

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF GLENDALE

and

**GLENDALE PROFESSIONAL POLICE OFFICERS ASSOCIATION,
LOCAL 212 OF THE LABOR ASSOCIATION OF WISCONSIN, INC.**

Case 106
No. 71653
MA-15183

Appearances:

Mr. Daniel Vliet, Buelow Vetter, Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, 53186 appeared on behalf of the City.

Mr. Ben Barth, Labor Consultant, Labor Association of Wisconsin, N116 W16033 Main Street, Germantown, Wisconsin 53022, appeared on behalf of the Association.

ARBITRATION AWARD

On June 19, 2012, the Labor Association of Wisconsin and the City of Glendale filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a dispute pending between the parties. Following appointment, a hearing was conducted on August 23, 2012, in Glendale, Wisconsin. No formal record of the proceedings was taken. Post-hearing briefs were filed and exchanged by September 28, 2012.

This dispute addresses whether or not the City can assign scheduled overtime to Sergeants, who are not members of the bargaining unit.

BACKGROUND AND FACTS

The City of Glendale and Local 212, of the Labor Association of Wisconsin are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. The events leading to this dispute began, on, or about October 24, 2011, when the Glendale Police Department was awarded funds from the Wisconsin Department of Transportation for safety-related projects. Funds were approved for a speed enforcement project and for a seat belt enforcement project. A significant aspect of the two grants was that

the Wisconsin DOT would reimburse the City of Glendale for stepped up law enforcement in these two areas.

The Department posted overtime schedules to put more Police Officers on the road. The postings allowed for Sergeants, who are not in the bargaining unit, to sign for the overtime. The Association objected to allowing Sergeants access to the overtime to the extent that it would deny overtime to a bargaining unit member. A series of meetings were held, and correspondence exchanged. The following represents the highlights of those exchanges:

From: Gscheidmeier, John
Sent: Sunday, October 30, 2011 9:09 PM
To: Czarnyszka, Thomas
...
Subject: Traffic Grant Overtime

Chief,

Last week I met with you twice (once with PO Bruno) regarding the assignment of traffic grant overtime hours to police supervisors and detectives, something that has never been done in the past. In our last meeting you told me that you were going to meet with Captain Ferguson and Lt. Brauer prior to the grant overtime being filled for November. You also indicated, and read to me the language in the contract, that the grant distribution would be made on a mutually agreeable basis between the Grant Administrator (Brauer) and the Board. You also indicated that the overtime would not be posted until at least Monday.

As of my arrival in the department today, Sunday, October 30th, 2011, the grant overtime was posted against what you indicated would occur. Furthermore no members of the Board met with Lt. Brauer as you indicated would happen prior to the posting of said hours. This is frustrating because we are trying to follow the correct and proper chain of command and work this out as you indicated to me that you wanted to.

Therefore, on behalf of the Board, we are asking immediately that you remove the Sergeants from the overtime posting for November as it relates to the distribution of traffic grant overtime hours. It is the Union's belief that the hours should at the minimum be filled first with patrol officers, then with supervisors if there are unfilled slots available. This is the same procedure we

agreed to in previous years with the posting of voluntary overtime at Bayshore. See an excerpt of Captain Ferguson's e-mail addressing the same from January, 2010, which is posted as follows after this text.

The 5 assigned overtime slots given to Sergeants should be given to union patrol officers. We are asking that this be done by this coming Tuesday at the latest, and that you provide a written response if the hours are not assigned to patrol officers.

Respectfully,

John Gscheidmeier
Local 212 Union President

. . .

From: Gscheidmeier, John
Sent: Saturday, November 05, 2011 1:47 PM
To: Brauer, Dan; Czarnyszka, Thomas

. . .

Subject: Traffic Grant Overtime

I have drafted a lengthy e-mail response to Lt. Brauer that I have first forwarded to the Board for approval. When approved or revised, I will forward to Lt. Brauer.

