

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE POLICE ASSOCIATION,
LOCAL 21, IUPA, AFL-CIO

And

CITY OF MILWAUKEE

Case ID: 251.0052

Award No. 7980

(Off Days Grievance)

Appearances:

Brendan Matthews, Cermele and Matthews, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, appearing on behalf of the MPA.

Lisa Gilmore, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, appearing on behalf of the City.

ARBITRATION AWARD

Milwaukee Police Association, Local 21, IUPA, AFL-CIO, hereinafter referred to as the MPA or the Association, and City of Milwaukee, hereinafter referred to as the City or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on that grievance was held via Zoom on September 29, 2021. The hearing was transcribed. Afterwards, the parties filed briefs, and MPA filed a reply brief, whereupon the record was closed on December 3, 2021. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided. The MPA frames the issue as follows:

Did the Department violate Article 14 of the parties' collective bargaining agreement through its actions on or about October 6, 2020, relating to cancelling regular off days of certain MPA members, and if so, what are the appropriate remedies?

The City frames the issue as follows:

Whether the circumstances surrounding the suspension of rest days, October 6, 2020 to October 11, 2020 constitute an "emergency situation" for the purposes of implementing exceptions to the notice and out-of-service compensation provisions in Article 14.4 of the collective bargaining agreement effective January 1, 2018 through December 31, 2019? If not, what is the remedy?

I have not adopted either side's proposed wording of the issue. I find that the issue that will be decided herein is as follows:

Did the City violate Article 14.4 of the parties' collective bargaining agreement by its actions herein? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The collective bargaining agreement (hereinafter CBA) applicable here was from January 1, 2018 to December 31, 2019. It contained the following pertinent provisions:

ARTICLE 5
MANAGEMENT RIGHTS

2. The City has the exclusive right and authority to schedule overtime work as required in the manner most advantageous to the City.

ARTICLE 14
HOURS OF WORK

1. The normal hours of work for employees covered by this Agreement shall consist of work shifts of eight (8) consecutive hours which in the aggregate results in an average normal work week of forty (40) hours.

4. Except on those occasions when an emergency situation exists, if the Department desires to change the off days falling within a single pay period for a member who otherwise continues to be assigned to the same schedule and off day group, the member must be given personal notice of such change, at least seven days prior to the start of the pay period in question. If the Department fails to give such notice, all hours worked on either of the off days in question shall be treated as falling outside the regularly scheduled eight-hour shift, as provided in Article 15.

ARTICLE 15 OVERTIME

1. DEFINITION

Overtime shall be all authorized assignments outside the regularly scheduled eight-hour shift as hereinbefore defined under the Article "Hours of Work." Notwithstanding the fact that trade off of work assignments or other rescheduling of work assignments authorized by the Department at the request of the employee results in work assignments outside of the regularly scheduled eight-hour shift, such time shall not be considered overtime.

2. OVERTIME RATES

- c. Overtime earned as a result of an authorized eight-hour shift assignment which falls outside the regularly scheduled eight-hour shift in whole or in part and which because of the nature of the work performed does not fall within 2.a. or 2.b., above, shall be compensated at one and one-half (1 ½ X) the base salary rate, except that if an employee's regularly scheduled eight-hour shift, as established by the HOURS OF WORK provision of this Agreement, is changed, then all time worked on the new regularly scheduled eight-hour shift shall be compensated at (1X) the base salary rate.
- d. Overtime earned as a result of an authorized assignment outside of the regularly scheduled shift which does not fall within 2.a., 2b., or 2c., above, shall be compensated at one and one-half (1 ½ X) the base salary.

BACKGROUND

The City operates a police department for the public safety of its citizens. The MPA is the bargaining representative for the City's law enforcement personnel.

The following overview provides pertinent context for this case. In early 2020 (all dates hereinafter refer to 2020), there were two police officer (hereinafter PO) involved fatalities in the Milwaukee area: on February 2, the fatal shooting of Alvin Cole by Wauwatosa PO Joseph Mensah; and on April 25, the fatal chokehold death of Joel Acevedo by Milwaukee PO Michael Mattioli. Outside of Wisconsin, on March 23, Breonna Taylor was fatally shot in her home by Louisville police executing a no-knock warrant. Then on May 25, George Floyd was fatally asphyxiated by Minneapolis PO Derek Chauvin. These deaths set off a summer of protests and civil unrest in Milwaukee, Wauwatosa and elsewhere. People were injured and property was damaged as a result. Then on August 23, Jacob Blake was shot by a Kenosha PO. That shooting caused civil unrest, violent protests and demonstrations in Kenosha. On August 24, Governor Evers authorized the Wisconsin National Guard to support law enforcement authorities in Kenosha. On August 25, Kyle Rittenhouse shot three protesters in Kenosha, two fatally. On September 23, there was civil unrest in Louisville following the decision to not charge police officers involved in the shooting death of Breonna Taylor.

It was in that context that the following occurred.

FACTS

On September 30, Milwaukee County District Attorney (hereinafter DA) John Chishom notified numerous state and local law enforcement departments that on October 7 he planned to announce his decision on whether to criminally charge Wauwatosa PO Mensah for his shooting death of Alvin Cole. Given the civil unrest and protests referenced above, it was widely anticipated that more civil unrest and protests would follow the DA's charging decision.

That same day (September 30), the Wauwatosa Police Department invoked what is known as a mutual aid request of numerous police departments, including the Milwaukee Police Department. This request was made "in anticipation of civil unrest that may occur" following the DA's October 7 charging announcement. [Note: Wauwatosa shares a border with Milwaukee].

On October 1, the commander of the Milwaukee Police Department's Major Incident Response Team (MIRT), Captain Leitzke, was tasked with creating an operational plan in anticipation of the DA's charging announcement. In response, the Department's Fusion Division received, gathered, analyzed and shared threat related intelligence information related to the anticipated announcement of the Mensah charging decision. Based on this shared intelligence gathered from multiple sources and past protest experiences, law enforcement officials anticipated there would be protests and civil unrest in association with the DA's announcement of his charging decision.

The Milwaukee Police Chief subsequently approved activation of emergency operations to prepare for the potential of large-scale protests and civil unrest in Milwaukee and Wauwatosa. As part of that process, the Department activated its Emergency Operations Center which included the deployment of MIRT.

On October 5, the Milwaukee Journal Sentinel reported that the DA planned to announce his charging decision on PO Mensah on October 7. That same newspaper also quoted Wauwatosa Mayor Dennis McBride as saying:

We have mutual aid agreements with other departments in the area so we have robust plans in place to deal with any unrest. We expect unrest and we have plans in place to deal in an appropriate fashion, commensurate with whatever level of protests happen.

In anticipation of protests, Wauwatosa declared an emergency to exist. It closed its City Hall and Library at noon that day. Additionally, the Wauwatosa School District switched to virtual learning for the rest of the week.

On October 7, Department captains were notified via email by Assistant Chief Thiele that in preparation for the Mensah charging decision by the DA “all off days (including regular offs) will be cancelled through Sunday, unless your officers or supervisors are on a regular FULL vacation.” The impact of this order was that officers’ regular off days were cancelled from October 7 through October 11. The Department also cancelled training during that time. The reason this action was taken was because the Department’s administrative staff had serious concerns about the Department’s ability to respond after the DA’s charging decision was rendered.

That same day, Governor Evers authorized the Wisconsin National Guard to support law enforcement authorities in Wauwatosa. This action was taken after officials there requested assistance to help ensure public safety in advance of the Mensah charging decision.

Later that day, the DA announced that he would not charge Wauwatosa PO Mensah for the fatal shooting of Alvin Cole. Thus, the DA declined to file criminal charges against Mensah.

Following that announcement, some protests occurred in Milwaukee and Wauwatosa, but they were not violent or widespread. Thus, the anticipated public unrest did not materialize.

Several days later, some Milwaukee police officers sought to be paid overtime for their off days which were cancelled between October 7 and 11 and subsequently rescheduled. Their request for overtime was denied.

On November 3, two bargaining unit employees—Jovan Petkovich and Mark Mielcarek—filed a group grievance which alleged that they were entitled to overtime pay for their cancelled off days. The Police Chief subsequently denied the grievance on the grounds that the change in rest days which occurred was due to an “emergency situation” within the meaning of Article 14.4.

The grievance was subsequently appealed to arbitration.

Some additional facts are referenced in the DISCUSSION.

DISCUSSION

What happened here can fairly be summarized thus: those officers who were scheduled to have their regular “off days” between October 7 and 11 had them cancelled. Since their off days were cancelled during that time, they had to work their regular hours on those days. At issue here is whether those employees who worked on their regular off days are entitled to overtime for those hours. The Association contends that they are, while the City disputes that assertion. Based on the rationale which follows, I find that the employees who had to work on their regular off days between October 7 and 11 are not entitled to overtime for the hours which they worked in that timeframe. Thus, I find no contract violation occurred.

The factual situation just referenced is specifically addressed in Article 14.4, so that provision is obviously relevant to this matter. Here’s my review of that language. With an exception that will be noted later, the first sentence in that provision provides that if the Department wants to change an employee’s “off days falling within a single pay period”, then the employee “must be given personal notice of such change, at least seven days prior to the start of the pay period in question”. This language expressly allows the City to change an employee’s “off days” so long as it gives them a certain amount of advance notice. The second sentence in the provision then identifies what happens “if the Department fails to give such notice” (i.e., if it does not give the employee the specified notice). What happens is that the employee is given a monetary remedy for the lack of notice and disruption to their work schedule. The monetary remedy which is specified is that “all hours worked on either of the off days in question” shall be paid as overtime.

In this case there is no question that the Department cancelled certain employees’ off days without giving them the advance notice specified in the first sentence of Article 14.4. Because of that, I’m now going to return to the first sentence of Article 14.4 and address the exception which I referenced in the paragraph above but did not address. The exception is found at the very beginning of the provision and provides thus: “Except on those occasions when an emergency situation exists” This exception expressly provides for the cancellation of rest days in emergency situations. Not surprisingly, the City hangs its proverbial hat on the exception just noted and contends it applies here. Specifically, the City submits that when it cancelled employees’ off days from October 7-11 it was due to an “emergency situation.” The Association disputes that assertion.

The phrase just referenced (i.e., “emergency situation”) is not contractually defined, nor is the single word “emergency”. Sometimes, when the language at issue is not contractually defined, bargaining history evidence is offered to show that the parties jointly discussed and agreed on the meaning of a particular term. Here, though, no bargaining history was offered into evidence, so all I’ve got to work with, so to speak, is the contract language itself.

In the absence of a contractual definition of “emergency”, the Association offers several different dictionary definitions of that term and invites me to pick one of them and apply it here. Thus, what the Association wants me to do here is to supply a definition of “emergency” that can be applied to the next case of this nature that comes down the proverbial pike.

I’m not going to do that. Instead, what I’m going to decide is simply whether an emergency situation existed in this particular case. That’s it. If the Association wants the phrase “emergency situation” defined in the CBA, it can do that at the bargaining table.

I find that an “emergency situation exist[ed]” in Milwaukee on October 7, 2020. The basis for this finding can be simply put: first, the Chief gets to decide if an emergency situation exists, and second, his finding that one existed has substantial support in the record. The following discussion elaborates on these findings.

As noted above, the phrase “emergency situation” is not contractually defined. In the absence of a contractual definition, the basic question is who gets to decide, in a given factual situation, whether an “emergency situation exists.” The answer is clear: the Chief does. Here’s why.

First, the City of Milwaukee is unique in that the state legislature delegated the power and responsibility to determine whether an “emergency situation exists” to the Milwaukee Chief of Police. Specifically, Wis. Stat. § 62.50 (10m) provides:

REST DAYS. The Council of every city of the 1st class, however organized, may provide for, and when such provision is made, the chief of the police department shall assign to each police officer in the service of the city one full rest the day of 24 consecutive hours during each 192 hours, except in cases of positive necessity by some sudden and serious emergency, **which, in the judgment of the chief of police**, demands that such day of rest not be given at such time. Arrangements shall be made so that each full rest day may be had at such time as will not impair the efficiency of the department. (Emphasis added)

Second, the Department’s standard operating procedure 010.10 A. 4 “Regular Off Days – Police members”, repeats the language of the statute:

4. Any regular off days may be rescheduled if deemed necessary or suspended in case of a sudden or serious emergency, **when, in the opinion of the chief of police**, such off days would impair the efficiency of the department. (Emphasis added)

Finally, the CBA contains a management rights clause which, among other things, provides thus:

1. The City has the exclusive right and authority to schedule overtime work as required in the manner most advantageous to the City.

When read collectively, the foregoing conclusively establishes that the Milwaukee Chief of Police gets to decide whether an “emergency situation exists” within the meaning of Article 14.4.

Next, the Chief’s finding that an “emergency situation” existed on October 7, 2020 has substantial support in the record. First, as was noted in the FACTS, police officer involved deaths sparked protests and social unrest throughout the summer of 2020 in Milwaukee and elsewhere across the country. Because of that, law enforcement and civil authorities in the Milwaukee area thought it was likely that the public’s response to the DA’s criminal charging decision of PO Mensah could lead to civil unrest and protests (as had occurred earlier). Their conclusion in this regard was not just idle speculation; it was supported by the intelligence gathered by the Fusion Division. Second, because of that credible threat assessment, the Department’s administration understandably wanted all staff available on October 7 in case they were needed. Said another way, it wanted all hands on deck so to speak. It is also noteworthy that the deployment of MIRT (a team of officers that receive special training and equipment to manage crowd control issues) resulted in a reduction of officers assigned to the districts for regular assignment. Thus, MIRT’s deployment had a cascading effect on the staffing of the police force. Third, the Chief’s decision to cancel off days between October 7 and 11 allowed for exceptions. Specifically, captains were empowered (as part of the decision to cancel rest days) to balance operational needs in limited special circumstances if a special request was made. In my view, the foregoing establishes that when the Chief invoked the Article 14.4 emergency exception on October 7, 2020, he had a reasonable and justifiable basis for doing so. Said another way, his decision to do that was not arbitrary or capricious.

While it ultimately turned out that Milwaukee was relatively peaceful following the DA’s charging decision that does not change the finding above.

Finally, the Association notes that in two prior instances where the Department activated the Article 14.4 exception, it formally declared an “emergency” to exist. The two instances which the Association referenced were the summer 2016 Sherman Park riots and the May 2020 George Floyd/Joe Acevedo social justice protests. The Association notes that here, though, the City did not formally declare an emergency to exist. The Association sees that as significant. I do not. It would be one thing if Article 14.4 specifically required the City to declare an emergency to exist before the Article 14.4 exception could be activated. However, it does not explicitly require that to happen.

Aside from that, what the Association implies is that the two instances just referenced created an enforceable past practice that the City’s declaration of an emergency has become a condition precedent to the activation of the Article 14.4 emergency exception. The problem with that contention is that not every pattern of conduct amounts to a binding past practice, particularly when the pattern of conduct arises from the exercise of a management right. That is precisely the situation here. What happened previously in the two incidents referenced by the Association was not the result of bargaining with the City, but rather the City’s unilateral act. In those two instances, the City decided to issue emergency declarations. That was the City’s right. The City had the right to make that decision because it reserved to itself, via the contractual Management Rights clause,

the right to make that decision. Also, as noted above, there is nothing in Article 14.4 or elsewhere in the CBA that obligates the City to declare an emergency to exist before it invokes the Article 14.4 exception. That means that the two instances referenced by the Association were the product of management prerogatives. Said another way, they arose from the exercise of a management right. Since the two prior instances of invoking the emergency exception to Article 14.4 resulted from the City exercising its management right to declare an emergency to exist, the Association had the burden of showing that the City knowingly waived its management right to invoke the Article 14.4 exception here. The Association did not prove that. As a result, the City did not waive its management right to invoke the Article 14.4 exception here.

Based on the foregoing, I find that the Chief's decision to invoke the Article 14.4 exception on October 7, 2020 passes arbitral muster. Hence, the City did not violate that provision by its actions herein.

In light of the above, it is my

AWARD

That the City did not violate Article 14.4 of the parties' collective bargaining agreement by its actions herein. The grievance is therefore denied.

Issued at Madison, Wisconsin this 22nd day of December, 2021.

By:

Raleigh Jones
Arbitrator