BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 767
No. 70850
MA-15064

(Big Overtime Grievance)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Roy Williams, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance which the parties denominated the big overtime grievance. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on February 22, 2012. The hearing was not transcribed. The parties filed briefs and the Association filed a reply brief, whereupon the record was closed March 23, 2012. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

7808

ISSUE

The parties stipulated to the following issue:

Does Section 3.02 of the collective bargaining agreement allow the Sheriff's Office to unilaterally decide which overtime assignments are given to the members of the MDSA?

PERTINENT CONTRACT PROVISIONS

The parties' 2007-08 collective bargaining agreement contained the following pertinent provisions:

1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

- The right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed;

- The right to determine the number of positions and the classifications thereof to perform such service;

- The right to direct the work force;

- The right to establish qualifications for hire, to test and to hire, promote and retain employees;

- The right to assign employees, subject to existing practices and the terms of this Agreement;

- The right, subject to civil service procedures and § 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;

- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are to be conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and

practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing management rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management.

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3.02 OVERTIME

(1) All time credited in excess of eight (8) hours per day or forty (40) hours per week shall be paid in cash at the rate of one and one-half (1½) times the base rate, except that employees assigned to continuous jury sequestration shall be paid sixteen (16) hours at their base rate and eight (8) hours at the rate of one and one-half (1½) times the base rate for each 24-hour period of uninterrupted duty, and except that first shift hours worked in excess of forty (40) per week shall be paid at the rate of one and one-half (1½) times the base rate.

(2) Overtime needs and required staffing levels shall be determined by the Sheriff.

(3) All scheduled overtime shall be assigned within classifications as follows:

(a) Employees shall volunteer for overtime and their names shall be placed on a list in seniority order within each work unit.

(b) When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list

within the work unit where the overtime is being scheduled.

(c) In the event an employee refuses to accept an overtime assignment or there are insufficient volunteers for the work unit where overtime is required, the least senior employee in the classification in the work unit shall be required to work the overtime assignment.

(d) Employees shall not be scheduled for overtime when they are liquidating accrued time off or during an approved leave of absence or disciplinary suspension.

(e) For an event identified by the Sheriff as a Special Event, the above procedure shall be utilized on a departmental basis. In the event there are insufficient volunteers for a Special Event overtime assignment the Sheriff shall rotate in the inverse order of seniority among all employees in the department in the classification.

(f) Employees shall not be permitted to volunteer to work during a period of scheduled vacation, personal time, holiday time or compensatory time unless approved to work by the Sheriff. However, for special events as defined in (e) above, employees shall have the opportunity to work overtime hours in accord with the above procedures when they are on vacation, on their normal off-days, or are using holiday or personal days only under the condition that the Sheriff's Department is under contract to be reimbursed for non-tax levy overtime expense incurred for the Special Event.

(4) Employees shall have the option of accumulating one hundred twenty (120) hours of compensatory time, exclusive of holidays, in lieu of cash, within twenty-six (26) pay periods, provided that such compensatory time may be liquidated only with the consent of the department head and if the County determines staffing is adequate and if no overtime assignment will result employees will be allowed to liquidate their accrued compensatory time. If, because of the needs of the department, such compensatory time is not liquidated the balance shall be compensated in cash.

(5) Any overtime in excess of thirty-two (32) additional hours worked in a pay period will require the advanced approval of the Sheriff or his designee.

FACTS

The County operates a Sheriff's Department. The Association represents the sworn law enforcement employees of the Sheriff's Department who hold the rank of deputy sheriff and deputy sheriff sergeant. Hereinafter, these two groups of employees will be referred to as MDSA (Milwaukee Deputy Sheriffs' Association) members. The County also employs corrections officers. The corrections officers are not included in the aforementioned bargaining unit and thus are not represented by the MDSA.

