

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE COUNTY
(SHERIFF'S DEPARTMENT)**

and

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

Case 768

No. 70851

MA-15065

(Fox Overtime)

Appearances:

Attorney Roy Williams, Principal Assistant Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

Attorney Graham Wiemer, MacGillis Wiemer, LLC, Attorneys at Law, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin, 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

INTRODUCTION

Milwaukee County ("County") and the Milwaukee County Deputy Sheriffs' Association ("Association") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On July 18, 2011, the Association filed a request with the Wisconsin Employment Relations Commission to initiate arbitration concerning an overtime dispute. The filing requested that the Commission assign a commissioner or staff member to serve as sole arbitrator in this matter. The

Commission thereupon assigned Arbitrator Matthew Greer to hear the matter. Subsequently, Arbitrator Greer became unavailable. Given the option of either having the Commission assign another staff member or jointly agreeing on a replacement arbitrator, the parties jointly selected the undersigned to serve as arbitrator. The parties also decided to forego a hearing and have this matter decided on a stipulated record. The stipulated record was filed on October 23, 2012. Thereafter each party filed written arguments on November 2, 2012, and the record was closed on that date.

ISSUE

The County and the Association have stipulated that the following is the statement of the issue to be decided:

Did Milwaukee County violate Section 3.02 of the 2007-2008 Collective Bargaining Agreement when it denied Deputy Brian J. Fox's requests for overtime during the Summerfest Music Festival and the Wisconsin State Fair? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

1.01 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserved 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 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.

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 classification 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 will 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 the non-tax levy overtime expense incurred for the Special Event.

BACKGROUND

The parties have stipulated to the facts set forth here. The Grievant Brian Fox (“Grievant”) was, at all relevant times to this matter, a Deputy Sheriff employed by Milwaukee County. As such, he was represented for purposes of collective bargaining by the Association and covered by the Agreement between the County and the Association.

Since at least 1997, the Sheriff’s Department (“Department”) has been using Deputy Sheriffs on overtime assignments patrolling Milwaukee County owned park-and-ride lots during the Summerfest Music Festival (“Summerfest”) and the Wisconsin State Fair (“State Fair”). The Department used only Deputy Sheriffs to handle these assignments, until the summer of 2010.

On June 15, 2010, management issued a memorandum to all Correctional Officers, which indicated that the Department was beginning a security patrol operation that would employ uniformed Correctional Officers to patrol Milwaukee County owned park-and-ride lots during Summerfest. Subsequently, on July 29, 2010, an additional memorandum was issued indicating that the Department was beginning an additional security patrol operation that would employ uniformed Correctional Officers to patrol Milwaukee County owned park-and-ride lots during the State Fair. Between 1997 and the issuance of these memoranda, the Department never had employed Correctional Officers in this capacity.

In June and July of 2010, the Grievant applied for Summerfest and State Fair park-and-ride patrol overtime assignments. These applications were denied, and the Grievant was informed that he could not volunteer for such overtime assignments because they only were being provided to Correctional Officers. The Grievant filed two grievances regarding the denial of his requests for the overtime, one related to the Summerfest hours and one related to the State Fair hours. These grievances were denied by the County, leading to the present case.

DISCUSSION

Merits

The question here is whether the County violated the Agreement by assigning the overtime at park-and-ride lots during Summerfest and the State Fair to Correctional Officers rather than Deputy Sheriffs. The parties have stipulated that Section 3.02 of the Agreement, because it covers overtime matters, is mainly the provision that is applicable to this dispute.¹

¹ This observation is not intended to discount the County’s reliance, also, on the Management Rights clause found at Section 1.02 of the Agreement, which will be addressed later.

Section 3.02 does not, however, specifically identify who should be working the disputed overtime hours. Indeed, the overtime hours associated with park-and-ride lots during Summerfest and the State Fair are not mentioned at all.

Section 3.02 does state, generally at subsection 3, that “all scheduled overtime shall be assigned within classification as follows” (and it then provides specific assignment requirements and restrictions that are not relevant here). This broad statement begs the question as to what is meant by “all scheduled overtime” and whether the “classification” referred to here includes Deputy Sheriffs and excludes Correctional Officers. The record, however, lacks the evidence that would be necessary to draw any reliable conclusions with regard to this sentence.

