

IN THE MATTER OF AN ARBITRATION BETWEEN

---

WISCONSIN PROFESSIONAL POLICE ASSOCIATION

and

TOWN OF MUKWONAGO

Case 4

No. 72135

MA-15241

AWARD NO. 7887

---

**Appearances:**

Andrew D. Schauer, Staff Attorney, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of the Wisconsin Professional Police Association.

Daniel G. Vliet, Buelow, Vetter, Buikema, Olson & Vliet, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186-1873, appearing on behalf of the Town of Mukwonago.

**ARBITRATION AWARD**

On June 17, 2013, the Wisconsin Professional Police Association and the Town of Mukwonago filed a request with the Wisconsin Employment Relations Commission to have William C. Houlihan, a member of the Commission's staff, appointed to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on September 26, 2013 in Mukwonago, Wisconsin. A transcript of the proceedings was taken and distributed to the parties and to the arbitrator. Post hearing briefs and reply briefs were filed and exchanged by December 20, 2013.

This Award addresses the non-disciplinary termination of Christopher Heckman

**BACKGROUND AND FACTS**

Christopher Heckman, the grievant, was hired by the Town of Mukwonago Police Department, as a patrol officer, in March 2002. Heckman has experienced hearing loss since childhood and has worn hearing aids since he was 10 to 12 years old. At the time of his hire, there was no hearing standard in place for the Mukwonago Police Department. Heckman worked as a patrol officer for the Town for the 11-year period preceding his termination on

May 15, 2013. It was his testimony that he received no complaints about his work. Heckman had no history of discipline.

Thomas Czarnecki (hereinafter “Czarnecki” or “Chief”) has been the Police Chief of the Town of Mukwonago since 2009. Czarnecki has been with the Mukwonago Police Department for 16 years. In September 2011, Chief Czarnecki reviewed the job description for police officer and caused it to be modified to include vision and hearing requirements. The added requirements provided:

Corrected vision of 20/20 in one eye; and no less than 20/40 in the other eye.

Hearing not to exceed a minimal loss of 25 decibels at 1000, 2000 and 3000 Hertz.

The Chief modeled the new standards on those in effect in the City of Milwaukee Police Department. The parties to this dispute stipulated that for the purposes of this arbitration the hearing standard is reasonable.

In June 2012, Kathy Karalewitz, the Town Administrator, directed that the full-time employees of the Town take a baseline audiology test. The idea to do so came about from a worker’s compensation training session conducted by the Town’s worker’s compensation insurance carrier.

Heckman took the test on July 25, 2012 and failed. The test was conducted by ProHealth Care. Heckman took the baseline exam without benefit of his hearing aids and was evaluated to have moderate to severe hearing loss at each level tested. Heckman retook the test with ProHealth Care on August 30, 2012, with his new hearing aids. On the hearing aid assisted test, Heckman tested at a loss of 25 dB at 1000, 2000, and 3,000 Hertz in his right ear. He tested at a loss of 30 dB at 1000 Hertz, 20 dB at 2000 Hertz and 30 dB at 3000 Hertz. This test result was below the minimum departmental standard and was reported as such by ProHealth Care.

On, or about September 6, 2012, Heckman was taken off active duty. He was forced to use banked time to continue receiving a paycheck.

Heckman went to his personal audiologist for a second opinion. A hearing test was conducted on August 27, 2012. When the setting for his hearing aid was set at the “normal” setting, i.e. where Heckman would set it for typical daily use, he tested at a loss of 30 dB at each of the benchmarked settings. The hearing aid is capable of being manually adjusted. When Heckman turned the hearing aid up, he tested at a loss of 25 dB at each of the benchmarked settings.

The reported results reflected a combined hearing in both ears. They did not distinguish between the right and left ears.

After Heckman failed the ProHealth Care test, he was scheduled to be tested by an otolaryngologist at the Medical College of Wisconsin, Froedtert Hospital. Heckman was seen by Dr. David Friedland on September 14, 2012, and following an exam was "... deemed qualified for employment (as described in the job description) ...."

