their regularly scheduled work day or work in excess of their regular work week shall receive one and one-half (1-1/2) times the straight hourly rate for all overtime hours worked. For purposes of interpretation of this article, vacation days, compensatory time off, and sick leave shall be counted towards the eighty-two and one-half (82.5) hours which establishes overtime eligibility.

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Section 4.07- Vacant Shifts: All vacant shifts caused by less than twelve (12) hours' notice, shall first be offered to full-time employees before part-time employees.

Section 4.08: Full time employees shall be assigned to one of the following shifts:

- 1st Shift 5:45 a.m. to 2:00 p.m.
- 2nd Shift 1:45 p.m. to 10:00 p.m.
- 3rd Shift 9:45 p.m. to 6:00 a.m.
- 4th Shift 6:45 p.m. to 3:00 a.m.
- 5th Shift 10:45 a.m. to 7:00 p.m.

The investigations officers shall be assigned to work a 10:45 a.m. to 7:00 p.m. shift, unless manpower needs or duties dictate a necessary move to other hours.

Two (2) officers shall be designated as a swing shift officer and shall not have a permanent, assigned shift. Officers assigned to the swing shift shall have their preference by seniority of one of the following: 1st, 2nd, or 5th shift or 2nd, 3rd, or 4th shift.

Once the schedule is posted, employees must be notified at least forty-eight (48) hours in advance of a shift change. If less than forty-eight (48) hour notice, the employee shall receive time and one-half (1 ½) for all hours worked outside his/her normal shift.

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ARTICLE V - PROBATIONARY EMPLOYEES

Section 5.01 - Probationary Period: All full-time employees shall serve a probationary period of twelve (12) months from their date of hire as a full-time employee. All part-time employees shall serve a probationary period of two thousand and thirteen hours (2,013) from their initial date of hire based upon actual hours worked. For purposes of calculating this requirement, all overtime hours shall be calculated at straight time. In addition, if a part-time employee becomes a full-time employee, all hours worked as a part-time employee shall be credited towards the twelve (12) month probationary period for full-time employees.

Section 5.02 - Termination During Probationary Period: Probationary employees may be terminated at any time by the action of the Police Chief. Discharge by the Chief during the probationary period shall not be subject to a grievance except as provided in the rules and regulations for the Village Police Commission.

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ARTICLE XIV - SENIORITY

Section 14.01 - Seniority Defined: The term “seniority” as used in this Agreement shall refer to the employee’ years of continuous uninterrupted service with the Village of Twin Lakes Police Department. Seniority shall be defined as that period of service commencing from the last date on which the employee was hired by the Village and continuing thereafter until termination. Part-time employees shall gain seniority within rank based on the number of hours worked (i.e. 40 hours = 1 week). Part-time seniority shall apply for calling in available part-time employees for a vacant shift. Any part-time employee who becomes a full-time employee shall have an adjusted starting date giving consideration for all hours worked part-time since the last date of hire. The adjusted date of seniority shall only be used to determine the number of vacation days the employee is entitled to the amount of Longevity compensation. Seniority for any other purpose including the selection of Vacation shall accrue from the date of hire as a full-time employee.

Section 14.02 - Loss of Seniority: An employee shall lose seniority for any of the following reasons:

- A. quits or resigns;
- B. is discharged;
- C. fails to return to work on the first day following expiration of a leave of absence;
- D. fails to return to work within ten (10) working days after recall from a layoff; or
- E. retires.

Section 14.03 - Seniority During Layoff: Employees laid off during a time of reduction in force shall have their seniority status continued for a period equal to their seniority at the time of the layoff, but in no case shall this period be less than three (3) years.

Section 14.04: Seniority shall govern the assignment of overtime, shift preference, vacation days, holidays and days off. Exceptions will be made when such assignments are detrimental to the officer’s health and welfare or to the department’s function or operation.

By December 1st of each year, employees shall notify the Chief of Police of their shift preference based on seniority for the following year.

Employees who are involuntarily removed from a shift shall select another shift based on their seniority. Shift selections not affected by an involuntary removal from a shift shall be for a period of no less than one (1) year.

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ARTICLE XVII - GRIEVANCE PROCEDURE

Section 17.01: The Village Board and employees agree that the prompt and just settlement of a grievance is of mutual interest and concern. The provisions of this grievance procedure are strictly limited to interpretation of this agreement, and to those matters which do not come within the jurisdiction and procedures of the Twin Lakes Police Commission. All matters within the jurisdiction of the Twin Lakes Police Commission are reserved to the Commission, and are not subject to the following procedure. Discipline pursuant to Wisconsin Statutes 62.13(5) is not subject to the grievance procedure.