In summary, the Board doesn't believe we have the authority to determine "who" is eligible for the grant, just the distribution of the hours thereafter. Either way, we are eager to come to a resolution on how those hours are distributed as soon as possible so these grants can be re-established and those scheduled don't miss their hours.

It is my hope that the decision on eligibility comes from you, and then we address it from there. If it were to go to a grievance, I don't see the harm in that. I think our hanging point is that the supervisors nor detectives have never been eligible for this but suddenly they are. Sergeants used to work a beat for us after 3 Sgts. were promoted and patrol was shorted those positions, but they no longer are allowed to work beats. It seems confusing to me to argue they should do patrol work only when convenient.

Although I can see this from all angles, it is my obligation to protect the Union's members interests as best I can. I hope that this can be resolved as soon as possible and that any talks of "sending the money back" are dispelled. That would be contradictory to the goals and mission of this department in my opinion.

Either way, I hope to have the e-mail to Lt. Brauer ASAP. As always, I can be reached on my cell when I am not here. I hope to mutually resolve this relatively small issue soon with the both of you.

Best,

John

. . .

From: Gscheidmeier, John
Sent: Sunday, November 06, 2011 4:55 PM
To: Brauer, Dan

. . .

Subject: Traffic Grant Overtime

Lt. Brauer:

Thank you for your patience in waiting for the Union Board's response regarding the distribution of overtime for the traffic grant. Allow me to historically put some perspective on where we are regarding this issue. The Board has heard from many union members regarding this issue, and we believe we speak for the membership.

First, we do not believe that we have the authority to decide who "gets" the overtime and who does not. It puts the Union, and the Board, in a position we do not want to be in. The Voluntary Overtime section in the contract addresses only the issue of the method of distribution, not those eligible. The Board believes that this is the decision of the Chief of Police, or his designee. Even if the Board had the authority to make this decision, we have an obligation to look out for the best interests of our members, not those who are apart from the bargaining unit.

Secondly, we are troubled by the fact the members of management have signed up for grant overtime that has always been filled by patrolmen. Never, to my knowledge, have supervisors worked overtime grant hours even if there were vacancies. The Board is fully aware and are sympathetic to the slashing of management benefits at the hands of the City. We believe wholeheartedly that the City did not have to cut vacation days, sick days, etc. from the management team. Furthermore, we believe that management should receive the same retroactive raise as we recently bargained and are about to receive. Unfortunately, we are not in a position to intervene into what benefits were given, or taken away from management. That solely, our opinion, lies in the hands of the City Administrator.

I would like to bring to your attention the following points to illustrate why we believe this overtime should be filled by patrolman:

- Even when the Bayshore overtime was posted, supervisors were only allowed to sign up after patrolman did, and were subsequently allowed to work unfilled slots. The allowance of supervisors to work traffic grant patrol overtime would be contrary to past history in filling overtime for patrol work.
- Many years ago, sergeants worked a patrol beat for patrolman who wished to take off and would extend staffing one below patrolman minimums. The City allowed this to happen in exchange for the appointment of 3 new sergeants. The vacant patrol positions were never filled. Over time, however, the Chief ended this practice telling us that "Supervisor's will only do supervisor work and not fill in for the patrolman." There was a clear separation in duties when this practice ended.
- Supervisors and Detectives are not held to the same contract management standards that patrolman are. We recognize that Detectives and Supervisors do not regularly make traffic stops, but that all are police officers and certainly have the authority to do so. However, it is our belief that if both classes are allowed to work patrol overtime grants, that they too should be held to the same standards patrol officers are when it comes to contracts. We are cognizant of the fact that supervisors have other duties and responsibilities, but so do patrol officers with follow-up, directed patrol, etc.