Upon receipt of the results Czarnecki sent a letter to Dr. Friedland which called into question the conclusion. The letter provided, in relevant part,

September 21, 2014

\* \* \*

Dr. Friedland,

I am contacting you in reference to the Audiologic / Physical Evaluation of Officer Christopher Heckman ... on 09/14/2012. I reviewed the result of the Audiogram and compared it to the requirement laid out in the Town of Mukwonago Police Officer Job Description. The Job Description requirement is as follows: "Hearing not to exceed a minimal loss of 25 decibels at 1000, 2000 and 3000 Hertz." It appears that the hearing was tested at 500 Hertz, 1000 Hertz, 2000 Hertz and 4000 Hertz. Comparing to the requirement at the only two comparable recorded levels (1000 Hertz and 2000 Hertz) Officer Heckman has not maintained a minimum loss of 25 decibels at 2000 Hertz with the benefit of his hearing aids. If I am reading the result correctly there was a loss of 25 decibels at 1000 Hertz and 30 decibels at 2000 Hertz and 35 decibels at 4000 Hertz (3000 Hertz not recorded).

I apologize that our expectation may not have been clearly stated. Because I am not sure we properly communicated the expectation of the Town of Mukwonago, for testing Officer Heckman, I will attempt to clarify.

1. Determine if Officer Heckman was able to test above the job description standard ("Hearing not to exceed a minimal loss of 25 decibels at 1000, 2000 and 3000 Hertz"). Results from the audiogram indicate that he was not able to do that.
2. That being the case our second expectation was to determine if there was something else that could be done to improve his hearing enough to maintain the job description standard long term?

\* \* \*

On September 24, 2012, Karen Belgard, the Audiologist from Froedtert Hospital, replied as follows;

September 24, 2014

\* \* \*

Chief Czarnecki,

I am writing to you in response to your letter faxed earlier this week regarding the audiometric test results for Officer Christopher Heckman. I did not have access to the job description you are referring to in your letter; however, I did perform testing at all required frequencies, including 3000Hz for both unaided and aided thresholds as designated on the audiogram you received. The lines in between the marked frequencies are the interval frequencies which were all tested under headphones without hearing aids. Aided testing was performed at 500, 1000, 1500, 2000, 3000 and 4000Hz. His air conduction thresholds at 3000Hz are 75dB in the right ear and 80dB in the left ear. His aided thresholds at 3000Hz were 35dB for each ear. The average aided results would be 30dB for each ear using your requirement of 1000, 2000 and 3000Hz. This minor difference in hearing could be adjusted for by his audiologist as he is so close to meeting your subjective standards.

I hope that this information is helpful to you. Please let me know if you have any other questions or concerns.

Karen Belgard, AuD

Heckman returned to his personal audiologist for a further evaluation. On or about October 8, 2012, he was tested again. Heckman tested at 20 dB in one ear and 25dB in the other at 1,000 Hertz, 15 dB and 20 dB at 2,000 Hertz, and 25 dB and 25 dB at 3,000 Hertz. Those results were forwarded to the Town.

The Chief then determined to send Heckman to California to take a Hearing in Noise Test ("HINT"). California was selected as the hearing site only because there was no facility closer that administered the test. The test was selected because it followed the protocol that would have been applicable under the Milwaukee Police Department procedure. It is a different kind of hearing test in that it is not administered in a controlled, noise free environment, but rather attempts to replicate the noises commonly found in a police squad car. The Union objected to the test for a number of reasons, including the assertion that it was irrelevant to the determination of

hearing under the standards promulgated by the Town, i.e., the standard of the Town did not have a hearing in noise component.

On December 9, 2012, Heckman was restored to paid leave status.

On January 3, 2013, Czarnecki directed Heckman to take the HINT test on January 24 in Los Angeles, California. The Town made the flight and hotel arrangements.

Heckman left Milwaukee on January 23, 2013, departing at 2:00 a.m. and arriving in Los Angeles at 3:15 p.m. His travel extended 3½ hours beyond his normally scheduled workday. He was tested on January 24, 2013. To take the test, Heckman left the hotel at 3:00 p.m., had the test performed, and returned to his hotel at 6:45 p.m. This would have been a scheduled day off in the shift to which he was assigned. Heckman departed Los Angeles on January 25, 2013, departing his hotel at 2:45 p.m. and arriving in Milwaukee at 1:00 a.m. on January 26, 2013. His travel took 10¼ hours on a day he was not on the schedule.

Heckman claimed 3½ hours overtime for January 23, 3¾ hours overtime for January 24, and 10¼ hours overtime for January 25, 2013. The Town denied the claims because Heckman was on paid leave, and, although he was placed on the schedule, it bore no relationship to hours worked. Heckman was not working at the time.

Heckman failed the HINT test. Following the HINT report, Heckman was taken off paid administrative leave effective February 1, 2013. In order to be paid, Heckman once again began to draw on his banked time. He ran out of paid leave on or about March 14, 2013, and thereafter was on unpaid status.

On March 22, 2013, Czarnecki scheduled an appointment for Heckman at a rehabilitation and counseling service in Madison, Wisconsin. The purpose was to determine what, if anything, could be done to accommodate Heckman's hearing. Heckman met with a vocational counselor on April 10, 2010. The counselor concluded in a report issued on May 9, 2013 that "... reasonable accommodations cannot be provided to allow Mr. Heckman to perform all of the essential functions of patrol work ...."

Heckman was terminated on May 15, 2013.

At hearing, a number of witnesses testified as to Heckman's work performance and how it was impacted by his hearing loss. Heckman testified that he never received a complaint about his work. He has no discipline in his record. He has no indication of any negative evaluation.

Andrew Douglas, a coworker, testified relative to his observations as to Heckman's hearing. Douglas indicated that Heckman would stand too close to suspects or others he was interviewing. Douglas believed that compromised the grievant's reaction time. Douglas further testified to an incident when the two of them approached a house to pick up a juvenile runaway. As they approached, Douglas indicated that he attempted to get Heckman's attention, but that Heckman could not hear him. Douglas testified that on a number of occasions dispatchers could

not reach Heckman and Douglas was sent to find him. Douglas attributed all these incidents to Heckman's compromised hearing.

Craig Ketola, a coworker, testified about an incident where he and Heckman were dispatched to back up the sheriff's department on a warrant arrest. Two sheriff's department detectives went into a house. Ketola maintained a position in the front yard, approximately 60 yards away. Heckman was stationed in the attached garage. A scuffle broke out in the house. Ketola heard it and ran past Heckman, entering the house through the garage door. Ketola believes that Heckman did not hear the scuffle, though he was ten yards away. It was Ketola's testimony that he was present on numerous occasions when Heckman could not hear his radio, could not hear the doorbell in the police station, and could not hear the phone ringing.

Eric Schmidt, a Sergeant, testified as to an incident involving a reckless or drunk driver. Schmidt indicated that dispatch notified the officers that there was such a vehicle proceeding toward them and provided a description and license plate. Dispatch also provided a description of the vehicle that had called the matter in. Shortly, Schmidt heard Heckman make a traffic stop with the suspect vehicle. Schmidt turned around to back up Heckman, only to discover that Heckman had stopped the vehicle that had called the matter in. The suspect got away. Schmidt indicates the dispatch was clear and that the vehicles were different makes and colors.

Schmidt testified to an incident where Heckman could not hear the phone when a dispatcher was trying to reach him. He testified to another incident when the front door buzzer was ringing and Heckman couldn't hear it.

Czarnecki testified to instances where Heckman could not hear matters going on around him. He further testified that other officers had come to him expressing concerns over Heckman's hearing.

---

**ISSUES**

The parties stipulated to the following issues:

**QUESTIONS PRESENTED**

1. Did the forced use of the Grievant's banked time from October 9, 2012 through December 9, 2012 and from February 1, 2013 through March 14, 2013 violate Section 3.01 of the CBA? If so, what is the appropriate remedy?
2. Was the Employer's termination of the Grievant on May 15, 2013 in violation of Section 3.01 of the CBA? If so, what is the remedy?
3. Was the grievant entitled to overpay for the following hours worked on January 23, 2013 (3.5 hours), January 24, 2013 (10.25 hours) and January 25, 2013 (3.75 hours) for his trip to Los Angeles to take the HINT test ordered by the Employer? If so, what is the remedy?

**RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**

**ARTICLE III – MANAGEMENT RIGHTS**

**Section 3.01** – The Town Board possesses the sole right to operate the Town and all management rights repose in it. These rights include, but are not limited to the following:

- A. To direct all operations of the Town;
- B. To establish reasonable work rules and regulations for the conduct of its business;
- C. To hire, promote, transfer, lay off, schedule and assign employees in positions within the Town municipal government;
- D. To suspend, demote, discharge and take other disciplinary action against non-probationary employees for just cause;

- E. To relieve employees from their duties because of lack of work or other legitimate reason;
- F. To determine the size and composition of the work force, and determine the work to be performed by the work force and each employee; to determine the competence and qualifications of employees;
- G. To establish the number of shifts, hours of work and work schedules and to schedule overtime work when required;

\* \* \*

## **ARTICLE X – DISCIPLINE AND DISCHARGE**

**Section 10.01** – The Employer agrees no non-probationary employee will be disciplined, suspended or discharged without just cause.

\* \* \*

## **ARTICLE XII – HOURS OF WORK**

**Section 12.01 – Assignment.** Hours of work will be determined and assigned by the Chief of Police. The Chief shall post the schedule for the next month by the 15th of the preceding month.

**Section 12.02 – Schedule.** Full-time employees shall work a 5-2, 4-2, 5-2, 4-2 schedule with a twenty-six (26) day work cycle. The regular shift shall be eight and one-quarter (8.25) hours. Part-time employees shall work as necessary to fill in the schedule established by the Chief and shall work the hours scheduled by the Chief. Part-time employees will not be used to reduce the straight-time hours worked by full-time employees. Further, part-time employees shall be used to supplement the full-time employees and not supplant full-time employment.



### **ARTICLE XIII – OVERTIME PAY**

**Section 13.01** – All overtime work must be directed and approved (see policy) in advance by the Chief of Police or designee.

**Section 13.02 – Weekly.** For full-time employees, all work performed outside of the employee’s regular shift assignment shall be considered overtime and shall be paid at the rate of time and one-half. For part-time employees, hours worked in excess of forty-one and one quarter (41.25) hours per week shall be considered overtime and shall be paid at the rate of time and one-half.

**Section 13.03 – Overtime Work Required.** The Chief of Police, or his designee, may require employees to work overtime.

### **DISCUSSION**

#### **Question 1.**

I do not believe the forced use of banked time violated Section 3.01 of the collective bargaining agreement. Heckman was placed on leave by memo dated September 6, 2012. It appears the actual use of banked leave began on October 9, 2012. As of September 6, 2012, Heckman had failed the initial test administered by ProHealth Care. He had passed the test administered by his own audiologist, though only with the hearing aid manually adjusted up. Heckman did not pass the test at the level he would normally wear the hearing aid. Shortly after the leave began, Heckman was sent to Froedtert Hospital for a follow-up evaluation, which he did not pass, though the Belgard memo suggests that the hearing deficiency is minor. Following that, Heckman revisited his audiologist and passed the test administered on October 8, 2012.

The Union believes the Town should be held to the successful October 8, 2012 test results. I don’t agree. The Town had concerns about Heckman’s hearing. The medical feedback it received was mixed. I think it was reasonably within the scope of the Chief’s discretion to relieve Heckman from duty until there was a more definitive determination as to Heckman’s fitness for duty. Paragraph E of Article III, Section 3.01, authorizes the Chief to relieve employees from their duties for legitimate reasons. At this point in time, there was a real question as to whether or not Heckman met the minimum hearing requirements of the department.

I see nothing in Section 3.01 that requires that the leave must be in pay status. Paragraph B of Article III, Section 3.01, requires that work rules must be reasonable. The parties have stipulated that the hearing standard is reasonable for purposes of this proceeding. Paragraph F of Article III, Section 3.01, authorizes the employer to determine the qualifications of employees. That is exactly what was taking place. All of this testing was transpiring because

there was a question as to whether Heckman could meet the minimum hearing standard of the department.

### Question 2.

This is not a disciplinary termination. Heckman is not alleged to have engaged in any conduct which would give rise to a termination. The sole basis for Heckman's termination was his level of hearing.

There are conflicting test results surrounding this controversy. The Union says that the Town should be bound by the October 8, 2012 test result and that should end this matter. I disagree. The first test result, from ProHealth Care, was negative. Had the Town argued that this result was dispositive in the face of medical evidence to the contrary, I would certainly have felt it appropriate to consider the balance of the evidence. The results from Froedtert Hospital show a greater hearing loss than reported by ProHealth Care. All of the tests are tightly grouped. Where Heckman passed, he barely passed. Where Heckman failed, the failure is described as minor.