Step 1: An employee or the Association who has a grievance within the terms of this Agreement shall submit such a grievance in writing to the Chief of Police within ten (10) work days after the occurrence of the actual condition or event which is causing the grievance. The Chief shall meet with the employee or the Association within ten (10) work days and attempt to resolve the matter within the Department. The Chiefs response to the employee or the Association shall be in writing within ten (10) work days.

Step 2: If an acceptable solution to the grievance is not resolved at the Departmental level, the grieving employee or the Association may, within ten (10) work days of the Chiefs response, file an appeal with the Village Administrator, which shall set a hearing date within fifteen (15) work days of the date of appeal. At the Village Administrator level, the grieving employee or the Association shall appear and make their position known to the Village Administrator. The Village Administrator shall give his or her answer in writing within ten (10) work days after receipt of all evidence, material and position of each of the parties.

Step 3: A grievance which cannot be resolved with the above procedure maybe submitted by the Association for a decision by an impartial arbitrator. The arbitrator shall be selected by mutual agreement of the parties, and in the event the parties are unable to agree, the parties shall petition the Wisconsin Employment Relations Commission for a panel of five (5) arbitrators from their staff, from which the parties shall alternately strike names until one name remains. The remaining arbitrator shall be selected by the parties. The decision of the Arbitrator shall be final and binding on both parties.

Step 4 - Time Limits: A grievance which is not filed or pursued in accordance with the time limitations set forth in the procedures shall be considered as disposed of at the level from which no appeal has been taken. If the Chief or Village Administrator shall fail to give an answer within the time limits set forth, it shall constitute a denial and the grieving employee shall be

entitled to the next step of the grievance procedure; however, nothing in this paragraph shall prevent the parties from mutually extending the time limitations set forth herein, and any such extensions of time for appeals or action by the Chief of Police or Village Administrator shall be made a part of the record of the grievance file; Work days shall exclude Saturdays, Sundays, and holidays listed in Article X, Section 1.

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BACKGROUND

On August 28, 2007, the Village hired Danny Gavahan a Village Police Officer. Chief of Police Dale Racer issued a Memorandum dated January 15, 2008 and addressed to "All Supervisors" that includes the following:

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SUBJECT: Probationary Officers

Beginning Tuesday, January 15, 2008 the Twin Lakes Police Department will have three (3) officers on probation. PO Saunders until February 13, 2008, PO Gavahan until August 25, 2008 and Officer Kreft until September 28, 2008.

Because probationary officers can be terminated for any cause during their probationary period, it's prudent for this administration to ensure that the probationary officers are not put into any situation that would cause the termination of these officers while on probation. This would be the case if the administration would allow any of these officers to work together without proper supervision by current supervisors or senior officers.

Until further notice, **AT NO TIME** will any of the officers mentioned above, work together on a shift or overlapping shift, without proper supervision by current supervisors, to include Sergeants or Lieutenant, or senior officers.

A "Memorandum" dated August 29, 2008 from Police Chief Racer to Officer Gavahan includes the following:

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SUBJECT: Probation-Satisfactory Completed

Officer Gavahan,

I want to take this opportunity to congratulate you for successfully completing your probation period with the Twin Lakes Police Department, effective Friday, August 29, 2008.

On September 1, 2008, Sgt. Santelli posted a "Memorandum" that includes the following:

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To: All Officers
From: Sgt. Santelli
Date: 09/01/2008
Re: Additional Open Shift(s) and hours/September 2008

The following is a list of open shift(s) available to both part-time and full-time officers. P/T officers can sign for the shifts up to five days after they are posted providing they do not receive overtime for working the shift. After five days, the shifts are available to F/T officers by seniority. If the shift(s) is still open four days before scheduling it can be re-offered to P/T officers or filled by reverse seniority. Another officer cannot bump officers from the shift within four days. The shifts are subject to cancellation/change.

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One of the listed "Open Shifts(s)" was "10p-6a Sun. 9/14." Although identified as a "9/14" shift opening, the shift began on 9/14 and continued into 9/15. Officer Gavahan initialed this "Open Shift" and wrote "3a - 6a." Subsequently, Officer Gavahan looked at the "Memorandum" and observed that his initials and other handwriting were crossed out and replaced with writing that stated (another Officer) "is here 7p-3a" and "Santelli 3a."

Officer Gavahan submitted a grievance dated "October 2, 2008" and signed "October 7, 2008." This grievance includes the following:

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Article or Section of Contract Violated:

Article III - Management Rights
Article IV - Work Schedule/Overtime
as well as any other Article, Section or Past Practice that may be applicable

Issue:

Did the Employer violate the terms of the collective bargaining agreement or long standing past practice when it allowed another officer to bump the grievant from the overtime assignment that he was previously approved to work within four (4) days of the shift?

