

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

PUBLIC SAFETY PROFESSIONAL DISPATCHERS' ASSOCIATION

Case 432
No. 69851
MA-14768

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, The Labor Association of Wisconsin, Inc., N116 W16033 Main Street, Germantown, Wisconsin 53022, appearing on behalf of Public Safety Professional Dispatchers' Association.

ARBITRATION AWARD

Winnebago County (County) and Public Safety Professional Dispatchers' Association (Association) are parties to a collective bargaining agreement covering contract years 2007-2009. (Contract). By its terms, the Contract remains in effect as the Parties negotiate a successor Contract. The Contract provides for final and binding arbitration of grievances arising under the Contract. On May 14, 2010, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) regarding the County's decision to deny Grievant's request to change the date of the "payback" shift related to an earlier shift switch request submitted on December 13, 2009. The Association further requested a panel of five WERC staff members and commissioners from which the Parties could select an arbitrator. The undersigned was selected. Hearing was held on the grievance on August 18, 2010 in Oshkosh, Wisconsin. The hearing was not recorded or transcribed. The Parties then submitted post-hearing written arguments in support of their positions, the last of which was received on October 12, 2010, closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

ISSUE

At the hearing, the Parties were not able to agree on the specific formulation of the issue and authorized me to formulate the issues to be decided. In its brief, the County submits that the issues to be decided are:

1. Did the Winnebago County Sheriff's Office violate Art. 6.5 [Switching Shifts/Duty Days] of the 2007-2009 collective bargaining agreement between Winnebago County and Public Safety Professional Dispatcher's [sic] Association by refusing to permit Dispatcher Michelle Guenther to change the originally scheduled "payback" date of April 22, 2010 to a date of her choice?
2. Does existing Winnebago County Sheriff's Office policy prohibit dispatchers from changing originally-scheduled "payback" days?
3. Did the Association establish an enforceable "past practice" of permitting dispatchers to change originally-scheduled "payback" days?
4. If the Association established a "past practice" of permitting dispatchers to change originally-scheduled "payback" days, does Art. 3, Management Rights, permit the County to modify the practice to make it consistent with existing policy?

The Association submits that the issue to be decided is:

Did the Employer violate the expressed or implied terms and conditions of the collective bargaining agreement and/or past practice when it cancelled Michelle Guenther's request to switch her payback day from April 22, 2010 to March 11, 2010 after the request was previously approved?

If so, what is the appropriate remedy?

I formulate the issues to be decided as follows:

Did the County violate Section 6.5 of the Contract when it denied Grievant's request to change the payback date that was originally identified on the switch shift request form submitted on December 13, 2009? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

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 with the Employer.

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

ARTICLE 6 – HOURS OF WORK

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6.5 – Switching Shifts/Duty Days. Employees shall be allowed to switch shifts or duty days with the consent of the Employer and as long as no overtime results with such switch. Shift switching shall not occur to the extent that less than two employees are available to work overtime (scheduled to work no more than eight and one-quarter (8.25) consecutive hours). No shift switches shall be less than four (4) hours unless approved by the Dispatcher-in-Charge. No chain switches (one employee working for another in place of a third, etc.) shall be allowed. All shift trades which are in excess of eight and one quarter (8.25) hours per day or forty (40) hours per week shall not be subject to the overtime provisions of this Agreement, pursuant to Section 553.31 – Substitution, Section 7(p)(3) of the Fair Labor Standards Act. All switch paybacks must occur within six (6) months of the date of the original switch. The initial switch must be under one of the following conditions: 1) The employee needs time off and the schedule does not allow it (maximum allowed already off), or 2) The employee is out of time to take off (i.e., compensatory time, OCC time, paid holiday or vacation).

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BACKGROUND

At the hearing in this matter, the Parties entered into a stipulation regarding many of the relevant facts. The following contains both stipulated facts as well as other relevant facts I have found in the record.

History of the Application of Section 6.5

The County operates a Communications Center as a division within the Sheriff's Department. Employees in the Communications Center are supervised regarding scheduling issues by the Communications Manager who in turn reports to the Administrative Captain. The Communications Manager at the times relevant to this matter has held the position since at least 1998. The Administrative Captain at the times relevant to this matter has held the position since May 2008. Prior to May 2008, the Administrative Captain worked in the patrol and corrections divisions of the Sheriff's Department where she also handled scheduling issues as part of her duties.

Section 6.5 of the Contract permits employees to voluntarily switch shifts under certain circumstances. When two employees enter an agreement to switch shifts, two shifts are affected, the initial switch shift and the payback shift. The initial switch shift occurs when one of the employees substitutes for the other employee during a shift, allowing the requesting employee to be off from work. The payback shift occurs when the requesting employee fills in for the other employee on a future shift. When a shift switch request is approved, an entry is made into the scheduling system. This entry results in the names of the switching employees appearing at the bottom of the daily schedule for the affected days. Along with the employees' names, there is also an indication of which employee is working for the regularly scheduled employee, the date of the corresponding switch shift and an indication as to whether the shift being worked that day is the payback shift. If the switch shift or payback is cancelled, a line strikes through the information and the date of cancellation and initials of the Communications Manager appears in the space to the right of the shift switch information.

