

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 OSHKOSH PROFESSIONAL POLICEMEN'S : Case 167  
 ASSOCIATION : No. 47038  
 : MA-7145  
 and :  
 :  
 CITY OF OSHKOSH :  
 :  
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Appearances:

Mr. Frederick J. Mohr, Attorney at Law, Suite 261, 414 East Walnut Street,  
 P.O. Box 1015, Green Bay, Wisconsin 54305, on behalf of the  
Mr. John W. Pence, City Attorney, 215 Church Street, Oshkosh, Wisconsin

Associ  
54901,

ARBITRATION AWARD

The Oshkosh Professional Policemen's Association ("the Association") and the City of Oshkosh ("the City") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the assignment of overtime. The Commission designated Stuart Levitan as the impartial arbitrator. Hearing was held in Oshkosh, Wisconsin on May 27, 1992; it was not transcribed. The parties submitted written arguments by June 12, 1992, and waived their rights to file reply briefs.

ISSUE

The Association frames the issue as follows:

Did management violate Rule 116 when it called Gary Sagmeister to fill the overtime slot on January 20, 1992 during the second shift instead of calling a second shift officer with more seniority?

If so, what is the appropriate remedy?

The City frames the issue as follows:

Did the City of Oshkosh violate the overtime provision of the labor agreement in assigning Officers Lain and Sagmeister to work overtime on the second shift January 20, 1992?

If so, what is the appropriate remedy?

I frame the issue as follows:

Did the Employer violate the collective bargaining agreement in assigning officers Lain and Sagmeister to work overtime on the second shift on January 20, 1992? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

. . .

ARTICLE V

CALL IN TIME AND COURT APPEARANCE

An officer called to return to duty or appear in Court at some time other than his regular scheduled duty day shall receive three (3) hours pay for the call or appearance unless the call or appearance is cancelled by 7 p.m. of the day prior to the call or appearance. The officer, in addition, shall receive time and one-half for the time spent on the call or appearance. Volunteers shall not be paid the call-in pay.

. . .

A call is defined as a request to return to duty at some time other than the regularly scheduled time not scheduled at least twenty-four (24) hours in advance and not immediately following the officer's regularly scheduled shift.

. . .

ARTICLE XIII

RULES & EVALUATION REPORTS

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective date.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

. . .

ARTICLE XVI

GRIEVANCE PROCEDURE

. . . A grievance is defined as any dispute or misunderstanding relating to employment between the City and the Association.

For the purpose of the final step of the grievance procedure, a grievance will be limited to the interpretation of (sic) application of the terms and conditions of this agreement, including past practices and policies incorporated in this agreement by its terms, and shall be handled in the following manner:

. . .

4.If the grievance is not settled under the provisions of paragraph 3 above and one of the parties deems the issue to be arbitrated, the party shall process the grievance within five (5) days (Saturday, Sunday and Holidays excluded) of completion of the provisions of paragraph 3 to arbitration. Arbitration procedures shall follow that outlined in State Statutes. The decision of the arbitrator shall be final and binding on the parties, subject to judicial review.

BACKGROUND

On July 5, 1991, Oshkosh Police Chief James F. Thome published Directive 116, relating to the standardization of procedures for the assignment of overtime. That directive, promulgated in accordance with Article XIII of the labor agreement, provided as follows:

OSHKOSH POLICE DEPARTMENT

DIRECTIVE

116ADMINISTRATIVE

July 5, 1991

SUBJECT: Overtime Work

Objective: Standardization of Procedures for Assignment of Overtime

Procedures:

1. When an Oshkosh Police Department function or event occurs which requires the assignment of overtime, that overtime shall be assigned by department seniority among those willing to perform the duty unless:
  - a. The function requires special training or unique characteristics which the more senior officers do not possess.
  - b. The assignment of a senior officer results in increased hours of overtime due to costs of call in.
  - c. The time required to locate the most senior person could adversely affect the success of the operation.
2. In the event of an anticipated shift shortage, vacancies shall be filled by officers from the shift that is short unless none are available, in which case, the shortage shall be filled by departmental seniority within the division.

This Directive replaces Memo 90-1.

James F. Thome /s/  
James F. Thome  
Chief of Police  
OSHKOSH POLICE DEPARTMENT

Shortly before the 2:30 p.m. resume 1/ on January 20, 1992, second shift commander Sgt. Robert Burton learned that he would be one officer short, due to Officer Scovronski's attendance at a training session. Sgt. Burton asked Officer Jere Lain, the most senior officer on the first shift, to work overtime. Consistent with the Oshkosh Police Department's policy of not working officers more than 12 consecutive hours, it was agreed between Burton and Lain that Lain would work till about 6:30, leaving Burton with the need to fill the final ninety (90) minutes until the 8:00 p.m. start of the next shift. Burton called Officer Gary Sagmeister, the most senior officer on the third shift, who reported early and thereafter received the contractually specified call-in and overtime pay. At no time did Burton attempt to call-in any officer assigned to the second shift. Officer Thomas Voelker was the most senior officer on the second shift.

