

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

GERMANTOWN PROFESSIONAL POLICEMEN'S  
ASSOCIATION, LOCAL 306

and

VILLAGE OF GERMANTOWN (POLICE  
DEPARTMENT)

Case 35  
No. 51273  
MA-8551

Appearances:

Mr. Kevin W. Naylor, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Union.  
von Briesen & Purtell, S.C., Attorneys at Law, by Mr. James R. Korom, appearing on behalf of the Village.

ARBITRATION AWARD

The Village of Germantown Professional Policemen's Association, Local 306, and the Village of Germantown are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an arbitrator from its staff to resolve Grievance No. 94-78 - Overtime. The Commission appointed Thomas L. Yaeger, a member of its staff, pursuant to that request. Hearing in the matter was held on September 14, 1994, in Germantown, Wisconsin. The hearing was not transcribed and the parties filed briefs, the last of which was received on November 3, 1994.

ISSUE:

The parties were unable to stipulate to a statement of the issue and the undersigned frames the issue as follows:

Did the Village violate Article V, Section 5.07 of the collective bargaining agreement when it extended two third shift police officers' work shifts on May 17, 1994, to assist with a State Patrol aerial traffic enforcement detail on Wisconsin Highway 41 instead of calling in the grievant, Officer Ryan, to work the detail?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

**ARTICLE III**

**MANAGEMENT RIGHTS**

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

A. To direct all operations of the Police Department;

...

C. To hire, promote, transfer, schedule and assign employees in positions within the Police Department;

...

F. To maintain efficiency of Police Department operations;

...

K. To determine the methods, means and personnel by which Police Department operations are to be conducted;

...

**ARTICLE V**

**OVERTIME**

**Section 5.01 - Overtime:** Overtime is any time worked by an employee at the direction of the Village in excess of the normally scheduled workweek or workday. Employees working overtime shall be compensated for such time at a pay rate of time and one-half (1-1/2) based on their normal hourly rate of pay. Overtime will be computed at the nearest highest quarter hour. Employees who are called in prior to their regularly scheduled shift shall be allowed to complete their full regular shift unless mutually agreed otherwise.

. . .

**Section 5.04 - Call-In Overtime:** Employees called in to work on other than a regularly scheduled time shall be entitled to at least two (2) hours' work, or pay therefor, at time and one-half (1-1/2) regardless of the length of time less than two (2) hours which they may work. An Employee shall not be entitled to the two (2) hour minimum when he is instructed to report early for a particular shift, is required to remain after the close of this shift, or is called in for an entire eight and one-half (8-1/2) hour shift pursuant to this Article.

Employees who are off duty and are involved in a police action within the corporate limits of the Village, shall be entitled to pay at the overtime rate. Police action is defined as an intervention or assistance on the part of the off duty employee which in the opinion of the Officer required immediate action and could not wait until the employee was on duty or until an employee could get to a public phone and call for an on duty Officer. If the remedy of any complaint brought to the Officer lies outside his jurisdiction, the Officer shall refer the complainant to the proper jurisdictional authority.

. . .

**Section 5.07 - Officer Staffing Procedure:** Officer staffing problems shall be resolved by the supervisor on duty by following these sequential steps.

1. Assign the relief-shift officer next scheduled to work with a practicable change of reporting time.
2. Assign an officer not scheduled to work but normally scheduled during the hours which require a replacement on a seniority basis.
3. Assign on a seniority basis the officers not scheduled to work.
4. Assign extended hours either or both to an officer on duty and to an officer next scheduled to work on a

seniority basis.

The parties agree that any alleged violations of the above procedure will be processed through the grievance procedure up to and including arbitration if necessary. Furthermore, the parties agree that if a bargaining unit employee, or other non-supervisory employee, makes an error in judgment which could be in conflict with the above procedures, the Employer will not be held responsible for this infraction.

Finally, the parties agree that no employee will be allowed to volunteer or be assigned to work overtime on both of his two (2) consecutive days off if the shifts on both days are eight and one-half (8-1/2) hours or longer. This does not preclude an officer from working eight and one-half (8-1/2) hours on one of his off days and then working overtime on his following off day provided that the overtime assignment is less than eight and one-half (8-1/2) hours in duration.