Due to ongoing budget deficits and cuts, the Sheriff's Department has been forced to make huge changes in staff. As just one example, there used to be 900 deputies in the department. There are now 300. A deputy has not been hired since 2006. Here's why. About ten years ago, the Department started replacing MDSA members with corrections officers to reduce costs. Corrections officers do not have the power of arrest and are considered civilian employees. In contrast, MDSA members do have the power of arrest and are considered law enforcement employees. Overall, the corrections officers have less training and specialized knowledge than MDSA members do. As a result, corrections officers are paid less than MDSA members. This transition from replacing MDSA members with corrections officers is an ongoing process. As part of that process, the Department constantly asks the following question - in the words of Deputy Inspector Edward Bailey - "Can the employees who perform this task be replaced by a lower paid employee?"

That's essentially what this case involves, albeit in the context of voluntary overtime work.

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As part of its responsibilities, the Sheriff's Department operates two correctional facilities. One is the county jail, which is officially known as CCFC (County Correctional Facility - Central). The other is the facility formerly known as the House of Corrections. This facility is officially known as the CCFS (County Correctional Facility - South). Both of these correctional facilities are staffed by corrections officers and MDSA members (meaning deputy sheriffs and deputy sheriff sergeants).

It wasn't always that way. Prior to 2005, the supervision of inmates at the CCFC (i.e. the jail) was performed exclusively by MDSA members. That changed in 2005 when the Employer decided to also use corrections officers to supervise inmates at that facility. Thus, corrections officers were first assigned to work at the CCFC in 2005. The record indicates that the decision to assign corrections officers to work at the CCFC was litigated by the

parties. The Employer won that litigation. One result of that litigation was that MDSA members and corrections officers now work side by side.

The MDSA members and corrections officers now work side by side at both correctional facilities. They perform the same or substantially similar work assignments at the two facilities. Specifically, they all do booking, monitoring, restraining, feeding, transporting and disciplining of inmates. Sometimes these job duties are assigned to an MDSA member while sometimes these job duties are assigned to a corrections officer. The decision of whether to use an MDSA member or a corrections officer is left to the front line supervisor. If a certain task requires the exercise of law enforcement powers though, then that task is assigned to an MDSA member. As previously noted, that's because MDSA members exercise law enforcement powers while corrections officers do not.

Having just noted that MDSA members and corrections officers perform many of the same job duties and are essentially interchangeable, it is noted next that this case does not involve their shared job duties or the work they perform during their straight time hours. Instead, this case involves a certain type of overtime work. The type of overtime work involved will be identified in the next paragraph.

The Employer has two types of overtime work: voluntary and mandatory. Voluntary overtime is when the Employer has an overtime opportunity that the Employer knows about in advance, and the employees voluntarily sign up to work that overtime. Voluntary overtime is given out by seniority. Mandatory overtime is different. When there are not a sufficient number of volunteers to work the overtime opportunities available, then an employee can simply be assigned to work overtime (whether they want to work it or not). This type of overtime, called mandatory overtime, is forced on employees in the inverse order of their seniority. This case does not involve mandatory overtime. Instead, it deals solely with voluntary overtime. Elaborating further on that point, it does not involve all voluntary overtime that is worked in the Department. Instead, it just involves the voluntary overtime that is worked at the two correctional facilities (i.e. the CCFC and the CCFS).

The record indicates that from the time corrections officers started working at the CCFC (i.e. the jail) in 2005 through January, 2011, both corrections officers and MDSA members were allowed to work the voluntary overtime opportunities that management decided needed to be worked.

During that time period, the voluntary overtime process at the CCFC and CCFS worked as follows: The MDSA members and the corrections officers who were interested in working voluntary overtime put their names on a sign-up sheet that was kept for that purpose. Both MDSA members and corrections officers signed the same sheet. When the Employer decided that voluntary overtime work was available at either of the two correctional facilities, it was given to the senior employee who had signed up for voluntary overtime. As previously noted, this voluntary overtime at the two correctional facilities was worked by both MDSA members and corrections officers.