Section 6.5 contains considerable detail regarding limits on employee use of switch shifts. However, it is silent on the procedural method for making requests, including whether the date of the payback switch shift can be changed after it has been identified at the time the initial request was approved. The only provision specifically related to payback shifts is the requirement that the payback shift occur within six months of the initial switch shift.

The administrative procedure related to Section 6.5 has been developed by the Parties over a decade. The County issued a standard operating procedure regarding the use of switch shifts on October 13, 1998 that was revised on March 13, 2009 (SOP). The SOP contains a requirement that the "Payback date must be identified at time of switch request," but does not expressly permit or prohibit subsequent changes to the payback date. The Parties entered into a Letter of Understanding (LOU) on November 3, 2004 that addressed other procedural

requirements related to switch shift requests, but also does include any relevant provision on the payback date change issue. The Administrative Captain issued a memo on August 12, 2009 entitled "Reminder regarding Switching Shifts." In this memo, among other things, the County reiterated the requirement that "The payback date & time must be entered at the time of the request," but does not expressly permit or prohibit changes to the payback date that is identified at the time of the request. For over a decade, the Communications Manager routinely approved employees' requests to change the payback date that was originally listed on their switch shift request. Prior to January 2010, these changes were submitted and approved almost daily.

The County first expressly prohibited changes in the payback date in a memo issued by the Administrative Captain dated January 6, 2010.¹ The memo states as follows:

Payback dates on a Shift Switch Request cannot be changed or cancelled once the switch has been submitted and approved.

The entire switch may be cancelled prior to the initial switch occurring. Partial changes to any shift switches will not be permitted.

All information must be complete (including the reason for the switch) before the shift switch can be approved.

At hearing, the Administrative Captain testified that other Sheriff's Department divisions do not permit changes in payback shifts. Prior to January 6, 2010, the County has never explicitly communicated in writing, nor enforced, a prohibition against changing the payback date on switch shift request forms in the Communications Center.

History of the Instant Grievance

Grievant Michelle Guenther (Grievant) submitted a shift switch request form on December 13, 2009. In it, she and another dispatcher, Anne Hallman (Hallman), agreed that Hallman would work Grievant's December 13, 2009 shift and Grievant would work a payback shift for Hallman on April 22, 2010. The request was approved by the Communications Manager and Hallman worked Grievant's shift on December 13, 2009. Grievant then submitted a new switch shift request form on January 4, 2010 requesting to change the payback date from April 22, 2010 to March 11, 2010. This request to change the payback date was also approved, as indicated by the change appearing in the scheduling system.

Following an e-mail exchange between Grievant and the Communications Manager, Grievant was informed on March 1, 2010 that the approval regarding the change in payback date had been revoked. The Communications Manager explained that "I realize there is

¹ There apparently was also a December 7, 2009 "reminder note" that the Communications Manager issued to employees, stating to the effect that changes in payback dates are not permitted. The actual text of this note and details regarding how it was communicated are not in the record.

nothing written that says you can't change your trade time but the rule for all divisions is you are held to the dates for the initial trade as well as the payback which is agreed to at the time of the trade."

Grievant complied with the directive by working the originally scheduled payback shift on April 22, 2010, but filed the instant grievance on March 9, 2010. The grievance was denied at the first three steps of the grievance procedure, resulting in this arbitration proceeding.

DISCUSSION

I conclude that the County violated Section 6.5 of the Contract when it denied Grievant's request to change the payback shift from that which was originally identified on the shift switch request submitted on December 13, 2009.

As noted above and acknowledged by the Parties, Section 6.5 is silent regarding the issue of whether employees who submit switch requests are allowed to request a change in the date of the payback switch shift after the initial request has been approved. As such, I find that the Contract is ambiguous on the point. Therefore, it is appropriate to examine the bargaining history of the Parties as well as the prior conduct of the Parties in applying Section 6.5 in an effort to resolve the ambiguity.

Neither the County nor the Union submitted evidence on specific prior bargaining history related to the ability to request changes in the payback date identified on the initial switch shift request. The record shows that the Parties entered into a Letter of Understanding (LOU) on November 3, 2004 that addressed other procedural requirements related to switch shift requests, but does not include any provision on the payback date change issue.

However, I do find that the longstanding and consistent conduct of the Parties gives meaning to Section 6.5 and resolves the ambiguity. The Administrative Captain testified that prior to the January 8, 2010 memo, the Communications Manager routinely approved requests to change payback dates. The record indicates that this practice goes back at least a decade. I do not read any of the County's arguments or evidence to dispute the fact that requests to change payback shifts were routinely allowed by Communications Center management prior to January 6, 2010. This conduct created a past practice that is linked to a specific contractual provision. I therefore conclude that Section 6.5 incorporates the past practice and allows employees to request changes in payback dates.

The County argues that even if a past practice is found, it is free to exercise its authority under the Management Rights provision in Article 3 of the Contract. Article 3 states that, unless "specifically provided" otherwise in the Contract, the County is allowed to "determine the schedules of work." In the County's view, since the Contract does not specifically provide in writing that employees can request changes in payback shifts, it is free to set a policy that prohibits changes. However, my finding is that the practice in allowing

requests to change payback date gives meaning to the existing specific contract language. As such, it has become part of Section 6.5 and its specificity overrides the County's general Article 3 rights. Similarly, because I find the ability to request changes in payback dates is not extra-contractual, but rather forms part of Section 6.5, the lack of maintenance of standards clause does not affect my conclusion regarding the County's ability to end the requests.

The County points out that the payback shift change requests were approved by the same Communications Manager who was subsequently disciplined for making the approvals. As such, the County argues that the failure of the Communications Manager's conduct to comport with the County's current view of the ability to change the payback shift should not bind the County to her unilateral action. However, the Communications Manager has been the County's agent for handling switch shift requests in the Communications Center since at least 1998. Basic principles of agency compel the conclusion that her consistent actions as a management employee, applying provisions of the Contract that she was charged with administering, became the actions of the County.

The County also argues that, since it has been consistent in requiring employees to identify the payback switch shift at the time the switch shift request form is submitted for approval, it would be incongruous to permit employees to change the payback date on a whim and that such a finding would encourage employees to falsify records by listing meaningless payback dates. This argument is also unpersuasive. Even if the County had been consistent in requiring the identification of the payback date, this requirement does not preclude the possibility that changes in the payback date could also be submitted and approved in the same manner as the initial request.

The County views the conclusion that payback dates cannot be changed as the "only logical implication" that can be drawn from the LOU, SOP, and August 12, 2009 memorandum and that the County has a "right to expect their workers to use logic and common sense when reading and following policies." This ignores the fact that, prior to January 6, 2010, there was no written policy on the ability to request changes in payback dates for the employees to read and follow. The only facts apparent to the employees regarding the issue were that the Contract is silent on the matter, that the County had not directly addressed the issue in policies or agreements, and that management administered the provision in a consistent manner for many years. If anything, it would be illogical for employees to come to a conclusion that was different than the fact that management would routinely accept and approve requests to change payback dates.

The LOU contains a statement that "The shift switch is based upon the circumstances at the time of the switch approval." The County argues that in order to make an educated decision regarding whether or not to approve the switch shift, the Communications Manager must know with certainty that the staffing needs on the identified payback date will be met as of the day of the approval of the initial request. By its express terms, the LOU expired on December 31, 2006 unless the Parties agreed to an "extension of its provisions to successor agreements." While many of the LOU's terms do appear in the current version of Section 6.5,

the language identified by the County does not. Nor does the language appear in the SOP that was revised by the County in 2009. Therefore I find that, whatever the identified language meant at one time, by not incorporating it into the Contract, the Parties have abandoned the language. However, it is worth noting that under Section 6.5, the County retains the right to deny change requests that are not consistent with the limitations in that section.

The County also identifies administrative burdens that result from approving and tracking changes in the payback date. As mentioned above, the Communications Manager stated in an e-mail that changes in payback dates were occurring “almost daily” prior to January 6, 2010. While I have no doubt that allowing changes in payback dates does indeed result in more work than if requests to change payback dates were not permitted, the County has managed to accommodate the ability to change the payback dates for at least a decade. There was no evidence presented that the additional work impeded the operation of the Communications Center in any significant manner.

The County also invokes its need to flexibly schedule employees in an effective and efficient manner in order to preserve the safety and protection of the citizens of Winnebago County. The County does not argue that it was unable to effectively schedule employees for over a decade when changes in payback dates were permitted on an almost daily basis. Indeed, Section 6.5 explicitly protects the County’s ability to ensure that scheduling needs are met. This award does not require the County to approve requests to change payback dates where it otherwise has the right under Section 6.5 to deny the request.

The Association’s requested remedy is that the entire January 6, 2010 memo be rescinded. However, there are portions of the memo that do not directly relate to the issue decided in this award. I conclude that only those portions of the memo that prohibit requests to change payback dates shall be rescinded. Specifically, this includes the first and third sentences of the memo.

For the foregoing reasons, I conclude that the County violated Section 6.5 of the Contract when it denied Grievant’s request to change the payback date that was originally identified on the switch shift request form submitted on December 13, 2009. Given this conclusion, the grievance is sustained and the Association’s requested remedy is awarded in part. The first and third sentences of the January 6, 2010 memo shall be rescinded.

Dated at Madison, Wisconsin, this 14th day of January, 2011.

Matthew Greer /s/

Matthew Greer, Arbitrator

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