This procedure can be circumvented in an emergency. For purposes of this paragraph, an emergency is defined as some sudden and unforeseen event which takes place without prior notice and utilizing the list would be impractical. Except in cases of an emergency, a Sergeant will not be assigned to replace a police officer when there are two or less police officers assigned and available to work a shift, and the period of 4:00 P.M. to 3:00 A.M. shall have three or less police officers assigned and available before a Sergeant is assigned.

#### BACKGROUND:

This dispute arises from the Village Police Department's Captain Evans' decision, in response to a request made on or about May 1, 1995, to the Village by the Wisconsin State Patrol to assist in an aerial speed patrol of Highway 41 on May 17, 1994, to assign third shift Officers Showalter and Johnson, who were on duty at the time, to the aerial enforcement team. The two officers were trained at 5:30 a.m. on the morning of the 17th by State Trooper Pueringer, and subsequent to the training began the aerial patrol at approximately 6:00 a.m. First shift Officers Eggers and Stieve reported for work at approximately 7:30 a.m. for their 8:00 a.m. shift and were sent on their normal patrol. Officers Showalter and Johnson's shifts were extended to allow them to continue to assist with the aerial speed patrol.

Officer Gardner, whom Captain Evans had originally asked some weeks earlier to

participate in the aerial patrol, but who was initially unable to do so on the 17th because of a scheduled court appearance, returned from the court appearance at approximately 10:00 a.m. At that time, Captain Evans trained Officer Gardner concerning the procedures of the aerial enforcement team. Officer Gardner then was assigned to replace Officer Johnson on the aerial patrol, and Officer Johnson went off duty. The aerial detail lasted from 6:00 a.m. until approximately 3:00 p.m., and Officer Showalter worked the entire detail.

Officer Daniel Ryan, the grievant in this case, was scheduled off during the day shift on May 17, 1994, but was available to be called in on overtime to work the aerial detail. Because he was not contacted by the Village to come in on May 17, 1994, he filed the subject grievance alleging that Captain Evans' decision to extend the shift of Officers Showalter and Johnson instead of calling in available non-scheduled officers to work the aerial detail violated Article V, Section 5.07 of the parties' collective bargaining agreement.

The Association contends that the language of the Article V, Section 5.07, is clear and unequivocal. Thus, the Arbitrator cannot "ignore clear cut contractual language, since to do so would usurp the role of the labor organization and the employer," citing Fox v. General Telephone Co., 85 Wis.2d 699, cert denied 100 S.Ct. 56 (Wis. App. 1978), Watertown v. Tractor and Equipment Company, Inc., 289 N.W.2d 288, Wis. (1980), and How Arbitration Works, 4th Ed., 1985, p. 348 and 349. In this case, the Association points to the language of Section 5.07 which commences with the mandatory command "officer staffing problems shall be resolved by the supervisor on duty by following these sequential steps:" The Association concludes that Captain Evans erred in not following the contractually established steps, and therefore the Employer is obliged to make the grievant whole for losses occasioned by Captain Evans' mistake.

While acknowledging, as claimed by the Village, that a past practice exists of extending the shifts of on-duty officers where a need exists to maintain continuity within an investigation and to change officers would adversely affect the efficiency and quality of service provided by the Department, rather than calling in an officer in accordance with the procedure established in Section 5.07, the Association asserts those facts were not present in this instance. The Association urges the undersigned to find that the instant case is not even remotely similar to the exceptions to which it has acquiesced. It also notes that the parties had the foresight during their negotiations to provide that under certain circumstances the staffing procedures outlined in Section 5.07 would be impractical to follow, and therefore provided "this procedure can be circumvented in an emergency." The parties defined "emergency" as "some sudden and unforeseen event which takes place without prior notice and utilizing the list would be impractical." Here, Captain Evans testified that he was notified on or about May 1, 1994, that the State Patrol would be using the aerial enforcement plane on May 17, 1994. Clearly, unlike a car accident or a burglary, this operation was not a "sudden and unforeseen event." Consequently, the facts of this case do not warrant excusing the Department from following the call-in procedure set forth in Section 5.07 based upon the "emergency" exception.