In January, 2011, the Department's management unilaterally changed how voluntary overtime work was distributed at the two correctional facilities. Specifically, management decided that henceforth, MDSA members could not work the voluntary overtime opportunities available at the two correctional facilities. Instead, just corrections officers could work the voluntary overtime opportunities that were available at those facilities. This changed policy was not put in writing. The Association learned of the changed policy when an Association representative asked a deputy inspector if management had changed how voluntary overtime was being distributed at the two correctional facilities, and the deputy inspector confirmed that voluntary overtime at those two facilities was no longer being given to MDSA members – it was just being given to the corrections officers. This verbal notice was the only notice the Association received concerning the new way voluntary overtime was being handled at the two correctional facilities. The Association subsequently asked management for written confirmation of the new voluntary overtime policy, but none was provided. This new voluntary overtime policy adversely affected the MDSA members who work at the two correctional facilities because they no longer have the opportunity to work any voluntary overtime.

On March 15, 2011, the Association filed the instant grievance which contended that the Sheriff's Office had violated the parties' collective bargaining agreement by denying MDSA members the opportunity to work (voluntary) overtime at the two correctional facilities. The grievance alleged that in the month of January, 2011 alone, MDSA members were improperly denied about 400 hours of (voluntary) overtime. The grievance was subsequently appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association contends that Section 3.02 of the collective bargaining agreement does not allow the Sheriff's Office to unilaterally decide which overtime assignments are given to MDSA members. Since that is what happened when the Employer excluded MDSA members from performing voluntary overtime at the two correctional facilities, the Association believes the Employer has violated the collective bargaining agreement. It elaborates as follows.

First, before reviewing the contract language, the Association gives the following factual context to this dispute. It initially notes that MDSA members and the corrections officers work side by side at the two correctional facilities. There, they have similar job responsibilities and work together to carry out their assigned tasks. Next, it notes that until January, 2011, both groups of employees (i.e. the MDSA members and the corrections officers) were given the opportunity to work whatever voluntary overtime work the Employer decided was available. Next, the Association notes that the voluntary overtime situation changed in January, 2011 when the Department's management decided that henceforth, MDSA members could not work any voluntary overtime; instead, just corrections officers could work

the voluntary overtime. The Association contends that decision by the Department's management violated the overtime provision.

Second, the Association disputes the County's contention that this case is controlled by the management rights clause. Here's why. The Association begins its argument on this point by acknowledging that the management rights clause gives the Sheriff the right to determine the classifications and the number of positions to perform services for the Sheriff's Office. It further acknowledges that the Sheriff can also assign employees in order to maintain efficiency of Sheriff's Office operations. As the Association sees it, this language gives the Sheriff the right to decide whether he assigns MDSA members to work at the two correctional facilities (or whether he assigns them to work elsewhere). That said, the Association submits that this case does not involve that decision (whether MDSA members are assigned to the two correctional facilities). Instead, it is an overtime assignment case. Building on that, the Association contends that the management rights clause doesn't say anything about the assignment of overtime. As will be noted next, the Association believes the assignment of overtime is covered by another provision (namely the overtime provision). That being so, it's the Association's view that the management rights clause is not controlling herein.

Third, the Association turns its attention to the overtime provision (Section 3.02). The Association acknowledges at the outset that Section 3.02(2) gives the Sheriff the right to determine overtime needs and necessary staffing levels. According to the Association, this sentence means that the Sheriff gets to decide whether overtime is available at that location. Next, the Association notes that the Sheriff has previously decided that voluntary overtime will be worked at the two correctional facilities. The Association emphasizes that it's not telling the Sheriff when employees have to work overtime or how many hours of overtime they work. The Association repeats, once again, that the Sheriff gets to make those calls. Building on that premise, the Association notes that until this case arose, voluntary overtime was worked by both MDSA members and corrections officers. (Note: This point will be addressed in more detail in the next paragraph). Now, though, management has decided that just corrections officers can work voluntary overtime and that MDSA members cannot. Thus, just corrections officers are now being allowed to work whatever voluntary overtime exists at the two correctional facilities. As the Association sees it, that action by the Employer violated the language in Section 3.02(3) which governs the assignment of voluntary overtime. According to the Association, that provision is clear and unambiguous in providing how voluntary overtime is distributed to employees. The Association opines that that language "requires that MDSA members be provided with the same overtime opportunities that are given to the corrections officers they work beside on a daily basis." The Association asks the arbitrator to apply that interpretation here, and again allow MDSA members to work whatever voluntary overtime opportunities are available at the two correctional facilities.