If so, what is the correct remedy?

Facts:

1. That the Village of Twin Lakes and the Twin Lakes Police Officer Association, Local 322 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 the grievant, Danny Gavahan, is a member of the Association and is covered by the collective bargaining agreement referenced in paragraph one.
3. That the Department issued a sign up sheet for an overtime opportunity on September 14, 2008.
4. That the grievant signed up to work part of the overtime from 3:00 AM to 6:00AM.
5. That on September 11, 2008, the grievant became aware that his name was crossed out by the Chief of Police and that Sgt. Santelli was now scheduled to work the hours of 3:00 AM to 6:00 AM.
6. That on October 2, 2008, the chief of Police confirmed that Sgt. Santelli received overtime for the hours of 3:00AM to 6:00AM, which the grievant previously signed up to work.
7. That the Village and the Association have a long standing past practice that other officers cannot bump officers from the overtime within four (4) days prior to the overtime shift.
8. That the Department violated the long standing past practice by allowing another officer to bump the grievant from the overtime shift within four (4) days prior to the overtime shift.

9. That the employer is exercising its' management rights in an unreasonable manner when it removed the grievant from the overtime assignment on September 15th, 2008 within four (4) days prior to the overtime shift.

Remedy: The Association respectfully requests that the employer cease and desist from violating the terms of the collective bargaining agreement. Further, the Association is requesting that the grievant be compensated for 3.0 hours at the appropriate overtime rate for being bumped from the overtime assignment within four (4) days prior to the overtime shift.

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.

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In a letter dated October 8, 2008 and addressed to Officer Gavahan, Police Chief Racer confirms that he received the above grievance on Wednesday, October 8, 2008 and that he would meet with Officer Gavahan on October 16, 2008 to discuss his issues.

A "Memorandum" from Police Chief Racer to Officer Gavahan dated October 16, 2008 includes the following:

I am in receipt of your grievance dated October 2, 2008 which I received on October 8, 2008. I am writing to follow up on our discussion of October 16, 2008 and to give you a written response pursuant to Article 17 of the contract between the Village and the Labor Association of Wisconsin.

At the outset, I note that your grievance is untimely. The event that you are grieving occurred on or about September 11, 2008. However, you waited until October 8, 2008 to file a grievance on this matter. Pursuant to Section 17.01 of the grievance procedures in the Collective Bargaining Agreement, you are required to file a grievance with me within "ten (10) work days after the occurrence of the actual condition or event which is causing the grievance." I note that more than ten days have passed since September 11, 2008 and more than ten days since the actual shift of September 15, 2008. Therefore I am denying your grievance because it is untimely.

Even if the grievance were timely, your grievance fails to take into account the issues of the event you grieve. Your assertion that I have violated a longstanding past practice that "other officers cannot bump officers from the overtime within four (4) days prior to the overtime shift" is not applicable in this situation.

While I am not taking an opinion with respect to the past practice, the practice only applies to officers bumping other officers within that four day period based on seniority. That is not what occurred in this case. Instead, your name was removed pursuant to a policy that was enacted in January of 2008 which was communicated to you at that time. That is, that there may not be two probationary officers on any one shift at the same time. I instituted this policy to make sure that we had one experienced officer on any shift. This rule is for the protection of the members of the police department and our citizens. I have retained the ability pursuant to Article 3 of the Management Rights clause Section 3.01 paragraphs A, B, C and L. For your convenience, I am attaching a copy of the announcement/policy that I circulated on January 15, 2008. I note that there has been no issue raised on this policy until this grievance. If you have any questions, please feel free to contact me directly.

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The grievance was denied at all steps and submitted to contractual grievance arbitration.

POSITIONS OF THE PARTIES

Village

Timeliness

Step 1 of the contractual grievance procedure requires the Grievant or the Association to submit a grievance “in writing to the Chief of Police within ten (10) work days after the occurrence of the actual condition or event which is causing the grievance.” The record evidence shows that the Association understood these requirements and complied with them in previous grievances.

The grievance procedure exists to ensure prompt resolution of disputes. In this case, the Association waited as much as 27 days from the date the Grievant admits that he became aware of the bump.

As acknowledged in the written grievance, the “occurrence of the actual condition or event which is cause[d] the grievance” is Sgt. Santelli’s bumping Officer Gavahan. By the Association’s own admission, Officer Gavahan knew by September 11, 2008 that he had been bumped.