The County argues that this case should turn on Section 3.02(2) of the overtime provision. That subsection provides that “[o]vertime needs and required staffing levels shall be determined by the Sheriff”. I am not persuaded that this statement permitted the County to decide that park-and-ride overtime assignments should be performed by Correctional Officers rather than Deputy Sheriffs. The sentence appears to provide that the Sheriff may decide *whether* overtime is needed and *how many* employees are to be used to fulfill that need, but it does not appear to give the Sheriff the authority to determine *who* should be eligible to work overtime hours.

The Association argues that the parties have an established past practice: when the Department requires overtime for the patrol of park-and-ride lots in conjunction with Summerfest and the State Fair, Deputy Sheriffs are used to fill those assignments. Given that the written Agreement is silent as to how this dispute should be resolved, it is appropriate to consider extrinsic evidence. The only extrinsic evidence available on the record before me is an explanation of how these hours have been assigned in the past. The record shows that every year², for the 15 years before the overtime hours were shifted over to Correctional Officers in the summer of 2010, the overtime hours at issue here have been assigned to Deputy Sheriffs. Prior to the summer of 2010, the hours never had been assigned to Correctional Officers.

It is axiomatic that conduct must be clear and consistent, long-standing, and mutually accepted to constitute a binding past practice. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed, 2003, at 607-609. The record here persuades me that the prior assignment of Summerfest

² Although this fact is not established in the record, I have taken arbitral notice that Summerfest and the State Fair are events that occur on an annual basis.

and State Fair park-and-ride overtime work to Deputy Sheriffs meets these criteria. The pattern of assigning all of that work only to Deputy Sheriffs for a period of 15 years is clear, and it is long-standing. Moreover, it is apparent that there was an implied mutual agreement with regard to the practice of assigning those hours to Deputy Sheriffs, as both parties obviously were aware of how the assignments were being made. As a practical matter, it can be fairly assumed that the generally well-established practice of assigning these overtime hours to Deputy Sheriffs is exactly what necessitated the issuance of Department memoranda announcing the new operation in which Correctional Officers would be handling the work.

The County relies on the Management Rights clause, at Section 1.02 of the Agreement, to argue that the change in these particular overtime assignments was not a violation of the Agreement. Specifically, it cites language at Section 1.02 stating that the County “retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders”. The provision establishes that this responsibility includes the “right to determine the number of positions and the classifications thereof to perform such service”, as well as 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”.

The problem with the County’s reliance on these provisions is that Section 1.02 also expressly provides that the rights set forth therein are not to be exercised for the purpose of frustrating or modifying the terms of the Agreement. Here the past practice of assigning the disputed overtime hours to Deputy Sheriffs constitutes an implied term of the Agreement, *Id.*, and as such the County’s right to manage its affairs cannot be exercised in a manner that defeats that term. This conclusion remains true even if it is accurate, as the County contends, that the use of Correctional Officers is more cost effective than the use of Deputy Sheriffs.

The record, therefore, persuades me that the procedure of assigning to Deputy Sheriffs the Summerfest and State Fair park-and-ride overtime hours was an established past practice; as such, the practice constituted an implied term of the Agreement; and the County violated the Agreement when it unilaterally began to assign the hours instead to Correctional Officers.

Remedy

The remedy in this case is difficult. Because the Grievant was denied the opportunity to sign up for the Summerfest and State Fair overtime hours, he obviously never worked any of them. Because Deputy Sheriffs were not allowed to sign up for the overtime assignments at all, it is impossible to know how many hours, when lined up against his peers, the Grievant would have earned the opportunity to work.

The Association's brief requests that the Grievant be compensated for 64 total overtime hours – 32 hours for each event. The Association does not, however, set out to justify this number, beyond asserting generally that the Deputy Sheriffs missed out on a “significant” number of hours. The County's brief does not address the subject of a remedy at all.

Given all of these circumstances, it is most appropriate to leave for the parties the opportunity to determine the appropriate remedial solution for this case. I have retained jurisdiction to offer assistance, if necessary.

AWARD

The grievance is granted.

JURISDICTION

The undersigned will retain jurisdiction over this matter for a period of 60 days following the date of this award for the sole purpose of resolving disputes over the remedy.

Dated at Madison, Wisconsin, this 29th day of January, 2013.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator