

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 OSHKOSH PROFESSIONAL POLICEMEN'S : Case 168
 ASSOCIATION : No. 47039
 : MA-7146
 and :
 :
 CITY OF OSHKOSH :
 :

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 Association
Mr. John W. Pence, City Attorney, 215 Church Street, Oshkosh, Wisconsin 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 staffing levels and 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 right to file reply briefs.

ISSUE

The Association frames the issue as follows:

Did management violate Article X, Previous Benefits, when it failed to assign work to patrol officers on January 20, 21 and 22, 1992, but instead had a Captain assigned to the patrol area?

If so, what is the remedy?

The City framed the issue at hearing as follows:

Does management have the right under Article 1 to use senior officers to drive patrol vehicles throughout the City of Oshkosh?

If not, what is the remedy?

The City framed the issue in its brief as follows:

Did the City violate the labor agreement when it had four officers working patrol?

If so, what is the appropriate remedy?

I frame the issue as presented by the Association.

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE X

PREVIOUS BENEFITS

The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours and conditions of employment not specifically referred to or altered by this Agreement.

BACKGROUND

Madison Police Chief David C. Couper has a national reputation for innovation and experimentation. This grievance concerns what happened when Oshkosh Patrol Commander Captain David Erickson attempted to implement a Couper innovation, and performed patrol officer duties in the pre-dawn hours of January 20-22, 1992.

In the late spring of 1991, Erickson attended a training seminar Couper presented, part of which focused on managing and supervising patrol personnel. As one means of keeping in touch with subordinates, and staying in beat with the scene on the street, Couper recommended that command personnel 1/ actually assume and perform patrol duties.

Sometime in December, 1991, Erickson decided that the period around January 20, 1992 would be a good time for him to perform patrol duties. Because his normal shift (7:30 a.m. to 4:00 p.m.) puts him in regular contact with officers from the first and second shifts, Erickson decided to do his patrol work on the third shift.

As Patrol Commander for about two years, second-in-command to Chief James Thome, Erickson oversees the operations of the Patrol Division. He previously served as a shift commander and training sergeant, and last worked a patrol shift in 1981. He has conducted and overseen numerous training activities, both for the Department and outside agencies. Erickson has both the qualifications and credentials to serve as a patrol officer.

The Oshkosh Police Department has designated six (6) patrol areas. The Department's practice is to have no fewer than four (4) officers patrolling at all times. Prior to the Erickson experiment, no Captain had ever operated in a patrol area.

On January 20, 1992, Erickson reported at about 2:30 a.m., at which time there were five (5) other officers working patrol. Initially, Erickson remained at the station house. However, at 4:00 a.m., when two of these officers ended their shifts, leaving three officers to fulfill the patrol assignments until the next shift reported at 6:30 a.m., Erickson checked out a squad car and operated as a regular patrol officer would. Under standard Departmental practice, had Erickson not been present, at least one patrol officer would have been required to maintain a full complement of on-duty officers.

On January 21, Erickson again reported at about 2:30 a.m. Rather than remain at headquarters, however, he immediately began a patrol shift. From 2:30 a.m. to 4:00 a.m., there were six officers besides Erickson; from 4:00 a.m. to 6:30 a.m., there were four officers besides Erickson. Under standard Departmental practice, had Erickson not been present, barring unforeseen circumstances, additional patrol officers beyond the four on duty would not have been called out.

1/ As used herein, "command personnel" refers to non-unit supervisors.

On January 22, Erickson rode with another officer from 2:30 a.m. to 4:00 a.m., at which time that officer's shift ended. From 4:00 a.m. to 6:30 a.m., during which time Erickson patrolled area SAM-2 alone, there were at least four other patrol officers on duty.

On January 30, 1992, the Oshkosh Professional Police Association filed a series of three grievances over the incidents of January 20-22, as follows:

Date of Incident: 01/20/92

Nature of Grievance: On 01/20/92 at 4 a.m. Lt. Eichman was in charge of 3rd shift. Working were Sagmeister, Bittner, Thaldorf, Hill & DelPlaine. Sagmeister & DelPlaine went home at 4 a.m. because their shift ended at 4 a.m. Leaving 3 Officers working 3rd shift from 4 a.m. - 6:30 a.m. Past practice has always been a minimum of 4 Officers working. Sagmeister nor DelPlaine was held over nor was anyone else called in to cover the shift. Capt. Erickson covered a patrol area and became the 4th Officer.

Date of Incident: 01/21/92

Nature of Grievance: On 01/21/92 on 3rd shift Sgt. Jewell was the Shift Commander. Officers working were Harvot, Dolan, Hill, Loker, DelPlaine & Curtis. At 2:30 a.m. Capt Erickson called on as SAM-7 (a patrol area). At 4 a.m. Dolan & DelPlaine went home because their shift ended, leaving 4 Officers and Capt Erickson working a patrol area, being the 5th patrol Officer.

Remedy: Pay Dolan & DelPlaine 2.5 hours O.T., as they could have been held over. Pay 3 hours Call In \$ 2.5 hours O.T. to every Officer on the Dept who was not working that night.

Date of Incident: 01/22/92

Nature of Grievance: On 01/22/92 on 3rd shift, Shift Commanders were Busby & Jewell. Working were Officers Harvot, Dolan, Hill, Strasser, DelPlaine & Curtis. From 2:30 a.m. till 4 a.m. Capt Erickson rode with Dolan. Dolan & DelPlaine went home at 4 a.m. and Curtis went home sick, leaving 4 Officers working. Capt Erickson then went into Patrol Area #SAM-2 and working it from 4:00 - 6:30 a.m., thus becoming the 5th Patrol Officer.

Remedy: Pay Dolan & DelPlaine 2.5 hours O.T., as they could have been held over. Pay 3 hours Call In & 2.5 hours O.T. to over Officer on the Dept who was not working that night.

As supportive evidence/argument, each grievance had the following addendum attached:

On 01/24/92 a meeting was held with the O.P.P.A. It was at this time that knowledge was presented to the Board in reference to 3 separate acts involving Capt. Erickson. It was at this time that the O.P.P.A. voted to look into this mater (sic) and this Grievance then filed.

1) Past Practice

Capt. Erickson has never filled in a Patrol Area when an Officer has called in Sick, Vacation or Training. Past practice has been that an Officer is held over from the previous shift or Officers are called in to fill shift shortages. These Officers has (sic) always been from the Patrol Division.

2) This was an attempt by Captain Erickson to not have overtime created, so that Directive #116 did not have to be adhered to.

3) The Bureau Commanders (Patrol) job description, applies to Administrative Duties. Not Patrolman duties.

4) Specialized Training is required as per Directive #116.
Example: When Patrol Officers Kaiser and Cornell were required to come back on the road into a Patrol position, they were required to ride with an F.T.O. for a period of time before they could be on their own. These Officers were patrol Officers who had been off the road for a period of time. They were required to have special training, to return. Capt Erickson does not work the road and has been off the road for a period of time. This special training would also apply to him.

5) Capt Erickson ONLY covered an area from 4-6:30 a.m. when the shift became short or additional personnel was needed as a result of burglaries. He did his NORMAL administrative job during these other hours.

Each grievance was denied by the Police Chief and City Manager. The grievances were consolidated for the purposes of arbitration.

POSITIONS OF THE PARTIES

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

Article X requires the City to maintain the status quo if change would negatively impact the wages, hours and conditions of employment of bargaining unit members. When Erickson assumed the patrol duties on the dates in question, he was unquestionably changing a long-standing policy and procedure of the Department. Since his actions in becoming the first Patrol Captain to ever work a patrol area related to wages, hours and conditions of employment, they constituted a violation of Article X.

On January 20, but for Erickson's actions, the shift staffing levels would have dropped below four officers between 4 a.m. and 6:30 a.m. Due to Erickson's actions, Officer Sagmeister lost the opportunity to earn 2.5 hours of overtime pay. On January 21, Erickson improperly deprived Officer DelPlaine of 2.5 hours of overtime pay. On January 22, by working a set patrol area from

4:00 a.m. to 6:30 a.m., Erickson improperly deprived Officer DelPlaine of 2.5 hours of overtime pay.

Because Erickson assumed a specific patrol area, and assumed patrol officer duties, the lone conclusion that can be drawn is that he attempted to save the City overtime costs. His actions constituted a violation of Article X, and must be remedied through the payments to Officers Sagmeister and DelPlaine.

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

It is the position of management that Capt. Erickson through his testimony demonstrated that he was qualified to operate a patrol car in the City of Oshkosh and to man one of the patrol areas. There is no minimum man power required in the labor agreement, nor is there even any reference to minimum man power.

The labor contract is silent as to any required overtime and is silent as to any minimum man power, therefore leaving us with the management's rights clause which gives these rights to management.

No patrol officer, nor member of the union lost work because of Capt. Erickson's activities during the week of January 20th, 1992. Having Capt. Erickson on duty on the 21st and 22nd provided added security to the City of Oshkosh and the other officers.

Because the grievance does not point to any contract language that has allegedly been violated, the grievance should be denied.

DISCUSSION

The collective bargaining agreement between the parties does not contain a minimum staffing provision. It does, however, have a maintenance of standards clause, which provides for preservation of "all . . . policies and procedures related to wages, hours and conditions of employment not specifically referred to or altered by this Agreement."

The Association asserts that there are policies and procedures -- e.g., not allowing patrol levels to fall below four officers, and not having command personnel function as patrol officers -- which, in effect, have created a modified minimum staffing provision. The City responds by reasserting the absence from the contract of any minimum staffing provision.

Because neither party offered testimony or other evidence on how Article X has been interpreted and applied, it is unclear whether this phrase refers only to formal policies and procedures, such as Directive #116, or whether this phrase encompasses the more informal, such as customs and practices.

The Association's case rests on the convergence of two separate issues. Considered separately, I believe they constitute only customs or practices. But when they are in conjunction, I conclude they establish a policy or procedure. This convergence, however, arises in only one of the three incidents at issue.

At earlier stages in this dispute, the Association has raised various

arguments in support of its position, as reflected in the addendum to the grievances cited above. Some of these arguments I find somewhat persuasive; some I find less so.

I reject the Association's argument that Capt. Erickson lacked the requisite specialized training to function as a patrol officer. While it is often said that, "those who can do; those who can't, teach," the testimony at hearing convinced me that Capt. Erickson is qualified not only to train and command patrol officers, but to function in that capacity as well.

I also reject the Association's assertion that this was an attempt by Erickson to avoid the creation of overtime, and thus to avoid the implementation of Directive #116. "Attempt" implies intent; while avoidance of overtime may (or may not) have been an effect of Erickson's action, there is nothing in the record to challenge his explanation of how he came to perform patrol duties as he did.

I reject, as factually inaccurate, the Association's assertion that Erickson performed only administrative duties from 2:30 to 4:00 a.m., and covered patrol areas only from 4:00 a.m. to 6:30 a.m.

I reject, as both irrelevant and outside the scope of this record, the Association's assertion regarding Erickson's job description.

I accept, as both relevant and accurate, the Association's primary points of past practice --- that Erickson had never filled in for an absent officer, and that shift shortages are handled by having officers report early/stay over.

It is unrefuted that, prior to the Erickson experience, no Captain had ever operated in a patrol area. Further, by Erickson's own testimony, the City, while it "routinely" has four (4) officers on third shift patrol duty, "generally" doesn't allow the staffing level to fall below that. On January 20, however, from 4:00 a.m. to 6:30 a.m., there were only three patrol officers on duty; by Erickson's own testimony, had he not been present, the City would have called in/kept over another officer. On the other two dates in question, Erickson was not the difference between a short-staffed shift and a full complement.

The parties should be clear what this award does, and does not, hold. This award neither establishes, nor refutes, minimum staffing levels, per se. This award does not bar the City from using command personnel on patrols. But this award does hold that it is a violation of the contract for the City to use non-unit supervisory personnel to bring a shift complement up to the generally understood minimum.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained as to January 20, 1992, and denied as to January 21 and 22, 1992.

2. That the City shall make Officer Sagmeister whole for 2.5 hours of overtime pay.

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

By Stuart Levitan /s/
Stuart Levitan, Arbitrator