In summary, we feel that this issue has spiked a wedge between patrolman and the supervisors who wish to work the grant and make extra income. Although we are sympathetic to this, we feel that management has been allowed to separate us from supervisors when convenient for the city. Supervisors do not

work a patrol beat, and cannot work for us when needed. Supervisors aren't ordered to cover desk overtime when there is a shortage, we are. The Chief and the City has made it clear over the years that supervisors are supervisors, patrolman are patrolman. We feel that the City's actions of cutting supervisor benefits has also spiked a wedge between us, and we are not comfortable with that.

The Board has been advised overwhelmingly by its members that patrol should be the only persons eligible for patrol-based over time on a traffic grant, as has been the case since we accepted grants many years ago. For those who feel we are being "selfish" we couldn't disagree more. We do not get the same benefits that management does as it relates to higher pay and the ability to flex hours. We further are not allowed to retire earlier than has been established by the WRS as most in management can, and enjoy the benefits thereafter regarding insurance.

If the City decides to allow supervisors the opportunity to be eligible for the traffic grant overtime, we reserve the right to grieve this decision. Having a 3rd party look at this issue from an unbiased perspective, in our opinion, would not be the worst thing in the world. This is not a personal issue between management and the member of this union. We are merely asking to maintain the same practices that have been in place for many years as it relates to those eligible for the overtime.

It has been rumored that the Chief of Police, if the Union does not concede to allowing supervisors to write for this overtime, will pull the grant and "send back the money". This is a decision we cannot control. We believe that this grant, with whomever fills the overtime slots, benefits all those who live, work and traverse through the City by making our roadways safer. It would be counterproductive to the acceptance of this grant to send the money and commitment back to the agency it was originally granted. It would also potentially increase crash rates, injuries, and possibly fatalities. We owe it to the citizens of this community to work this grant and eliminate speed-related crashes and to increase visibility through traffic enforcement.

If the city elects to assign supervisors to the traffic grant overtime, we would make the following request:

- All previously worked overtime slots by patrol officers be eliminated from the overtime ledger. In other words, we would all start with a clean slate. Because supervisors have never been involved in this overtime "pool", it would be unfair to patrol that they "catch up" and get priority as the grant progresses through the next several months.

- Supervisors, if allowed to work the grant overtime, should fill “unfilled” slots only after all patrolman have signed up and received those available slots.

I apologize for the length of this e-mail, and hope that you, nor the Chief, view this as greed on the part of the Union. Involving supervisors in the overtime grant assignments is new and contrary to what has happened throughout the course of the last 10 or so years.

As always, please do not hesitate to contact me regarding this. I can usually be best reached via my cell phone.

Respectfully,

John Gscheidmeier
Local 212 Union President

There was never an agreement between the Chief or Program Administrator, and the Association that allowed for the inclusion of Sergeants in the postings sign-ups.

Following this exchange, overtime cards were submitted by officers Bruno (12/30/11), Nelson (1/2/12), Gscheidmeier and Schieffer (1/12/12).

A grievance was filed on January 16, 2012. The grievance was denied and proceeded through the grievance procedure. At step 3 of the grievance procedure Chief Czarnyszka denied the grievance by the following memo:

To: Glendale Professional Police Association

From: T. Czarnyszka

Date: March 1, 2012

Re: Grievance No. 2012-3

On February 14, 2012, we met as required under Step 3 of the grievance procedure in effect with the Glendale Professional Police Association. The meeting included various representatives of the City and the Association. At the meeting the Association had the opportunity to explain its position regarding the grievance.

The grievance alleges violations of a number of articles in the Collective Bargaining Agreement. The Association asserts that the City cannot use

police supervisors to work overtime that became available as a result of grants received by the Department. The Association's position is that bargaining unit members were available to work the overtime hours and that the overtime should have been worked by bargaining unit members.

Initially, I note that the grievance isn't timely. Under Step 1 of the grievance procedure, grievances must be filed within ten working days of the incident or within 10 days following the grievant becoming aware of the situation. Since a number of overtime opportunities occurred outside of the 10 day period specified under the grievance procedure, the grievance isn't timely with regard to those incidents.