POSITIONS OF THE PARTIES

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1/ Also known, in other jurisdictions, as "roll call".

In support of its position that the grievance should be sustained, the association asserts and avers as follows:

The Police Chief testified that Directive 116 was in force at the time in question, and that it was not followed. The City's reasons for not following this valid directive are flawed and invalid.

This was an anticipated absence, as management knew of Scovronski's attendance at a training session. An emergency does not arise when management overlooks an upcoming, anticipated shift shortage, and management's error in not properly executing its schedule resulted in the requirement to fill this shift.

Regardless of whether the City had to call in the most senior second shift officer at the start of the shift, the four hours advance notice certainly constituted sufficient anticipation for the shortage that developed as of 6:30 p.m.

The City's reliance on past practice as grounds for not following the directive is also misplaced. First, the prior instances concerned shortages arising as a result of illness, and thus are clearly distinguishable. Further, the record as to the prior instances is not at all clear. Finally, the mere fact that the Association did not file a grievance does not create a past practice of violating this directive.

The City has acknowledged that its agents violated Directive 116. Its defenses are invalid. The grievance should be sustained, and the City directed to pay the senior officer on the second shift, Officer Thomas Voelker, call-in time plus ninety (90) minutes of overtime.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

The contract was followed, and there was no violation of the labor agreement; that the personnel shortage was unanticipated, and therefore exempt from Directive 116; and that the City's actions were consistent with unchallenged past practice

This was the third incident of an unanticipated shift shortage since the directive went into effect. On at least of the prior occasions, the same officers, namely Lain and Sagmeister, worked the overtime. No grievances were filed regarding the prior incidents. Past practice, therefore, establishes that the shift commander understood how to interpret the directive, and that the union acquiesced in his implementation.

Further, even if the directive had been improperly implemented, that would have been an administrative concern between the Chief and the shift commander, and would not affect the union or its right to overtime.

Further, the labor agreement is silent as to the assignment of overtime. Under its management rights, therefore, the City retains all inherent rights, including the

assignment of overtime.

#### DISCUSSION

As noted above, the Association may take to arbitration grievances over the interpretation and application "of the terms and conditions of this agreement, including past practices and policies incorporated in this agreement by its terms. . ." As further noted above, the employer has concurred in this grievance being processed to arbitration. I conclude that I have both the collective bargaining agreement, as well as Directive 116, before me.

The City has raised several defenses. I find the Association's arguments more persuasive.

The City claims this is the third instance of Directive 116 being applied in this manner, but the first to generate a grievance --- establishing, it contends, a past practice. But to be binding, a purported past practice must be clear, convincing, and mutually understood. The City's evidence of the prior incidents falls short of this standard, and does not establish a past practice of union acquiescence in implementation of the Directive as advanced by the City.

The Police Chief's Directive 116 provides that, when there is an anticipated shift shortage, vacancies shall be filled by officers from the shift that is under-staffed, unless no such officers are available. On January 20, 1992, the City's Police Department management team knew that Officer Scovronski would be attending a training session, and would thus not be available for his shift. The scheduled attendance of an officer at a training session is, by definition, an anticipated shift shortage.

Moreover, even if the shift commander did not know of Officer Scovrobski's absence until immediately prior to the shift, he knew that holding Officer Lain over for four hours would result in a subsequent shift shortage at about 6:30 p.m. That is, at 2:30, when he held Lain over with the firm understanding that Lain would have to be relieved prior to the end of the second shift, Sgt. Burton knew that he would need another officer to complete that shift. Again, this is by definition, an anticipated shift shortage.

In finding that Sgt. Burton violated Directive 116, I expressly do not find any malicious or improper intent on his part. Indeed, his decision to call a third-shift officer in a little bit early, rather than have a second-shift officer come in for just ninety minutes, would seem to many to be a reasonable and rational thing to do. However, my job is not to apply external standards to the operations of the Oshkosh Police Department; my job, and my only authority, is to interpret and apply the terms of the collective bargaining agreement.

Between 6:30 and 8:00 p.m., on January 20, 1992, there was an anticipated shift shortage. The most senior officer assigned to the second shift was available for duty, but was not called. By filing this vacancy with an officer from another shift, the City violated Directive 116, incorporated by reference by Article XIII.

Accordingly, based on the collective bargaining agreement, the record evidence, and the arguments of the parties, I issue the following

#### AWARD

1. The grievance is sustained.
2. The City shall pay to Officer Thomas Voelker an amount representing three hours of straight time wages plus ninety (90) minutes at time-and-one-

half.

Dated at Madison, Wisconsin this 17th day of July, 1992.

By Stuart Levitan /s/  
Stuart Levitan, Arbitrator