

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE LABOR ASSOCIATION OF WISCONSIN, INC. ON BEHALF OF THE BURLINGTON
POLICE BENEVOLENT ASSOCIATION, LOCAL 218

AND

CITY OF BURLINGTON

Grievance No. 2023-007

Case ID: 441.0004

Award No. 7996

Appearances:

Douglas J. Nelson, The Labor Association of Wisconsin, Inc., 120 Bishops Way, Suite 136, Brookfield, Wisconsin, appearing on behalf of the Burlington Police Benevolent Association, Local 218.

Kyle Gulya, von Briesen & Roper, 10 East Doty Street, Suite 900, Madison, Wisconsin, appearing on behalf of the City of Burlington.

ARBITRATION AWARD

The Burlington Police Benevolent Association, Local 218, hereinafter referred to as the Association, and the City of Burlington, hereinafter referred to as the City, were parties to a 2023-2025 collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. Pursuant to that agreement, the Wisconsin Employment Relations Commission assigned the undersigned to decide an overtime grievance. A hearing on that grievance was held in Burlington on February 16, 2024. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on April 5, 2024. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUES

The Association frames the issues as follows:

Did the City violate the express or implied terms of the collective bargaining agreement when it failed to assign the grievant to an overtime assignment that was offered to Sergeants on August 20, 2023? If so, what is the appropriate remedy?

The City frames the issues as follows:

Did the City violate Article VII, Section 7.02 of the Collective Bargaining Agreement by not offering the event and special assignment overtime opportunities to the grievant? If so, what is the appropriate remedy?

The parties did not stipulate the issues to be decided. I find that the issues that will be decided herein are as follows:

Did the City violate the express or implied terms of Article VII, Section 7.02 of the collective bargaining agreement by offering event and special assignment overtime opportunities to sergeants before offering them to the grievant? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The collective bargaining agreement (CBA) applicable here was from January 1, 2023, to December 31, 2025. It contained the following pertinent provisions:

ARTICLE I – RECOGNITION

Section 1.01: This written agreement shall be entered into by and between the City of Burlington hereinafter referred to as the “Employer” and the Labor Association of Wisconsin, Inc. hereinafter referred to as the “Association,” for and on behalf of its affiliate local, the Burlington Police Benevolent Association, Local 218. The Employer recognizes the Association as the sole and exclusive bargaining agent for all regular part-time and regular full-time employees of the City of Burlington Police Department with the powers of arrest, excluding supervisory, confidential, and managerial employees. Any reference to “Employee” in this Agreement shall mean a member of the Burlington Police Benevolent Association represented by the Labor Association of Wisconsin, Inc.

Article V – HOURS OF WORK

Section 5.01 – Hours: The normally scheduled shift for all members of the Association shall be five (5) consecutive working days followed by three (3) consecutive off days and then repeating the cycle. The normal workday shall consist of eight and three-quarter (8.75) consecutive hours. The normally scheduled shift for the Detective shall be five (5) consecutive working days followed by two (2) consecutive off days and then repeating the cycle Monday through Friday. The normal workday shall consist of eight (8) consecutive hours. The Detective shall

receive compensatory time off to keep his/her overall yearly hours at the same amount as the patrol officers, which is currently one thousand nine hundred and ninety-six (1,996) hours per year.

Section 5.02 – Shifts: Effective the first date of the Agreement, and each January 1st thereafter, each patrol officer shall be assigned to one of the following regular shifts on a steady basis:

- | | |
|-----------------|---|
| A. First Shift | 5:30 a.m. to 2:15 p.m. |
| B. Second Shift | 1:30 p.m. to 10:15 p.m. |
| C. Third Shift | 9:30 p.m. to 6:15 a.m. |
| D. Fourth Shift | 7:00 p.m. to 3:45 a.m. |
| E. Detective | 11:00 a.m. to 7:00 p.m., however the Chief of Police, or his designee, may alter these hours based on the needs of the Department as it relates to Detective needs. |
| F. Swing shifts | 7:00 a.m. to 3:45 a.m.
1:30 p.m. to 10:15 p.m. |

Three (3) days on 4th shift followed by two (2) days on 2nd shift followed by three (3) days off, and repeating.

Section 5.03: Each Patrol Officer shall be assigned to one of the above regular shifts with the officers having the right of choosing their shift on the basis of seniority.

Article VII – OVERTIME COMPENSATION PAY

Section 7.01: If the total of all hours worked by a Patrol Officer in carrying out the duties assigned to him exceeds eight and three-quarters (8.75) hours per day or exceeds one thousand nine hundred and ninety-six (1,996) hours per year, (excluding, however, up to two (2) hours per month for departmental in-house training or in-house departmental meetings for which full compensation is provided for above under Article V), such hours in excess of eight and three-quarters (8.75) hours per day or such hours in excess of one thousand nine hundred and ninety-six (1,996) hours per year shall be considered overtime and shall be paid for at one and one-half (1-1/2) times the Patrol Officer's regular hourly rate of pay as defined in Article IV; providing, however, that all such additional hours which are required by the Chief of Police involving court time, conferences with the City Attorney, and training and educational activities, shall be paid at one and one-half (1-1/2) time the Patrol Officer's regular hourly rate of pay as defined in Article IV.

Where the City orders an employee to attend training or schedules State or Federal Mandated Training with fourteen (14) calendar days' notice, the employer shall have the right to modify an employee's scheduled hours of work on a previously scheduled workday to accommodate that training. Should that training be scheduled on a regularly scheduled off day, the City, employee and Association president may

mutually agree to allow that employee to take a regularly scheduled day off from the five-day groups immediately contiguous to the day on which the training has been mandated, or receive pay or compensatory time off shall apply to the exercise of that option. For non-mandatory training, the Association president, employee, and representative of the City shall discuss the appropriate rate of pay for employees attending such non-mandatory training.

For non-mandatory training, employees will be compensated at straight time for all travel time. For mandatory training, employees shall receive compensation at the rate of time and one-half for all travel time. All travel time compensation shall be in the form of compensatory time off.

Section 7.02: For this section, all overtime required to be worked by a Patrol Officer prior to or beyond his/her regular eight and three-quarters (8.75) hour per day shift shall be by seniority upon that shift as outlined in Article XIX. The senior Patrol Officer shall have the elective availability to work the overtime or if the senior Patrol Officer doesn't wish to work the overtime, then he/she may pass his/her elective availability to the next lower Patrol Officer who shall then have the overtime or he/she may pass the overtime to the next lower person. The Department shall contact employees by seniority to fill vacant shifts. The first option is to fill the entire vacant shift. If no employee volunteers for the entire shift, the Department shall split the shift. If no employee volunteers to fill the split shifts, then the Department shall order the least senior employee to fill the entire vacant shift or the remaining open split shift. Employees on a paid day off, cannot be ordered in. Employees who volunteer to work the entire shift shall be awarded the overtime over an employee volunteering to work a split shift regardless of seniority. There shall be no bumping of overtime by a more senior officer with less than three (3) hours prior to the start of the shift. Exceptions will be permitted when an officer is needed to complete a duty that he/she is directly involved in. This section shall not apply in cases of emergency. No employee shall be compelled or allowed to work more than thirteen (13) consecutive hours except by mutual agreement between the employee and the Chief or designee.

Section 7.04: Whenever an employee is required to work overtime on a Sunday, he/she shall be entitled to double time.

Article XVII – OTHER DEPARTMENTAL RULES, REGULATIONS AND PRACTICES

Section 17.01: The rules, regulations and practices as published by the Department shall be followed to the extent they do not conflict with any specific provision of this agreement or violate any state or federal law.

Article XVIII – GRIEVANCE PROCEDURE

Section 18.01. Step 4. The arbitrator shall have no power to add to, subtract from, or modify any terms of this Agreement, and the arbitrator's decision shall be final and binding on the parties. . . .