As to any overtime opportunities occurring within the 10 day window, there is nothing in the contract that prevents the City from making overtime available to supervisors in the Department. While the Association has cited various contract provisions, this grievance really addresses Section 15.04(e) of the agreement, which provides for volunteer overtime. While this section provides officers with an equal opportunity to volunteer for this type of overtime, nothing in this section restricts the voluntary overtime to bargaining unit members.

There is no reason, contractual or otherwise, to exclude Sergeants from working overtime. In addition to their supervisory responsibilities, Sergeants are expected to and in fact do perform all the duties of a police officer, including the enforcement of traffic laws. Just as Sergeants are expected to perform these responsibilities during their shift, there is no reason to prevent them from doing the same work on an overtime basis. While the bulk of the overtime available under the grants was performed by bargaining unit members, there is no contractual requirement that the City do so, just as there is no contractual requirement the City apply for the grants in question.

Finally, I also note that while a number of officers said that they would have worked the overtime if asked, it appears that officers in fact may not have been eligible to work the overtime in some cases. Therefore, since in those situations the officer was not eligible, the officer cannot possibly claim to have any expectation to work the overtime.

For all the above reasons, the grievance is denied.

The Department has received DOT Law Enforcement grants in the past. In 2008 the Department received a grant for Speed and Aggressive Driving Enforcement. In 2009 the Department received a grant for Speed Enforcement, and a second grant for Alcohol

Enforcement. In 2010 the Department received a grant for Speed Enforcement. The increased staffing that was created by those grants was filled by bargaining unit employees.

At one time, in the recent past there was a need for stepped up law enforcement at the Bayshore Mall. To secure additional manpower, the City posted the overtime opportunity created by that need. Bargaining unit members posted for the overtime. When the voluntary postings did not produce enough coverage, the City and the Association Board of Directors agreed to have Sergeants post for overtime opportunities that remained.

When overtime is posted the Department puts up an anticipated schedule of overtime hours, and employees sign for the slots they want. Article XV, Sec. 15.04 has an overtime equalization provision, which requires an effort to distribute overtime as equally as is practical. In order to accommodate that provision Lt. Dan Brauer maintains a ledger which keeps track of overtime. It was the testimony of Mike Bruno, who is the Association President, that the Association does not get to see the ledger.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate article 15.04 of the collective bargaining agreement when it allowed Police Supervisors of the Police department to work overtime that has been performed by members of the Police Association in the past?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Section 1.05 – Management Rights: It is agreed that the operations and management of the Police Department and the direction of its personnel is vested exclusively in the Police Chief, the Police Commission and the Common Council of the City. The Police Chief, Police Commission and the Common Council of the City, within their respective spheres of jurisdiction as provided by law, shall continue to have the exclusive right to establish departmental rules except those matters that have been determined to be subject to collective bargaining by the W.E.R.C.,

. . .

Except as limited herein, the City reserves all rights to manage its own affairs. Such rights include, but are not limited to:

. . .

(3) Determining the services and level of services to be offered by the Police Department;

(4) Establishing, continuing, abolishing or altering policies, practices, procedures and facilities for the operation of the Police Department.

(5) Determining the number, type and rank of police officer required and to increase or decrease the number of police officer according to the rules, decision and findings of the WERC and the courts of the State of Wisconsin.

...

(8) Assigning work, determining if overtime work is to be required, the amount of it and the police officer who are to perform it, and the right to contract with others to provide services, except as limited by Sections 15.03 and 15.04.

...

ARTICLE XV – SENIORITY

...

Section 15.04 – Equal Opportunity for Overtime: Overtime shall be distributed as equally as practicable among qualified employees in the bargaining unit, and a record of overtime accumulation and distribution shall be kept and made available to the Association upon request.