The Association also finds unpersuasive the Village's attempt to portray the facts of this case to be such that if it were required to follow the collectively bargained procedure that would place an enormous burden on its operation and would adversely affect its ability to provide services to the public. Obviously, the Village was able to work around Officer Gardner's court appearance by having Captain Evans train Officer Gardner upon return from court and similarly could have dealt with training officers called in to work. It found similarly unpersuasive the Village position that because they were not in control of the aerial operation, they had no knowledge as to how long it would continue and extending third shift officers made more sense than calling in off-duty officers. The Association believes that it makes sense to assume that the State Patrol would not go through all the trouble of setting up an operation such as the aerial patrol if it did not intend to use the plane as long as possible.

In response to the Employer's contention that Grievant Ryan was not the proper grievant in this case, the Association contends that while he was not the most senior off-duty officer, he was the second most senior and thus entitled to grieve. Because two third shift officers had their shift extended, obviously Officer Ryan would have been the second officer called in had he been contacted, even if the more senior officer had also been contacted and agreed to work. The only consequence of Officer Ryan being the second most senior officer was that when Officer Johnson was sent home, it would have been Officer Ryan who would have been sent home had he been called in to work.

Finally, the Association, in response to the Employer's contention that efficiency of operation was a key consideration in its decision to hold over two third shift officers, asks rhetorically would it not have been more efficient to have officers on the aerial detail who had just gotten a good night's sleep instead of officers who had just completed an eight hour shift. For all of the above reasons, the Association urges the undersigned to find that the Village violated the express and implied terms of the collective bargaining agreement and award the grievant 7 1/2 hours of overtime pay at the rate of time and a half.

The Village believes that the central dispute in this case surrounds the words "officer staffing problems" found in the first sentence of Section 5.07. If the assignment of officers to the aerial enforcement detail is not an "officer staffing problem" contemplated by the parties, then the Village believes that the grievance must be denied. It states that "officer staffing problems" cannot be read in a vacuum. The Village believes that all of Section 5.07 and, in fact, all of Article V must be looked at to determine the meaning of the phrase "officer staffing problems." When that is done, the Village believes that a rational reading of Section 5.07 verifies that the procedure developed by the parties is designed solely for replacing officers who are absent from their regularly scheduled shift and whose replacement is required by the minimum manning requirements maintained by the Village. It points to the introductory language of Section 5.07 which provides "the supervisor on duty," and states this language implies the procedure was designed to address circumstances where an on-duty supervisor must make a decision concerning the next shift. Otherwise, the language would not specify who was to apply the procedure.

Compare this language to the introductory sentence of Section 5.05 which requires that all training overtime be authorized by the "Chief of Police." The Village believes that this view is also supported by the language in Section 5.07 which provides "Furthermore, the parties agree that if a bargaining unit employee, or other non-supervisory employee, makes an error in judgment which could be in conflict with the above procedure, the Employer will not be held responsible for this infraction." Clearly, this language contemplates that bargaining unit and other non-supervisory employees will be applying the provisions of this procedure on occasion when the Village has received recent notice that an employee will be absent and contacting a supervisor or the Chief of Police to secure a replacement would be impractical. The Village also believes that the language of Step 2 of Section 5.07 supports its conclusion. That language provides "Assign an officer not scheduled to work but normally scheduled during the hours which require a replacement on a seniority basis." "Which require a replacement" contemplates a process that will apply when a regularly scheduled officer is not available to work his regularly scheduled shift and therefore must be replaced, rather than situations where additional officers are to be added. The Village believes that Step 4 of the procedure established under 5.07 also supports the conclusion that this procedure is intended to deal with situations of replacement of an officer scheduled but not available to work where replacement is required in order to maintain minimum manning requirements.

The Village also argues that arbitrators routinely reject interpretations of contract language which lead to impractical or absurd results because arbitrators rightly assume that the parties would not intentionally create contract language inconsistent with rational behavior without a good reason for doing so. In this case, the parties also negotiated an exception to the requirements of 5.07 in the case of "some sudden and unforeseen event which takes place without prior notice and utilizing the list would be impractical." While acknowledging that the creation of the aerial enforcement detail is not an event contemplated by that contract language, it is also true however that the parties never contemplated use of an aerial enforcement detail when the contract language was negotiated because they had never before been involved in one. Thus, the Village reasons the Arbitrator must attempt to give meaning to the parties' language to determine how it applies to this unanticipated set of facts.

The Village also believes the contract relieves it from the obligations of Section 5.07 where the facts giving rise to the overtime obligation are unpredictable and uncertain. Because there were many reasons why the aerial enforcement detail might be cancelled or cut short, the detail thus falls within the parameters of an unpredictable and uncertain situation relieving the Village from the obligations of Section 5.07. If the Village had followed the provisions of Section 5.07 as urged by the Association, it would have resulted in having two officers it did not need on duty for approximately an hour overlapping with two officers who were doing the job assigned to them. The Association would have had the Village call in Officers Yogerst and Ryan for an 8:00 a.m. shift and have provided them with 30 minutes of training or the 15 or 20 minutes of training received by Officer Gardner and then put on the aerial detail. Also, the Village could have called in Officers Yogerst and Ryan to work at 8:00 a.m., trained them, sent them out on the road only to have the State Patrol call off the detail shortly after putting them on the road. The Village,

however, would have been obliged to pay the officers the two hour minimum call-in time, which under those circumstances would have been a waste of Village resources. Also, other than the inefficiencies of dual training and overlapping scheduling, the Village did not save money by using Officers Showalter and Johnson rather than Officers Ryan and Yogerst on this detail because overtime was paid to the two third shift officers whose shifts were extended.

The Village also contends that the un rebutted evidence of past practice shows that the parties intended Section 5.07 only to apply in limited circumstances and that past practice should be used in interpreting the phrase "officer staffing problems." The Village argues that the testimony of the grievant and Captain Evans established that there was a practice of having officers complete their assignment even if it means extending them beyond the end of their shift. However, if the Association's contention is correct with regard to what was required pursuant to 5.07 in this instance, then this practice is in violation of that interpretation of Section 5.07. Captain Evans testified about numerous opportunities available to officers where scheduling an officer was above the minimum staffing requirements maintained by the Village, and yet the provisions of Section 5.07 were not followed. On May 17, the Department was adequately staffed on the first shift with Officers Yogerst, Stieve and Gardner. No additional staffing was required so there was not a "officer staffing problem" requiring the application of Section 5.07. Rather, there was an overtime opportunity created by other needs of the Department, and it has never been contemplated by the parties nor is it reflected in the past practice of the parties that Section 5.07 applies to all overtime opportunities. Thus the Village concludes the Department was justified in permitting Officers Showalter and Johnson to continue their assignment until its completion rather than engage in the inefficiencies requested by the grievant in this case.

#### DISCUSSION:

The basic facts giving rise to this grievance are not in dispute. The dispute is over whether the procedure set forth in the parties' collective bargaining agreement at Article V, Overtime, Section 5.07 - Officer Staffing Procedure, had to be followed or the Village had discretion as to which employees would be selected to work overtime on May 17, 1993.

The Article III, Management Rights, Section 3.01, makes clear that the Village retains certain rights regarding the direction of the officers it employes as long as it exercises those rights consistent with the rest of the terms of the collectively bargained agreement. This case presents the question of whether Article V, Section 5.07 limited in any way the Village's right to make work assignments to assist the State Patrol in its aerial speed patrol of Highway 41 on May 17, 1994. The Union does not argue, nor does it appear open to question, that the Village and its agents (Captain Evans) were vested with the authority to determine if on-duty officers would be assigned to assist with the detail or not. The Village also had the authority to decide if officers, in addition to the regularly scheduled officers, would be assigned overtime either because they were going to be assigned to the aerial detail or they would be assigned to perform the regular duties of

those on-duty officers assigned to the speed enforcement detail. Initially, Captain Evans had decided that at least one day shift officer, Officer Gardner, would be assigned to assist the State Patrol, but because of a scheduled court appearance he was not going to be immediately available for that assignment. However, when he did become available he was put on that assignment. The Association does not take issue with that decision of Captain Evans. However, the Association believes that once the operational decision was made by Captain Evans that an officer or officers would be needed on an overtime basis to either work the aerial enforcement detail or replace those on-duty officers who were assigned to the detail, Evans was obligated to follow the procedures set out in Article V, Section 5.07 in determining to whom to offer the overtime assignment. As noted above, the operational decision which was vested with Captain Evans was what, if any, overtime was required to carry out routine departmental operations while at the same time assisting the State Patrol with the special Highway 41 operation. Captain Evans decided that overtime was necessary because day shift Officer Gardner was to be in court and because officers in addition to regular on-duty officers were needed for the aerial patrol.

The first place to look for the answer to whether Section 5.07 is applicable to the instant dispute is the contract language itself. However, when one does that the answer is not discernible from the plain meaning of the language. The limited guidance it provides is that "staffing problems shall be resolved by the supervisor on duty by following these sequential steps." Thus, the next inquiry must necessarily be whether Captain Evans was dealing with "staffing problems" in determining work assignments to cover the aerial patrol.

There was no evidence adduced by either party as to the bargaining history that gave rise to the inclusion of Section 5.07 in the parties' agreement. However, there was testimony by both Captain Evans and grievant Ryan concerning numerous other occasions when the Section 5.07 procedures were not followed when officers worked on an overtime basis. Captain Evans testified that accident and criminal investigations are handled by the officer who starts the investigation and if overtime is required to conclude that investigation then the officer's shift is extended. Also, in the area of overtime for crime prevention or the juvenile officer, Captain Evans has not followed Section 5.07. Also, with respect to accident reconstruction overtime, he testified he uses anyone of three officers without regard to Section 5.07. Further, in the case of executing search warrants if the activity runs beyond the assigned officer's shift, he does not call officers in on overtime to finish, but rather extends the officer's shift into overtime. Evans also testified that, after grievant Ryan stated in the grievance meeting that Section 5.07 was followed in special details such as July 4th and Thanksgiving, he investigated and found that officers' shifts were extended and if additional officers, not replacements, were going to be needed beyond those whose shift were to be extended, then a sign-up sheet was posted for employees to indicate their interest in the assignment. Officer Ryan's testimony on cross examination confirmed Captain Evans' testimony as to how the above situations have been handled without regard to Section 5.07.

What does this testimony establish with respect to whether Section 5.07 should be applied to the aerial patrol overtime? It shows that none of the situations testified to relate to staffing

shortages created by regularly scheduled officers being unable to report and replacements being needed. Rather, it establishes that in situations where an activity has commenced and it makes operational sense to be finished by the officer who started the activity that that officer's shift will be extended and the Section 5.07 procedures are not followed. It also establishes that where certain officers have a particular area of expertise and an overtime assignment occurs requiring that officer(s) particular expertise, he/she is contacted and Section 5.07 is not followed. Also, in special detail situations requiring additional officers like July 4th and Thanksgiving, officers' shifts will be extended and any additional officers will be obtained from volunteer sign-up sheets posted in advance of the special detail.

Captain Evans testified that Officer Ryan could have been assigned to the aerial detail in that no special expertise was required. It is also clear that Captain Evans had advance notice of the aerial detail, and he had talked with Officer Gardner about starting work early on May 17 to participate in the aerial detail. Thus, this situation was unlike those situations where, without advance notice or planning, officers started an investigation during their regular shift and concluded it on overtime. Also, the need for additional officers on the day shift on May 17 to staff the aerial patrol was not created by a need for replacements due to day shift officers not reporting as scheduled. Rather, the need for additional officers on May 17 was caused solely by the Village agreeing to assist the State Patrol with the aerial detail.

Thus, the undersigned believes this situation is similar to the special details for July 4th and Thanksgiving which were staffed without regard to Section 5.07. On those occasions, officers' shifts were extended and additional officers were obtained by a volunteer list. In this case, Captain Evans testified that he did not anticipate the detail going as long as it did. Thus, he concluded he could staff it with day shift Officer Gardner and extending a third shift officer(s) shift and additional volunteers would not be required.

The undersigned is persuaded that the evidence of the parties' prior actions in similar circumstances is the most reliable measure of what their intent was as to how and which overtime situations Section 5.07 was to be applied. That evidence establishes that Section 5.07 language "staffing problems" was not intended to include overtime created by special assignments like the aerial patrol, July 4th and Thanksgiving. Consequently, Captain Evans' decision to extend third shift officers and use day shift Officer Gardner for the aerial patrol did not violate Article V, Section 5.07.

Therefore, based upon the foregoing and the record as a whole, the undersigned renders the following

#### AWARD

The Village did not violate Article V, Section 5.07 of the collective bargaining agreement when it extended two third shift officers' work shifts on May 17, 1994, to assist with a State Patrol aerial traffic enforcement detail on Wisconsin Highway 41 instead of calling in the grievant on

overtime to work the detail.

Dated at Madison, Wisconsin, this 2nd day of March, 1995.

By Thomas L. Yaeger /s/  
Thomas L. Yaeger, Arbitrator