Fourth, the Association argues that if the arbitrator finds the language in Section 3.02(3) is ambiguous, then the arbitrator should consider the parties' past practice. According to the Association, the past practice in the Sheriff's Department is this: Since the MDSA members and corrections officers started working together in the two correctional

facilities, both groups of employees had the same opportunity to work whatever voluntary overtime opportunities existed. Said another way, up until January, 2011, MDSA members had the same opportunity to work voluntary overtime as corrections officers did. The process was this: both groups of employees signed up for voluntary overtime on the same sheet; then, after the Employer decided that voluntary overtime work was available, that work was given to the senior employee who had signed up for voluntary overtime. The Association contends that was the way voluntary overtime was handled at both correctional facilities on "every day of every year between the time corrections officers were first assigned to these positions and January, 2011." The Association maintains that given its longstanding duration, that method of distributing voluntary overtime at the two correctional facilities qualifies as a past practice which is entitled to contractual enforcement. The Association contends that in January, 2011, though, management broke that practice when it unilaterally decided that henceforth, MDSA members could no longer work voluntary overtime (while the corrections officers could continue to work whatever voluntary overtime work existed). According to the Association, this restriction precluding MDSA members from working voluntary overtime at the two correctional facilities is unprecedented, and should not stand.

In sum then, the Association argues that when management repudiated the longstanding practice concerning who works voluntary overtime at the two correctional facilities, the Employer violated the overtime provision (as interpreted via the parties' past practice). The Association asks the arbitrator to overturn the Employer's decision and enforce the parties' past practice.

With regard to a remedy, the Association asserts that the parties "have agreed that they will discuss and potentially arbitrate the appropriate remedy" after the arbitrator issues his decision in this matter.

<u>County</u>

The County contends that the Sheriff's Department's decision to use corrections officers exclusively to perform voluntary overtime at the two correctional facilities does not violate the collective bargaining agreement. It elaborates as follows.

The Employer sees the following background as being pertinent to this case. It begins by noting that the Sheriff's Department is facing huge budget deficits and cuts. That being the case, it stands to reason that the management of the Sheriff's Department is constantly looking for financial efficiencies in managing the operation of the department. It notes that one efficiency is to use less expensive resources when they are available. In the context of this case, the word "resources" applies to human resources (meaning staff). Given that background, the Employer believes that what it did here (i.e. decide to use corrections officers exclusively to perform voluntary overtime work at the two correctional facilities) was reasonable. The Employer avers that the reason it made that decision was because corrections officers are paid less than deputies are. The Employer opines that when it needs to have

employees work voluntary overtime at the two correctional facilities, it makes little financial sense to have a deputy do the work that a corrections officer can perform. Simply put, it's cheaper to use corrections officers to do that work than the deputies. Hence, that's why it made the change.

The Employer primarily relies on the management rights clause to support its position that using corrections officers exclusively to perform voluntary overtime at the two correctional facilities does not violate the collective bargaining agreement. It first notes that the introductory sentence (of that section) says that the County retains the right "to manage its affairs." Next, it notes that the second bullet point in that section goes on to say that the County has the right "to determine the number of positions and classifications thereof to perform such service." In the last bullet point, it says that the County has the right "to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions that are reasonable and necessary to carry out the duties of the various departments and divisions." As the Employer sees it, this language – especially the reference to "efficiency" – gives the Employer a broad grant of authority to manage the Department. It maintains that subsumed into that is the responsibility to manage the financial affairs of the department. Subsumed into that is the responsibility to manage how overtime is assigned and distributed.