(a) Overtime that covers a full shift (4¼ and 8½ hours)

1) If overtime is known to the employer two (2) hours or more before it commences, overtime shall be first offered to the off-duty officers who are assigned to the shift needing the personnel. If none of the off-duty officers accept, or are not available, the overtime will be split between the off-going and on-coming shift. The opportunity procedure, outlined later, will apply.

2) If overtime is known to the employer less than two (2) hours before it commences, overtime will be split between the off-going and on-coming shifts. The procedure, outlined later, will apply.

(b) Overtime between two (2) hours and one-half (1/2) shift (4 hours): Overtime shall be split between the off-going and on-coming shifts. The opportunity procedure, outlined later, will apply.

(c) Overtime of less than two (2) hours: Overtime shall be offered by seniority to the shift immediately before or after the time is to commence. The opportunity for overtime will not be recorded on the ledger. (This would accommodate events such as prisoner transports).

(d) An event of emergency or urgent basis will suspend the above steps. The process will immediately return when the event is contained.

(e) Volunteer Overtime: Periodic programs resulting in overtime opportunities over extended time frames can be filled through a volunteer system outside the procedures list in this section. The program administrator and the G.P.P.A. board will establish mutually agreed upon procedures that allow employees the equal opportunity to volunteer for overtime opportunities made available by the program administrator. Overtime filled on a volunteer basis will not be recorded on the overtime ledger or affect an employee's equal opportunity for overtime under the other procedures in this section. If an employee is ordered to fill a vacant volunteer overtime opportunity, the overtime shall be filled following the procedures described in sub (a) through (d) of this section.

The ledger maintained by the department will show each opportunity for overtime by officer, by date and the type of contact. Types of contact available are: Yes, No, or No-Contact. For the purpose of opportunity, all are considered equal.

Opportunity Procedure: The opportunity for overtime will be based on the information listed on the overtime ledger. First, it must be determined which officers have the opportunity for overtime, based on (a) or (b) above. Next, the dates each officer had their last opportunity will be noted from the furthest to the most recent. The opportunity will be offered first to the furthest on the list, then in order to the most recent. The Yes, No, N/C response will be recorded with the opportunity date.

a) In a situation where overtime is available, and multiple employees had the opportunity for overtime on the same date, the order for the call-in shall be: No-Contact (N/C), then No (N), followed by Yes (Y). Employees with off-requests (i.e. vacations, extra-offs, holidays, conditional days, unconditional days and sick days) posted on the calendar for the day in question, are not eligible for overtime.

b) Employees shall provide the Chief of Police with a separate preferred contact number specifically for overtime call-in purposes. The number could be a home telephone number, a cellular telephone number or a pager number. Only one number will be called.

c) The Shift Commander based on the given circumstances shall determine the return callback time.

...

ARTICLE XIX – GRIEVANCES AND GRIEVANCE PROCEDURE

Section 19.01 – Definitions: A grievance is a claim based upon an event or condition which affects the wages, hours or conditions of employment of one or more employees or the Association and/or the interpretation, meaning or application of any of the provisions of this Agreement. The Association may be a grievant in cases where it feels that it has a collective grievance of its members.

...

Section 19.02 - Grievance Procedure:

(a) The grievance procedure shall consist of the four (4) steps hereinafter set forth. No grievance shall be made or recognized unless it is founded upon an alleged breach of the terms and conditions of this Agreement. All grievances not initiated or filed by the grievant or his representative within the applicable time limits specified in this Article shall be deemed abandoned. A grievant may initiate, present and process the grievance with or without a representative or representatives. All times hereinafter set forth in this Article, unless otherwise specified, are working days and are exclusive of Saturdays, Sundays and any holiday recognized by this Agreement. All time requirements set forth in this Article may be waived or extended by mutual agreement of the parties.

...

(e) All grievances, whether individual or group, shall be submitted to and reviewed by an Association Board Member(s) prior to Step 1 of the Grievance Procedure. It shall be the responsibility of the Association Board Member(s) reviewing the grievance not to cause an undue delay in its processing.

(f) Only one subject matter shall be covered in any grievance. A written grievance shall contain a clear and concise statement of the grievance, indicate the issue involved, the relief sought, and the date the incident or violation took place and the section of the Agreement which has been alleged to have been violated.

Step 1: In the event of a grievance, the employee shall perform the employee's assigned work task and grieve the complaint later. A police officer, believing he/she has cause for a grievance, shall orally present his/her grievance to the supervisor within ten (10) working days of the incident or within ten (10) days of the grievant securing knowledge thereof. Thereafter, the grievant shall discuss the matter with such immediate supervisor. Such discussion shall be held as soon as possible but no later than forty-eight (48) hours after the initiation of the grievance.

Step 2: If the grievance is not settled within forty-eight (48) hours after such discussion to the satisfaction of the grievant, the grievant shall reduce such grievance to writing and submit it to the Chief of Police within five (5) days after such discussion.

Step 3: The Chief of Police shall set a time for discussion of the grievance which shall be within five (5) days from the time of presentation to the Chief of the written grievance by the grievant. The Chief of Police shall give his decision in writing to the grievant and his/her representative, if any, within five (5) days of the date that the discussion was held. Within five (5) days, if the grievant is not satisfied with the Police Chief's decision, the grievant shall further process the grievance as provided in Step 4.

Step 4: The Association shall present the grievance in writing to the City Administrator. Within ten (10) days of the receipt of the grievance, the City Administrator shall hold a hearing with the concerned party(s). Within ten (10) days after such hearing, the City Administrator shall notify the grievant and the Association in writing of his determination. Thereafter, if the grievance is not resolved, the Association shall process the grievance as set forth in Step 5 within ten (10) days, or the matter shall be considered resolved by all parties.

Step 5: The Association and the City shall, within five (5) days of the answer in Step 4, attempt to mutually agree to an arbitrator.

. . .

The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination.

POSITIONS OF THE PARTIES

It is the view of the Association that the grievance is timely. The Association argues that the grievance should be considered a "continuing" grievance. The parties met to discuss

the underlying dispute. When no agreement was reached the City permitted the supervisors to select overtime and the Association grieved. The only incidents the Chief regarded as untimely were those that occurred outside the 10 day period referenced in the grievance procedure. The dispute over whether or not supervisors can work the overtime shifts continues. The evidence shows that supervisors were signed up into the month of January.

It is the view of the Association that the contract language is clear and unambiguous. "Overtime shall be distributed as equally as practicable among qualified employees in the bargaining unit." Supervisors are not in the bargaining unit. The Association believes the analysis should end here.

The Association addresses the claim of the City that Article 1.05(8) authorizes the City to designate who is to be assigned overtime. The Association argues that Article 1.05 is a general provision which must give way to the more specific provision in Article 15.04. The Association further argues that the provisions of Article 15.04 are the very exception set forth in Article 1.05, as limits to the employer's right to assign work.

It is the view of the Association that there exists a bona fide past practice. The Association points to record testimony that over the last 22 years overtime has always been offered to bargaining unit employees, and that supervisors have never been allowed to select overtime assignments before they were offered to Association members.

The Association identifies the four grievants as entitled to pay for lost overtime opportunities.

It is the view of the City that the Chief decided to allow the Sergeants to fill a few of the overtime slots in order to make sure that all of the overtime opportunities would be filled and to give the Sergeants some additional time on patrol. The City argues that the Association was well aware of what the City was doing, in that the overtime was being worked in October and the parties were talking and exchanging emails in October and November. The City cites Gscheidmeier's November 16 email as acknowledging the City's right to select who is assigned overtime.

It is the view of the City that following the conversations and exchanges, nothing happened. The overtime was worked, and no grievance was forthcoming until January 16, 2012. The chief's response contends that the grievance is not timely.

It is the view of the City that the grievance is not timely and that the contract provides that the failure to file a grievance in a timely manner results in the grievance being "abandoned". As a consequence, the City believes that the contract requires that I dismiss the grievance.

The City cites a number of Arbitration Awards which hold the parties to the timelines of the grievance procedure under a variety of circumstances. The city argues that “Grievance timelines have similarly been held to be unalterably mandatory.”

The City contends that neither party is free to unilaterally toll the grievance timelines. The association’s reserving the right to grieve does not serve to toll the contractual filing timelines.

It is the view of the City that, as the moving party, the Association bears the burden of proving a contract violation. It is the view of the City that the Association bears a burden of showing a contract violation by clear and convincing evidence, and that the Association has failed to meet its burden. The City argues that nothing in the contract bars the City from working overtime. Sergeants regularly perform the same work as Patrolmen. Sergeants are not in the bargaining unit, and so the Association cannot bargain over their hours of work. The City points to Section 1.05(8) as authority for the City’s right to determine who will perform work. It is the view of the City that nothing in the contract undermines that authority.

DISCUSSION

Timeliness

The collective bargaining agreement defines a grievance as a claim based upon an “event” or a “condition”. The grants that created the overtime were received on October 24, 2011. The parties met shortly thereafter. Gscheidmeier’s e-mail of October 30 refers to a meeting last week. The e-mail goes on to indicate that the grant time has been posted. The postings, which were made a part of the record, show supervisors scheduled to work in November, December and January.

Under the terms of Step 1 of the grievance procedure an employee is to “orally present his/her grievance to the supervisor within ten (10) working days of the incident...”. There was a meeting somewhere between October 24 and 30, well within the 10 working day period. Gscheidmeier’s October 30 e-mail, which references that discussion, frames the dispute.

Step 2 of the grievance procedure requires that an unresolved grievance be reduced to writing within 48 hours of the discussion. The discussion referenced in Step 2 is that which was to occur in Step 1. The discussion began in October and evidently continued into December, while supervisors worked the overtime schedule. No written grievance was filed until January 16, 2012.

Step 2 requires a written grievance to be submitted within 5 days of the discussion. The grievance was filed on January 16, which is well beyond 5 days of any noted discussion.

Step 3 requires a discussion within 5 days of the presentation of a written grievance. The parties met on February 14, four weeks after the written grievance was filed. Step 3 of the

grievance procedure requires the Chief to provide a decision within 5 days of the meeting. The Chief supplied a written answer on March 1.

Other than the initial oral presentation, it does not appear that either party followed any timeline set forth in the grievance procedure. As noted by the City, Section 19.02 (a) provides; “All grievances not initiated or filed by the grievant or his representative within the applicable time limits specified in the Article shall be deemed abandoned.”

At hearing, both parties indicated that they needed an answer to a long simmering dispute as to whether or not the City could offer anticipated, and scheduled, overtime to Sergeants. Consistent with that view, the parties stipulated the issue to be as set forth above. Notably, the issue submitted goes to the merits of the dispute.

There is no procedural/timeliness issue submitted for decision. Section 19.02 of the contract limits the authority of the Arbitrator as follows:

“The Arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination.”

In light of the foregoing, I think it is appropriate for me to confine the analysis in this decision to the stipulated issue, and to refrain from comment on the timeliness of the submission and processing of the grievance.

STIPULATED ISSUE

Section 1.05, Management Rights, preserves to the City the right to manage the Department. Specifically, paragraph (8) includes the reserved right to:

Assigning work, determining if overtime work is to be required, and the amount of it and the police officer who are to perform it, and the right to contract with others to provide services, except as limited by Sections 15.03 and 15.04.

The general right of the City to identify and assign overtime is subject to the provisions of Sections 15.03 and 15.04. Section 15.03 addresses shift assignment and seniority, and is not germane to this dispute. Section 15.04, on the other hand, squarely addresses the dispute posed in this proceeding.

Section 15.04 – Equal Opportunity for Overtime – generally appears to be a provision directed at bargaining unit employees. The introductory paragraph refers to bargaining unit employees and directs that overtime records be kept and made available to the Association. The Association represents bargaining unit employees. Paragraph (a) similarly addresses overtime as it is applied to bargaining unit members. Gscheidman’s e-mails support this

reading in that they assert that Sergeants do not work patrol. The same is true of paragraphs (b) and (c), as well as the Opportunity Procedure provision of Section 15.04. It is in this context that the first sentence must be read.

The first sentence of Sec. 15.04 provides “Overtime shall be distributed as equally as practicable among qualified employees in the bargaining unit,…” It is the view of the Association that the plain meaning of the sentence is that bargaining unit employees are entitled to overtime. The City offers no alternative construction. The second phrase which requires that a record of overtime be maintained and shared is consistent with the Association’s description as to how the parties have operated under the clause. Historically, Association members have had exclusive rights to scheduled overtime. The single exception entered into the record involved a situation where the parties mutually agreed to an alternative that had Sergeants select overtime after bargaining unit members had entered their own selections.

Paragraph (e) addresses “Volunteer Overtime”. It allows for the filling of certain overtime opportunities outside the procedures otherwise set forth in Section 15.04. The grant programs could certainly qualify as “Periodic programs resulting in overtime opportunities…” Chief Czarnyszka’s grievance answer cites Section 15.04(e) as applicable. Paragraph (e) allows for the program administrator and the G.P.P.A. board to establish mutually agreed upon procedures. It is presumably those procedures which are to operate as an alternative to the procedure set forth in the first paragraph of Section 15.04.

There is nothing in the record to suggest that the parties established an alternative procedure. Gscheidman’s memos and Bruno’s testimony was that no such meeting was ever held and that no such procedure was ever discussed or agreed upon. Their testimony stands uncontradicted. Whatever the flexibility offered by Section 15.04(e), there is no indication in the record that the parties entered into a “Volunteer Overtime” mutually agreed upon procedure.

The record does indicate that Sergeants do, at times, work overtime. That overtime appears to be time worked in the course of a Sergeant performing his daily duties. If a Sergeant observes a matter requiring law enforcement attention he attends to the matter. If it requires his attention beyond his shift, he completes the task. I think this is different in kind from overtime which is scheduled in advance. The record reflects a concern on the part of the Chief that the overtime slots be filled, in order to satisfy the terms of the grant. Nothing in the record suggests that the overtime slots would not have been filled through use of bargaining unit employees. If the concern over adequate staffing is genuine, section 15.04(e) provides a mechanism, which has been successfully used in the past, to bring the Sergeants into the mix.

AWARD

The grievance is granted. By unilaterally allowing Sergeants to work scheduled overtime without a mutual agreement consistent with Section 15.04(e), the Employer has violated Article 15.04 of the collective bargaining agreement.

REMEDY

The grievance was filed on January 16, 2012. The Association knew of the use of Sergeants from the very beginning. As Sergeants worked the overtime shifts in November, December and January, the Association refrained from filing a grievance, notwithstanding the limits set forth by Section 19.02(a). The record consists of the scheduling calendars for the two grants, involving the months of October, 2011 – January, 2012. It is not clear whether the grant extended beyond January, 2012. However, by January 16 the die was cast. Virtually all the overtime signed for by Sergeants had been worked. By the time the grievance was initiated, Sergeants were only scheduled to work three more slots, including January 17, 20 and 27.

Given the ongoing discussions between the parties, I believe the administration knew the Association disputed the use of Sergeants. By allowing the grant program to be fully scheduled and largely worked with Sergeants in the mix, I think the Association has waived its claim for monetary relief.

Dated at Madison, Wisconsin, this 14th day of November, 2012.

William C. Houlihan /s/

William C. Houlihan, Arbitrator