The date on which Sgt. Santelli received overtime is immaterial. Additionally, the Association could have confirmed Sgt. Santelli’s receipt of overtime well before October 2, 2008.

Under the Association's argument, the time limits are tolled until the Association confirms an incident. Acceptance of this argument would lead to absurd results.

The grievance was not timely filed under the contractual grievance procedure. Accordingly, the grievance is not arbitrable.

Association

Timeliness

The contractual grievance procedure states that the first step of the grievance must be filed within ten (10) days "after the occurrence of the actual condition or event which is causing the grievance." On September 11, 2008, Officer Gavahan was notified that he was being denied overtime for September 15, 2008.

After being contacted by Officer Gavahan, the Association investigated the matter. During this investigation, the Association took the position that, if Sgt. Santelli did not receive time and one-half for working the hours that Officer Gavahan had taken away from him, there would be no grievance. In an email dated October 1, 2008, Association Representative Barth contacted Chief Racer to ascertain whether any overtime had been awarded for the shift in question.

On October 2, 2008, Association Representative Barth received an email from Chief Racer stating that Sgt. Santelli was paid overtime for the 3:00 a.m. to 5:45 a.m. shift on September 15, 2008. Once the Association confirmed that Officer Gavahan had been "bumped" out of the overtime, the Association filed this grievance.

The Association should not be penalized for taking diligence in verifying the facts with the Employer prior to filing a grievance. The Association acted reasonably in waiting for verification of key facts from the Employer before taking action.

DISCUSSION

Article XVII-Grievance Procedure, Step 1, states that "An employee or the Association who has a grievance within the terms of this Agreement shall submit such a grievance in writing to the Chief of Police within ten (10) work days after the occurrence of the actual condition or event which is causing the grievance." (Emphasis supplied) The term "shall" is directory, not permissive.

Article XVII, Step 4 – Time Limits, recognizes that the parties may mutually extend the time limits, but any such extensions "shall be made a part of the record of the grievance file." In the present case, the parties did not mutually extend the time limits for filing the Step 1 grievance. Rather, from the time that the grievance was filed at Step 1 of the grievance procedure, the Employer has asserted that the grievance was not filed within "ten (10) work days" and, thus, was untimely.

Step 4 – Time Limits also states, “A grievance which is not filed or pursued in accordance with the time limitations set forth in the procedure shall be considered as disposed of at the level from which no appeal has been taken.” This language is not as clear as it could be. However, within the context of Article XVII, this language is most reasonably construed to mean that, if a grievance is not timely filed at Step 1, then the grievance is disposed of at Step 1 of the grievance procedure. Where, as here, the Village has consistently asserted that the Step 1 grievance was not timely filed, it would be unreasonable to conclude that the Association’s conduct in appealing the grievance to Steps 2 and 3 means that the grievance was not disposed of at Step 1.

As the Village argues, the written grievance challenges Sgt. Santelli’s right to bump the Grievant from the overtime assignment of 3:00 a.m. to 6:00 a.m. on September 15, 2008. Thus, the “occurrence of the actual condition or event which is causing the grievance” is Sgt. Santelli’s conduct in bumping the Grievant from this overtime assignment.

The overtime sign-up sheet does not indicate when the sign-up sheet was changed to “bump” the Grievant from his overtime assignment. However, as the Village argues, the written grievance confirms that, on September 11, 2008, the Grievant knew that he had been removed from this overtime assignment and that Sgt. Santelli was scheduled to work in his place. Thus, as of September 11, 2008, the Grievant was aware of the “occurrence of the actual condition or event which is causing the grievance”, as work days are calculated under Article XVII.

It is laudable that the Association wished to confirm its facts prior to filing a grievance. However, the language of Article XVII neither expresses, nor implies, that the time limit for filing a Step 1 grievance is tolled while the Association conducts its investigation of the grievance. By filing the written grievance on October 8, 2008, the Association and the Grievant did not submit “a grievance in writing to the Chief of Police within ten (10) work days after the occurrence of the actual condition or event which is causing the grievance.”

Under Step 3 of the contractual grievance procedure, the Association has the right to submit a grievance “which cannot be resolved with the above procedure” to arbitration. Inasmuch as the Step 1 grievance was not filed within the contractually mandated “ten (10) work days” and the parties have not mutually extended the time limits for filing the Step 1 grievance, this grievance was disposed of, and thus resolved, at Step 1 of the grievance procedure. As the Village argues, this grievance is not arbitrable.

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

AWARD

1. The grievance is not arbitrable.
2. The grievance is dismissed.

Dated at Madison, Wisconsin, this 3rd day of January, 2011.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator