

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/  
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

**CITY OF MANITOWOC**

Case 220  
No. 71235  
MA-15107

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Appearances:

**Mr. Andrew D. Schauer**, Staff Counsel, Wisconsin Professional Police Association, 660 John Nolen Drive, Madison, Wisconsin 53713 on behalf of the Union.

Buelow, Vetter, Buikema, Olson & Vliet, S.C., by **Attorney Susan M. Love**, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186 on behalf of the City.

**ARBITRATION AWARD**

At all times pertinent hereto, the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (herein the Union) and the City of Manitowoc (herein the City) were parties to a collective bargaining agreement covering the period from January 1, 2011 through December 31, 2012. On November 17, 2011, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a dispute concerning an allegation that the City had violated the parties' collective bargaining agreement when it failed to award available overtime at the 2011 Manitowoc County Fair to Officers Swetlik and Vogel and awarded it instead to officers with less departmental seniority. The undersigned was selected from a panel of arbitrators to hear the dispute. A hearing was conducted on May 15, 2012 and June 12, 2012. The proceedings were transcribed. The parties filed their initial briefs by August 17, 2012 and their reply briefs on October 26, 2012, whereupon the record was closed.

**ISSUES**

The parties did not stipulate to a statement of the issues.

The Union would frame the issues, as follows:

- 1.) Did the City violate the terms and conditions of the contract and/or past practice when it removed Brian Swetlik's name from an overtime posting, allowing less senior employees to work a total of 13.5 hours from August 23-25, 2011?
- 2.) If so, what is the remedy?
- 3.) Did the City violate the terms and conditions of the contract and/or past practice when it removed Randy Vogel's name from an overtime posting, allowing less senior employees to work a total of 13.5 hours from August 23-25, 2011?
- 4.) If so, what is the remedy?

The City would frame the issues, as follows:

- 1) Did the City violate the Collective Bargaining Agreement when assigning call-in overtime for the County Fair in 2011 based on shift seniority on a shift on which the employee was required?
- 2) If so, what is the remedy?

The Arbitrator adopts the issues as framed by the City.

**PERTINENT CONTRACT LANGUAGE**

**ARTICLE VII**  
**HOURS OF WORK**

. . .

**Section 3. Shifts.**

- (a) **Patrol Officers.** The shifts for patrol officers shall be as follows:

7:00 a.m. to 3:00 p.m.  
3:00 p.m. to 11:00 p.m.  
11:00 p.m. to 7:00 a.m.

. . .

Section 8. Call-In. All employees shall be subject to call for work outside their normal schedule, and said call shall be by seniority on the shift on which the employee is required within the rank of the employee required. If an emergency does not exist, no employee shall be required to work unless no one accepts the work in which case the employee lowest in seniority who is available may be ordered to work. For events which are predictable, such as the County Fair or court appearances, employees shall be given as much notice as possible regarding their work schedule.

Once an employee refuses a voluntary overtime opportunity, the employee may not be called for any other voluntary overtime opportunities occurring during the 24 hours following the refusal.

. . .

## **ARTICLE XI** **SENIORITY AND JOB POSTING**

Section 1. Definition of Seniority. Unless otherwise modified in this contract, seniority rights shall prevail. City seniority shall be defined as the length of service with the City of Manitowoc from the employee's last date of hire to a position within City service. Police Department seniority shall mean the length of service with the Manitowoc Police Department from the employee's last date of hire to a sworn officer position within the Police Department. If an employee moves from one City department to another City department, City seniority for benefit purposes shall prevail. Police Department seniority within classifications shall prevail for the amount of vacations, sick leave, longevity, etc. Seniority shall not be diminished by layoff or approved leave of absence except as otherwise provided in this contract.

### **BACKGROUND**

In August 2011, the Manitowoc Police Department posted a sign-up sheet for available overtime hours at the Manitowoc County Fair, which was being held from August 23, 2011 through August 28, 2011. The posting announcing the event stated, in pertinent part:

MTPD will still be assigning several Officers to assist at the Manitowoc County Fair. Job responsibilities will include but not be limited to: patrol the parking lot and entrances, walk through the grounds, handle complaints, and traffic control. Patrol uniform is required. Take a marked Squad Car and make sure you have all necessary equipment to safely perform these duties (traffic vest, charged flashlight, etc.) Officers may have to stay later depending on the size of the crowd at closing time. *OT will go to second shift officers or detectives first because most of the hours occurred between 3 - 11 pm.* (emphasis added)

The Grievants in this matter, Randy Vogel and Brian Swetlik, were, at the time of the events leading to this grievance, detectives with the Manitowoc Police Department and the two most senior members of the bargaining unit represented by the Wisconsin Professional Police Association. Both were assigned to the first shift. By the time the matter went to arbitration Vogel had retired. Both Vogel and Swetlik signed up to work overtime at the fair. Vogel signed up for 4.5 hour shifts on August 23, 24 and 25, a 7 hour shift on August 26, a 7 hour shift on August 27 and 3 separate shifts of 4,4 and 5 hours on August 28. Swetlik signed up for 4.5 hour shifts on August 23, 24 and 25 a 5.5 hour shift on August 26 and a 7 hour shift on August 27. Subsequently, Vogel's name was crossed off from the sign-ups on August 23, 25 and 26. Swetlik's name was crossed off from the sign-ups on August 23, 24 and 25. The requested hours were subsequently assigned to and filled by less senior officers who regularly worked the second shift. In each case, the available hours occurred primarily or exclusively between the hours of 3:00 p.m. and 11:00 p.m., which corresponds with the Department's second shift as set forth in Article VII, Section 3 of the contract.

On September 6, 2011, both Vogel and Swetlik filed grievances over the denial of the requested overtime assignments. Vogel alleged he was improperly denied 10.5 hours of overtime and Swetlik alleged that he was improperly denied 13.5 hours of overtime, in violation of contract and past practice. Both sought to be made whole. The City denied the grievances, claiming that the assignment of the overtime hours was consistent with both the contract and the procedure used by the Department in the past. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

### POSITIONS OF THE PARTIES

#### The Union

The Union contends that the language in Article VII, Sec. 8 of the contract addresses only "shift specific" overtime. That is, when there is an unfilled shift vacancy due to an absence for illness, vacation, or the like, the other off-duty officers on that shift will be offered the overtime shift in order of shift seniority. If no one accepts the shift, it will be offered to the rest of the bargaining unit in order of unit seniority. If no one still accepts the overtime it will be assigned to the least senior available officer on the shift.

The Union argues that "non-shift specific" overtime is controlled by Article XI, Sec. 1 and past practice clarifying it. Non-shift specific overtime is defined as overtime that arises due to a special event outside of the normal work schedule, rather than a vacancy on a shift. This includes a wide range of community events for which extra security or crowd control might be needed and specifically includes the County Fair. Article XI, Sec. 1 defines bargaining unit seniority generally and states that it prevails "for the amount of vacations, sick leave, longevity, etc." It is the Union's position that past practice establishes that "etc." includes non-shift specific overtime.

The Grievants were, at the time of the 2011 Manitowoc County Fair, the two most senior members of the bargaining unit and were in the best position to know how overtime is assigned. Throughout their careers non-shift specific overtime had been handled according to this practice. Vogel testified that he discussed this understanding with his supervisor, Captain Luchterhand, who agreed with him. Further, the Union offered numerous exhibits that establish that special event overtime has been offered by departmental, rather than shift, seniority. The only exceptions were Metro Jam and the County Fair in 2011. Swetlik was awarded overtime for Metro Jam and Vogel did not request it, so the County Fair was the first occasion in memory when they were denied special event overtime in favor of less senior officers.

The practice of offering non-shift specific overtime by unit seniority meets the requirements of a binding past practice. The pertinent contract language is ambiguous. The practice was unequivocal in that the Grievants were never denied special event overtime prior to the 2011 County Fair. It was clearly enunciated in that Association exhibits establish that department overtime was announced and awarded for special events over a period of many years. The same exhibits show that the practice was readily ascertainable over time as a fixed and established practice accepted by the parties.

The language of Article VII, referring to shift seniority, only makes sense in the context of shift vacancies where replacements are needed. Special event overtime is not shift specific. The postings for the 2011 County Fair refer to blocks of time, but not to shifts as that term is used in the contract. The reference to the County Fair in Article VII is limited to the context of the reference, which is that the department will attempt to give employees as much advance notice as possible for special events. It is not connected to the sentence addressing shift overtime and, as such, has no relevance to the method of assigning such overtime.

The City will assert that Captain Freiboth, who currently assigns overtime, has consistently done this on a shift seniority basis. The problem is that this was never bargained, nor was the Association put on notice about the change. Freiboth himself testified that there was no practical way for the Association to have known this because no notice was given and the first time overtime was denied to the most senior officers was the 2011 County Fair.

### **The City**

The City points out that the Union bears the burden of proof as to the merits of the grievance and asserts that this burden has not been met. The grievances allege that the City removed the names of the Grievants from the sign-up list for County Fair overtime, thereby allowing less senior employees to receive the overtime opportunities. The Union has failed, however, to offer any evidence that the names were crossed off by anyone in management. As far as the record shows, the names could have been stricken by another employee, or even by the Grievants themselves.

The facts do not support a finding that the City violated the contract. The language of Article III is clear and unambiguous and gives the City specific rights to direct the workforce and the operations of the Department. The testimony of Kevin Rocklewitz establishes that the City has adhered to the same procedure for assigning overtime since at least 2000. Moreover, nothing in the process used by the City violates the management rights clause. Article VII, Sec. 8, regarding call-ins is also clear and unambiguous and specifically identifies the County Fair as an event for which overtime is awarded first by shift seniority.

The Union relies on Article XI and Article II as the basis of its claims. There is nothing in these provisions that bears on the issue at bar. Article XI, while discussing seniority, does not refer to the assignment of overtime at all. Article II speaks of cooperation and maintenance of amenities. Maintenance of amenities is restricted to matters outside the contract itself. Since overtime is specifically addressed in Article VII, Sec. 8, this provision is irrelevant.

In the event the arbitrator determines that the contract is ambiguous, the Union has failed to establish a binding past practice of offering special event overtime by Department seniority. If anything, the evidence indicates the practice has been to assign such overtime by shift seniority, as the Department has done consistently for at least twelve years. The Union disregard's the language of Article VII, Sec. 8, which, if accepted would render that language meaningless. In any event, the City and the Union have both presented contradicting versions of what they believe the practice to be and have offered evidence supporting their positions. This makes it obvious that there that there is no clearly established practice such as to be binding.

### **Union Reply**

The Union reasserts its position that Article VII, Sec. 8 is ambiguous, in that it can be read either to include or exclude non-shift specific overtime. That being the case, the arbitrator must construe the language and, in doing so, must recognize the long-standing practice of awarding non-shift specific overtime by departmental seniority.

The City offered testimony from Captain Frieboth challenging the practice in that Frieboth has been assigning overtime for up to four years and claimed to always have assigned by shift seniority. Frieboth could not say, however, whether overtime was or was not awarded by departmental seniority previously. Further, there is no evidence that, if the procedure changed, the union was ever put on notice of this. Further, since there is no record of any senior employee not receiving requested overtime prior to the 2011 County Fair, there was no reason for the Union to question the procedure of challenge it. Testimony from former Captain Rocklewitz was likewise unenlightening as to when or whether the Union was notified of any change in policy regarding overtime. In fact, the first notice that special event overtime would be offered by shift seniority was for the 2011 Metro Jam. In that case, however, Grievant Swetlik was awarded overtime, so there was no need to question or grieve the situation. The first time a senior officer requested and was denied special event overtime due to shift seniority was the 2011 County Fair. The City attempted to use the incident with Detective Bonin to

show that it did, in fact, award overtime by shift, because it paid Bonin overtime he was denied when he was passed over for overtime. This is a red herring, however, because the record shows that Bonin was passed over because he was a detective and the issue had nothing to do with shift vs. departmental seniority.

### City Reply

The City maintains that Article VII, Sec. 8 is the only provision in the contract addressing overtime and controls in this situation. Article XI, dealing with seniority, specifically states that seniority prevails unless modified elsewhere in the contract. Article VII, Sec. 8 does modify this language by stating that overtime will be offered according to seniority on the shift required. There is no reference in the contract to “shift specific” or “non-shift specific” overtime. These are terms of art manufactured by the Union for this grievance. The contract makes no distinction between one type of overtime and another. The City’s position is further buttressed by the fact that Article VII, Sec. 8 specifically refers to the County fair, which the Union concedes is a special event. The union would have the arbitrator believe that the reference to the fair was only in the context of giving advance notice, but such a proposition contradicts standard principles of contract interpretation. It is clear that the City consistently applies Art. VII, Sec. 8 to all overtime, and that the language is clear. There is, therefore no need to refer to any past practice. The Union would assert that the term. “etc.” in Art. XI renders that provision ambiguous as to whether it applies to overtime, and that past practice should control. The Union failed to establish such a practice, however, so that argument falls, as well.

### DISCUSSION

This case involves a dispute between the parties as to the proper procedure for allocating overtime within the Police Department for community events that occur throughout the year and where a police presence is needed for security, traffic control, education and the like. It is the position of the Union that the contract is ambiguous on this point and that over the years there has been a longstanding practice of awarding such overtime according to department seniority. It is asserted that this was not done in the case of the grievants herein with respect to available overtime for the 2011 Manitowoc County Fair and that they are entitled to be made whole. The City demurs and argues that the contract clearly supports awarding such overtime according to shift seniority, which was done for the fair. Further, the City argues that the Union has failed to establish the existence of a binding practice, so even if the language is found to be ambiguous the grievances must fall.

The dispute as to the meaning of the contract on this point focuses on two provisions and the weight the parties place on them. Article VII, Section 8 states, in pertinent part, as follows:

Section 8. Call-In. All employees shall be subject to call for work outside their normal schedule, and said call shall be by seniority on the shift on which the employee is required within the rank of the employee required. If an emergency does not exist, no employee shall be required to work unless no one accepts the work in which case the employee lowest in seniority who is available may be ordered to work. For events which are predictable, such as the County Fair or court appearances, employees shall be given as much notice as possible regarding their work schedule.

Article XI, Section 1, states:

Section 1. Definition of Seniority. Unless otherwise modified in this contract, seniority rights shall prevail. City seniority shall be defined as the length of service with the City of Manitowoc from the employee's last date of hire to a position within City service. Police Department seniority shall mean the length of service with the Manitowoc Police Department from the employee's last date of hire to a sworn officer position within the Police Department. If an employee moves from one City department to another City department, City seniority for benefit purposes shall prevail. Police Department seniority within classifications shall prevail for the amount of vacations, sick leave, longevity, etc. Seniority shall not be diminished by layoff or approved leave of absence except as otherwise provided in this contract.

The position of the City is that Art. VII, Sec. 8 is the only provision in the contract that directly addresses assignments of overtime and that, by specific reference to the County Fair, it encompasses all overtime opportunities, including special events as well as shift vacancies. The Union, on the other hand asserts that the references to shifts in Art. VII, Sec. 8 limits the provision to just overtime for shift vacancies and that special event overtime is encompassed by Article XI, Sec 1, which, it contends, by use of the omnibus term "et cetera," covers special event overtime and requires it to be allocated according to department seniority. It further maintains that the reference to the County Fair in Art. VII, Sec. 8 is merely illustrative on the subject of advance notice and has no bearing on the issue of allocation. The Union states that, in fact, the practice of the parties over the years has been to allocate special event overtime by department seniority, supporting its interpretation of the contract. The Union concedes, however, that there is room for disagreement as to the interpretation of the language and so asserts that the language is ambiguous and prays that its alleged practice be enforced.