The Chief ordered the HINT test. The Union questioned the relevance of the HINT test and offered medical critique of the test. The test is a part of the protocol used by the Milwaukee Police Department where hearing is an issue. Since the hearing standard came from the Milwaukee Police Department, it appears to be a logical step. The HINT test is used to screen hearing for police officers in California. It is not a contrived or sham procedure. The test is different from those administered above. It interjects noise on the premise that there is ongoing noise in a squad car. There is a certain logic to the approach. There is evidence in the record which indicates that some individuals who cannot pass a conventional hearing test have done well on the HINT and, conversely, that there are individuals who have failed the HINT test but passed conventional hearing tests. I think the results of the HINT test lend weight to the claim that Heckman's hearing is below the Town's threshold. Whether the test is relevant to the enunciated hearing standard is not a matter that is necessary to resolve.

The conflicting tests have to be considered in the context of Heckman's work performance. There were a number of witnesses who testified that it was common for Heckman to fail to hear dispatch, the radio, the telephone, the office buzzer, or others attempting to communicate with him. Some of this is of modest consequence. Some of it is of meaningful significance. Testimony that Heckman could not be reached by dispatchers is troubling. The testimony related to the runaway backup scuffle is very troubling. There existed the potential for injury. The incident related to the mistake as to which car to stop is troubling and contributed to the escape of a suspect. Law enforcement is a dangerous occupation. Errors can bring about very onerous consequences. A number of the incidents described go to the essence of the job of a police officer.

I think the weight of the evidence is that Heckman did not pass the hearing test. There is simply more evidence to that effect. I think the concern is a real one in light of the testimony as to how Heckman's hearing has affected his job performance. The hearing standard is measurable.

The question was posed as to whether an accommodation is possible. None was suggested at hearing. The professional rehabilitation services concluded that accommodation was not possible.

I do not believe the termination violated the collective bargaining agreement.

Question 3.

Heckman filed a claim for overtime for some of the hours involved in traveling to Los Angeles, California. At the time, Heckman was assigned a schedule but was not working. He was on paid leave status. The first claim was for 3.5 hours on January 23, 2013. The essence of the claim is that Heckman worked 3.5 hours beyond his contractual workday. Article XII, Section 12.02, provides for a regular shift of 8.25 hours. Article XIII, Section 13.02, provides overtime for work performed outside the employees regular shift assignment. The Chief directed Heckman to go for the HINT test and the Town made his reservations. Everyone was on notice the day would be long. I believe Heckman is entitled to 3.5 hours at the overtime rate for the hours worked on January 23, 2013.

The second claim is for 3.75 hours on January 24, 2013, to take the test. The essence of the claim is that January 24 was a scheduled day off and thus outside the regular shift assignment. Heckman was on paid leave between December 9, 2012 and February 1, 2013. He was not working. I don't know the purpose of placing him on the schedule. It was certainly not to staff the operation. Article XII, Section 12.02, sets forth a work schedule. Implicit in the detailing of hours of work is that the employee is working. I think it is outside the sweep of Section 12.02 and Section 13.02 to treat the 3.75 hours worked as overtime under circumstances where the employee is not actually working the described work schedule. This is not an instance where an employee is in work status and takes a sick day or goes on vacation. This Award is not intended to address the relationship between the work schedule and paid time off for employees on active work status. I do not believe Heckman is entitled to overtime for the hours worked on January 24, 2013.

On January 25, 2013, Heckman flew home. He worked for 10.25 hours. Consistent with the above, I do not believe he is entitled to be paid overtime for the first 8.25 hours of the day. However, he did actually work for 10.25 hours, 2 hours beyond his regular shift hours. I think Heckman is entitled to be paid for 2 hours overtime for hours worked on January 25, 2013.

**AWARD**

The grievance is denied with respect to the first issue. The grievance is denied with respect to the second issue. The grievance is sustained in part, and denied in part, with respect to the third issue.

---

**REMEDY**

The Town is directed to pay Heckman five and one-half (5.5) hours at the overtime rate for his travel to and from Los Angeles, California.

Signed in Madison, Wisconsin, this 11th day of April 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

William C. Houlihan, Arbitrator