Next, the Employer maintains that the broad authority which is granted to management in the management rights clause is "echoed" in Section 3.02(2) of the overtime clause. That section provides that "overtime needs and required staffing levels shall be determined by the Sheriff." According to the Employer, this sentence clearly gives the Sheriff (who is a constitutional officer elected by the citizens of Milwaukee County) the right to determine overtime needs and staffing levels. Building on that premise, the County avers that the Sheriff decided that the Department's "overtime needs" could be best met by having corrections officers perform the voluntary overtime work available at the two correctional facilities (rather than the deputies performing that overtime work). The County asks the arbitrator to not overturn the Sheriff's decision.

Finally, it's the Employer's view that there is nothing in the overtime provision that says that the Department must use deputies to perform voluntary overtime work at the two correctional facilities. Building on that premise, the County contends that the Association has not shown that it (i.e. the Employer) violated an express provision of the collective bargaining agreement by taking the action that it did.

The Employer therefore asks the arbitrator to dismiss the grievance and find no contract violation.

DISCUSSION

I'm going to start my discussion by addressing what I'm characterizing as the big picture. This is an overtime case. Oftentimes, overtime cases involve instances where a single

employee alleges they should have gotten overtime work which was assigned to another employee. That's not the situation here. This particular overtime case is much bigger than that, in that it involves an entire class of employees – namely, all the MDSA members who work at the two correctional facilities. Aside from that, another important aspect is the fact that the grievance alleges that in the month of January, 2011 alone, the aforementioned MDSA members were improperly denied about 400 hours of overtime. When that number (i.e. 400 hours of overtime pay) is multiplied by the number of months that have elapsed since January, 2011, it's easy to see that the amount of money involved in a possible arbitral remedy is, in a word, significant. When those two matters are considered collectively, one can easily understand why this grievance came to be denominated as the "big overtime grievance."

Another part of the big picture concerns what's been happening in the Department to the MDSA members. I'm referring to the fact that for over a decade, the Department has been replacing MDSA members with less expensive corrections officers. That process is still ongoing. When this overtime case is considered in that overall context, it's apparent that this case is simply the latest battle in the parties' ongoing fight over the work performed by MDSA members and the corrections officers.

Having noted that, I'm next going to comment – in broad terms – on the type of overtime involved in this case. While it will be addressed in more detail later, it suffices to say here that there are two types of overtime work in the Department: voluntary and mandatory. This case only involves voluntary overtime work. However, it does not involve all voluntary overtime which is worked in the Sheriff's Department. Instead, it just involves the voluntary overtime work which is performed at the two correctional facilities. That's it.

While I just noted what type of overtime is involved in this case, the stipulated issue is not, on its face, limited to just the voluntary overtime work performed at the two correctional facilities. Instead, it asks whether Section 3.02 of the collective bargaining agreement allows the Sheriff's Office to unilaterally decide which overtime assignments are given to members of the MDSA. While I will answer that question in the **AWARD** section on the last page of this decision, I've decided to specifically note – early in my discussion – that my ultimate finding in this case is going to be narrower than the stipulated issue posed. Here's why. I read the stipulated issue to arguably cover all overtime assignments in the Department or, at a minimum, overtime assignments beyond those referenced at the hearing. I consider that problematic. To address that concern, I've decided to emphasize that my finding in this case does not apply to all overtime assignments in the Department, or even those overtime assignments beyond those referenced at the hearing. Rather, my finding just applies to a certain subset of overtime assignments, namely the voluntary overtime assignments at the two correctional facilities. With that caveat noted, I find that the Employer's decision to exclude MDSA members from performing voluntary overtime work at the two correctional facilities violates the collective bargaining agreement. They (the MDSA members) should not have been excluded from that overtime work. My rationale follows.

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Here's an overview of how my discussion is structured. First, I will address the contract language cited by the parties. They relied on two contract provisions: the Management Rights provision (Section 1.02) and the Overtime provision (Section 3.02). These provisions will be addressed in the order just listed. After that contract language has been reviewed, attention will be given to certain evidence external to the agreement. The evidence I am referring to involves an alleged past practice.

Since this is a contract interpretation case, I've decided to begin with the following introductory comments about how I go about interpreting contract language. In a contract interpretation case, my interpretive task is to determine if the meaning of the contract language is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then apply that meaning to the facts. Attention is now turned to making that call.

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I'll first focus on the Management Rights provision which is found in Section 1.02. That clause gives the Employer numerous management rights. Some of the rights specified therein are "the right to determine the number of positions and the classifications thereof to perform such service" and "the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions."

In the Employer's view, subsumed into its right to manage its financial affairs is the responsibility to manage how overtime is assigned and distributed. Building on that premise, the Employer contends that it has the management right to unilaterally change the "method" and "means" by which it distributes overtime (i.e. to unilaterally decide who works the available overtime).

I find that interpretation of the Management Rights provision to be unfounded. Here's why. The Management Rights provision contains a sentence at the end that is commonly found in such provisions. I'm referring to the sentence which says: "These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement." For the purpose of discussion, I'm going to call this sentence, particularly the part of the sentence which starts with the word "except", the "except as provided herein" sentence. It would be one thing if the rest of the collective bargaining agreement said nothing about how overtime was assigned and distributed. If the collective bargaining agreement was silent on that topic (i.e. the topic being how overtime is distributed among employees), then I would agree with

the Employer that the Management Rights provision would control the outcome of this case. However, the fact of the matter is that the collective bargaining agreement is not silent on the matter of how overtime is handled. I'm referring, of course, to the language contained in Section 3.02. While that language will be addressed next, it suffices to say here that that language does deal with the topic of overtime and how it (i.e. overtime) is handled. Since this case involves the topic of how overtime at the two correctional facilities is handled, it logically follows that the contract language most applicable to such a case would be found in the Overtime provision, and not in the Management Rights provision. Consequently, in this case, the "except as provided herein" sentence from the Management Rights provision applies. Accordingly, my review of the contract language will continue.

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The focus now turns to the Overtime provision (Section 3.02). While that provision is relatively long, the parts that are relevant to this case are found in subparts (2) and (3)(a) and (b). I'll address those provisions in the order just listed.

I begin my discussion of subpart (2) with the following overview. It provides that "overtime needs and required staffing levels shall be determined by the Sheriff." This statement means that the Sheriff has the right to decide if overtime is worked in the first place. Said another way, it's his (i.e. the Sheriff's) call to make. No one else gets to make, or challenge, his call. Given this language, if the Sheriff wanted to, he could decide that no overtime hours were to be worked at, say, the two correctional facilities. While the Sheriff could do that if he wanted (i.e. decide that no overtime will be worked at the two correctional facilities), it's apparent from the record that the Sheriff has decided just the opposite (namely, that overtime will be worked at both of the two correctional facilities). Thus, there's no question that the Sheriff has authorized overtime to be worked at the two correctional facilities.

The Employer reads subpart (2) to essentially grant the Sheriff authority to assign overtime to whoever he wants. The problem with that contention is that it rewrites the contract. Here's why. It would be one thing if the overtime provision ended at subpart (2) with its grant of authority to the Sheriff. However, it doesn't. There's an entire section that follows, namely subpart (3). That section addresses voluntary and mandatory overtime, plus other overtime matters that need not be identified here. Given the existence of subpart (3), the Employer's interpretation of subpart (2) overlooks subpart (3). That's problematic, because the Employer's interpretation of subpart (2) essentially swallows the rest of the overtime provision. As the Association opines in its brief: "What good is Section 3.02(3) if Milwaukee County's interpretation of Section 3.02(2) is correct?"

Once the Sheriff decides that overtime is going to be worked (in this case, at the two correctional facilities), then Section 3.02(3) kicks in and applies. The first sentence provides thus: "All scheduled overtime shall be assigned within classification as follows." Then, subparts (a) and (b) deal with voluntary overtime and subpart (c) deals with mandatory overtime. In this case, there's no need to review the language dealing with mandatory

overtime because it (i.e. mandatory overtime) is not involved here. As previously noted, this case just involves voluntary overtime, so the language that deals with same will be reviewed next.

Broadly speaking, the language in Section 3.02(3)(a) and (b) establishes a procedure for how voluntary overtime is handled. The procedure which it establishes is this: those employees who want to work voluntary overtime sign up to work it (i.e. whatever voluntary overtime work the Employer decides is available). Then, when voluntary overtime opportunities become available, that overtime work is given to the senior employee who has signed up for it (i.e. the voluntary overtime).

In this case, there really is no question about the voluntary overtime procedure established in Section 3.02(3)(a) and (b). Instead, the question is who gets to work that voluntary overtime. In the words of the first sentence of Section 3.02(3), which "classification" gets to work the voluntary overtime that the Employer decides is available?

In reviewing that language, my initial inclination was that the meaning of the word "classification" was seemingly unambiguous and referred just to MDSA members. My reasoning was this: the instant collective bargaining agreement covers just MDSA members. That's it. Building on that, I thought that if the parties had intended the word "classification" to apply to "classifications" other than MDSA members, then they would have said so. They did not.

Notwithstanding my initial inclination that the meaning of the word "classification" was seemingly unambiguous and referred just to MDSA members, there is record evidence – which will be addressed below – that establishes that the parties have treated the word "classification" as having a different meaning than I just gave it. Specifically, they have not limited voluntary overtime to just the classification of MDSA members. That's significant, because it makes the meaning of the word "classification" ambiguous in light of the proffered evidence.

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When contract language is found to be ambiguous, arbitrators routinely look beyond the contract language itself for guidance in determining its meaning. Oftentimes, they consider the parties' past practice. Past practice is a form of evidence commonly used to clarify and interpret ambiguous contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of what a particular provision means.

Before I address what the record shows about how voluntary overtime has historically been distributed at the two correctional facilities, I think it's important to consider the following two matters.

First, there's the factual context. Right now, the MDSA members and the corrections officers perform essentially the same job duties with the inmates. The reason for this is because management has decided that the best use of its human resources is to have the MDSA members and the corrections officers work side by side – interchangeably – at the two corrections facilities on all shifts. That's the Employer's call to make. This decision will not change or affect that.

Second, I've decided to repeat – once again – that the Employer decides if voluntary overtime is worked at all, and if it is worked, how many hours need to be worked. All that's involved here is which group of employees gets to work that voluntary overtime (at the two correctional facilities).

Having commented on the foregoing, here's what the record shows regarding how voluntary overtime has historically been distributed at the two correctional facilities. It's undisputed that since the MDSA members and corrections officers started working together in the two correctional facilities, both groups of employees were continually offered the same opportunity to work whatever voluntary overtime opportunities existed. Thus, MDSA members had the same opportunity to work voluntary overtime as corrections officers did. The process was this: both groups of employees signed up for voluntary overtime on the same sheet; then, after the Employer decided that voluntary overtime work was available, that work was given to the senior employee who had signed up for voluntary overtime. That was the way voluntary overtime was handled at both correctional facilities every day from the time MDSA members and corrections officers started working together until January, 2011. (Note: What happened then will be addressed below).