It is the arbitrator's function to interpret the contract and apply it to the facts giving rise to the grievance. In so doing the arbitrator first must decide if the pertinent contract language is clear and unambiguous. If it is, the language should be applied as written and according to its clear meaning. If it is not, it is then subject to construction by application of a number of available rules of interpretation. One such is the existence of a clear, longstanding and mutually acknowledged practice that indicates how the parties have applied the language in the past.



At the outset, I find that the only contract language bearing on the subject of overtime is to be found in Art. VII, Sec. 8. This provision specifically addresses the subject of calling officers for duty outside their normal work hours and specifies the process for doing so. I do not find that the use of the term *et cetera* in Art XI, Sec. 1 has any bearing on the matter. Art. XI, Sec. 1 states that *unless modified elsewhere in this contract* seniority shall prevail, on a departmental basis. Art VII, Sec. 8 does modify the contract as to the use of seniority in call-in procedures, making Art XI, Sec. 1 moot for this purpose. I acknowledge the Union's point that one could argue that Art. VII, Sec. 8 only applies to shift vacancies, but note that nowhere in the contract is any distinction made between overtime offered to fill shift vacancies and that offered to cover special events. There is nothing in the contract language to suggest any intent to carve out overtime for special events and treat it separately as a matter of departmental seniority.

A determination that Article VII, Sec. 8 is the applicable contract provision to the issue at hand, however, does not answer the question of whether that provision is clear and unambiguous as to the issue at hand. The key phrase under scrutiny here is "...call shall be by seniority on the shift on which the employee is required." The Union asserts that the use of the word "shift" means that shift seniority only applies in filling shift vacancies arising from vacations, illnesses, leaves of absence and the like. The City argues that the word shift as used here does not refer just to the regular daily duty assignments, but also to any special assignments arising during the time period encompassed by a particular shift (i.e., if extra officers were needed for an event such as the annual Thunder on the Lake air show, and the hours needed to be covered occurred during the hours of the day within which second shift falls, second shift officers would get called first according to shift seniority).

Both arguments are plausible and thus one might infer that the term is, therefore, inherently ambiguous and if the provision said no more than that I would agree. The last sentence of the paragraph, however, cannot be overlooked. It states, "For events which are predictable, such as the County Fair or court appearances, employees shall be given as much notice as possible regarding their work schedule." The Union contends that the reference to the County Fair in this sentence is only illustrative for the purpose of advance notice and has no bearing on whether departmental or shift seniority applies. I disagree. It is clear to me that the purpose of the sentence is to distinguish between events which are predictable from those that are not, but the inclusion of events such as the County Fair in the provision at all implies a clear understanding that such events are to be governed by the same rules for assigning duties outside the regular schedule as shift vacancies. That being the case, clear language controls notwithstanding the fact that the parties have departed from the language in their practice. Thus, while the record discloses several occasions when a posting for a special event indicates that assignments will be made by departmental seniority, and while that may, in fact, have been done, such departure does not invalidate the effect of the contract. Since the language of the contract is clear, the City was entitled to apply it according to its terms, notwithstanding exceptions that may have been made in the past and recourse to practice is not necessary or appropriate.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

**AWARD**

The City did not violate the Collective Bargaining Agreement when assigning call-in overtime for the County Fair in 2011 based on shift seniority on a shift on which the employee was required. The grievances are accordingly denied.

Dated at Fond du Lac, Wisconsin, this 4th day of March, 2013.

John R. Emery /s/

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John R. Emery, Arbitrator