Article XIX – SENIORITY

Section 19.01: Seniority shall be determined by the employee's length of service as a Patrol Officer in the Department. Time spent in the Armed Forces on military leaves of absence, and other authorized leaves not to exceed one (1) year, and time lost because of duty connected with disability, shall be included.

Article XXIV – MANAGEMENT RIGHTS

Section 24.01: Except as otherwise provided herein, management of the operations and direction of the work force, including the right to hire and the right to suspend, discipline, or discharge for just cause, and the right to transfer, promote or relieve employees from duty because of lack of work, or other legitimate reasons, the right to establish and make effective reasonable rules of conduct and the assignment of employees to a job, are vested exclusively in the Employer, together with all other functions of management, with the understanding that such rights of management will not be used for the purpose of discrimination against any employee, and such management rights shall not contravene any of the provisions of this Agreement.

ARTICLE XXV – ENTIRE AGREEMENT

Section 25.01: This contract constitutes the entire Agreement between the parties and shall only be amended in writing by mutual Consent of the parties.

BACKGROUND

The City is a municipal employer that provides law enforcement services through its Police Department. The Burlington Police Benevolent Association is a labor organization that serves as the collective bargaining representative of certain employees of the Burlington Police Department (hereinafter BPD), including patrol officers but excluding sergeants, lieutenants, and the chief of police. A CBA between the parties was effective from January 1, 2023, through December 31, 2025. The action that is the subject of this grievance arbitration occurred during that contract period.

FACTS

The City of Burlington Police Department (BPD) provides posts for special assignments or events for which employees may earn additional compensation. Examples include "Click-It or Ticket" seat belt enforcement, speed enforcement, local events, and security requests from private businesses. The Chief of Police decides what type of staffing is required for the event, and management decides who works based on the event needs and safety.

Sergeants are salaried exempt supervisors. Chief Zmudzinski testified that, since he joined the BPD 19 years ago, special assignments or events have been offered to sergeants or other supervisors before they have been offered to patrol officers. Prior to December 2018, sergeants were given “time-for-time” when working special assignments or events. In December 2018, City Administrator Carina Walters authorized sergeants to receive additional pay for working these assignments. Then-Lieutenant Zmudzinski notified sergeants of this change by email on December 4, 2018. *See* Jt. Ex. 5. Zmudzinski testified that the email didn’t change whether sergeants could work these assignments, just that they would receive pay rather than time for the shifts.

Zmudzinski further testified that the BPD has a long-standing policy of calling sergeants first for the purposes of filling a vacancy. If sergeants chose not to work the event, the BPD would then offer the overtime to bargaining unit members based on seniority within the CBA. Zmudzinski says he interprets the language in Section 7.02 – “required to be worked by a Patrol Officer” – to mean the seniority policy applies when a bargaining unit member is forced to work.

Lieutenant Krusemark testified that, prior to 2023, Officer Rice acknowledged that he was aware that sergeants were offered special assignment overtime first. Krusemark testified that the grievant, Officer Bill Rice (Rice), told him several times that Krusemark was taking food off his (Rice’s) table. Sergeant Rick Dimzoff, a former Association president, likewise testified that he knew that sergeants were offered special assignment overtime opportunities before patrol officers. He said Association members often talked about how sergeants were “taking money out of our pocket” but did not file grievances or make bargaining proposals about this policy. The City’s scheduling database shows that Rice lost special assignment overtime opportunities to sergeants thirty-five times from 2020 to 2023. The database also shows that it was extremely common for sergeants to receive special assignment and event overtime opportunities ahead of patrol officers.

On Saturday, August 20, 2023, Rice was denied an overtime shift, which was instead granted to Officer Dan Hayes and four sergeants employed by the BPD. These four sergeants are non-represented employees. Rice was the second most senior patrol officer to sign up to work the available overtime.

The Labor Association of Wisconsin, on behalf of the Burlington Police Benevolent Association, processed Grievance 2023-2 through the steps of the grievance procedure. The Association also processed grievances 2023-5 and 2023-7, and the parties stipulated the arbitrator’s award will be binding for those grievances. The Labor Association of Wisconsin brought this grievance before the Wisconsin Employment Relations Commission on November 15, 2023.

DISCUSSION

At issue here is whether the City’s actions in this matter violated the parties’ CBA. The Association contends that the City’s actions violated the CBA, while the City disputes that

assertion. Based on the rationale which follows, I find that the City's actions did not violate the CBA.

An arbitrator cannot disregard or modify plain or unambiguous provisions of a CBA. *See Madison Tchrs. Inc. v. Madison Metro. Sch. Dist.*, 2004 WI App 54, 271 Wis. 2d 697, 678 N.W.2d 311 at ¶15. However, an arbitrator has authority to construe an ambiguous provision. *Id.* Therefore, the initial question is whether the provision of the CBA in question – Sec. 7.02 – was ambiguous. A provision is ambiguous when there is more than one plausible interpretation. *See Portage County*, WERC MA-14386 (Milot, 10/15/10).

Sec. 7.02 governs overtime compensation pay. It reads, in relevant part:

“For this section, all overtime required to be worked by a Patrol Officer prior to or beyond his/her regular eight and three-quarters (8.75) hour per day shift shall be by seniority upon that shift as outlined in Article XIX. The senior Patrol Officer shall have the elective availability to work the overtime or if the senior Patrol Officer doesn't wish to work the overtime, then he/she may pass his/her elective availability to the next lower Patrol Officer who shall then have the overtime or he/she may pass the overtime to the next lower person. The Department shall contact employees by seniority to fill vacant shifts.”

This provision is thorough and shows that the parties intended to ensure that bargaining unit members who have served longer with the BPD are given preference to receive overtime opportunities.

Here, the provision is unambiguous. It clearly defines the type of overtime– “overtime required to be worked by a Patrol Officer” –making it clear that this seniority provision applies not to all overtime opportunities, but to overtime opportunities that *must* be staffed by an officer.

The Association argues that the sentence in the paragraph– “The Department shall contact employees by seniority to fill vacant shifts” –means that the section should be interpreted to require the City to contact bargaining unit members by seniority to fill overtime shifts. However, arbitrators must keep meaning consistent throughout the CBA. “When the words are ‘ordinary’ or of a technical nature, it is said to be ‘a well recognized rule of construction that a word used by the parties in one sense is to be interpreted, in the absence of countervailing reasons, as employed in the same sense throughout the writing.’” *See Elkouri & Elkouri, How Arbitration Works*, § 9.3.A.i.c. (7th ed. 2012). Here, Section 7.02 uses the phrases “overtime” and “shifts” interchangeably throughout the section. There is no reason to interpret the mention of “vacant shifts” in one sentence to reference anything other than vacant overtime shifts required to be worked by an officer, as defined at the beginning of the section.

The Association argues that the City never notified the Association that it was changing the call-in procedure in 2018. However, the City was not required to notify the Association of this change. The policy governs sergeants, which are not and were not bargaining unit members. Further, assigning employees to a job is the City's management right under Section 24.01 of the

CBA. Since changing the call-in procedure is a way of assigning employees to a job, changing the call-in procedure was the City's management right.

The Association further argues that allowing sergeants to receive overtime rather than flex time is a violation of the City's Handbook. However, that is outside the scope of this CBA, which only governs the working conditions of bargaining unit members. The Association does not have the right to dictate the working conditions of City employees outside of the bargaining unit, such as sergeants.

The Association entered no evidence that the shifts that Rice was passed over for were "required to be worked by a Patrol Officer." Therefore, the City did not violate the CBA by allowing a sergeant to work those overtime shifts ahead of Rice.

On the basis of the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following:

AWARD

That the Employer's actions in this matter did not violate the parties' CBA. The grievance is denied.

Issued at the City of Madison, Wisconsin, this 20th day of August, 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Katherine Scott Lisiecki, Arbitrator