The next question is whether the record evidence establishes the existence of a past practice. The definition of past practice which I've been citing in my arbitration awards for years is this: in order for a past practice to be considered binding, the conduct must be clear and consistent, of long duration and mutually accepted by both sides. Said another way, the practice must be shown to be the understood and accepted way of doing something over an extended period of time. I find that the previous method of distributing voluntary overtime to both MDSA members and corrections officers at the two correctional facilities qualifies as a past practice under the definition just noted. I further find that this past practice clarifies the ambiguous term "classification" which is found in Section 3.02(3). Specifically, it (i.e. the practice) establishes how the parties themselves have interpreted Section 3.02(3)(a) and (b).

My finding (that a practice exists) is significant because the Employer has been ignoring it since January, 2011. That's when management unilaterally decided that henceforth, MDSA members could no longer work voluntary overtime at the two correctional facilities (while the corrections officers could continue to work whatever voluntary overtime work existed). This restriction obviously precluded MDSA members from working voluntary overtime at the two correctional facilities. This restriction was unprecedented, in that MDSA members had never previously been restricted in terms of the voluntary overtime opportunities available to them.

It's a commonly accepted tenet in labor relations that when a party wants to end a past practice which clarifies ambiguous contract language, there's an accepted way of doing it. The accepted way is to change the contract language. Until that happens (meaning until the contract language is changed), the past practice – which clarifies the ambiguous contract language – continues. [1] That didn't happen here. In this case, the Employer never even tried to change the contract language. Instead, it just disregarded the practice. It couldn't do that, though, because the practice clarified how voluntary overtime at the two correctional facilities was handled.

Given the above, I find that the Employer's unilateral ending of the parties' voluntary overtime practice at the two correctional facilities violated Section 3.02(3)(a) and (b) as those provisions have come to be interpreted by the parties themselves.

. . .

Having found a contractual violation, the final matter to address is the remedy. In this case, the remedy has two parts.

The first part of the remedy deals with the status of the practice. As noted above, the Employer should not have stopped complying with the voluntary overtime practice at the two correctional facilities in January, 2011. To remedy that contractual violation, the Employer shall reinstate the voluntary overtime practice at those two facilities as soon as practicable so that MDSA members are once again given the opportunity to work voluntary overtime.

The second part of the remedy deals with the Employer's back pay liability. The Employer is on the hook (meaning it's liable for) the voluntary overtime opportunities which MDSA members lost as a result of the Employer's action between January, 2011 and the date the practice is reinstated (and MDSA members are once again given the opportunity to work voluntary overtime at the two correctional facilities). That said, I'm not going to decide – at least in this decision – the amount of the Employer's back pay liability. Instead, I've decided to leave that matter open so that the parties can address it themselves. Thus, that part of the remedy (i.e. the Employer's back pay liability) is left to the parties to decide. If the parties cannot resolve that portion of the remedy, then further proceedings will be scheduled. In the meantime, I retain jurisdiction over the remedy.

In light of the above, it is my

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[1] See, for example, "The Common Law of the Workplace, The View of Arbitrators", pages 83 and 84. "A practice that serves to clarify an ambiguous provision in the agreement becomes the definitive interpretation of that term until there is a mutual agreement on rewriting the contract. The practice cannot be repudiated unilaterally."

AWARD

1. That Section 3.02 of the collective bargaining agreement does not allow the Sheriff's Office to unilaterally decide which overtime assignments are given to members of the MDSA.

2. The record reflects that there is a practice dealing with voluntary overtime at the two correctional facilities. That practice establishes how the parties themselves have interpreted their contract language which deals with voluntary overtime. The Employer's decision to end that practice – and exclude MDSA members from performing voluntary overtime work at the two correctional facilities - violated Section 3.02(3)(a) and (b) as those provisions have come to be interpreted by the parties themselves.

3. To remedy that contractual violation, the Employer shall reinstate the voluntary overtime practice at the two correctional facilities as soon as practicable.

4. The Employer's back pay liability for the voluntary overtime opportunities which MDSA members lost as a result of the Employer's action between January, 2011 and the date the practice is reinstated is left to the parties to decide.

5. I retain jurisdiction over the remedy.

Dated at Madison, Wisconsin, this 31st day of May, 2012.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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