

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BERLIN POLICE DEPARTMENT EMPLOYEES,
LOCAL 514-B, AFSCME,
AFL-CIO

and

CITY OF BERLIN

Case 41
No. 51687
MA-8693

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME,
AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903,
for the Union.
von Briesen & Purtell, S.C., 411 East Wisconsin Avenue, Suite 700, Milwaukee,
Wisconsin 53202, by Mr. James R. Korom, for the City.

ARBITRATION AWARD

Berlin Police Department Employees, Local 514-B, AFSCME, AFL-CIO, (herein, "Union") and City of Berlin, (herein, "City"), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on November 15, 1994, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Berlin, Wisconsin on December 20, 1994. The parties filed briefs, the last of which was received January 20, 1995.

ISSUE

The parties could not stipulate to a statement of the issue and agreed that the Arbitrator should state the issue. Accordingly, the Arbitrator states the issue as the following:

Did the City violate the collective bargaining agreement when it determined to fill vacant shifts in the Communications Center by assigning overtime only to employes with TIME system certification?

If so, what is the appropriate remedy?

BACKGROUND

The City operates a police department which has a Communications Center. The City has received various grants to install computer hardware for the purpose of, among other things, accessing information and entering information into the National Crime Information Center. In June, 1991 and again in July, 1993 the Wisconsin Department of Justice, Division of Law Enforcement Services, Crime Information Bureau audited the City's use of the equipment and notified the City that it should be staffing the Communications Center with personnel who had been properly trained, that is, TIME system certified. 1/ In the 1993 audit, the Bureau told the City that it should begin training of more officers in six months.

Prior to January 1, 1993, the City did not require involuntary overtime at the Communications Center. If the absence of an employee created a shift vacancy, the City would seek a volunteer of any classification including patrol officers from the bargaining unit in general and if none were forthcoming, ask employees in the shift immediately before and after the vacant shift to work an extra four hours. If the City was unable to cover the vacant shift this way, it would forego coverage.

In bargaining for the 1993-94 collective bargaining agreement, the City proposed a provision to allow it to mandate involuntary overtime. The Union agreed to include the following provision in the 1993-94 contract:

Once the Chief of Police decides to fill all or part of a vacancy, the existing policy for shift coverage shall be maintained to seek volunteers to fill the shift. If volunteers are not available, the Chief may assign employees to work the vacancy by reverse seniority.

In bargaining, the parties did not discuss whether the most junior Communications Center officer, or the most junior member of the bargaining unit would be mandated to work. Also, there was no discussion of whether assignments would be limited to employees with TIME system certification.

In discussions after the bargaining, the City assured the Union that it would not mandate overtime for anyone who was scheduled to be off on the day in question and would not mandate overtime in such a way that any employee would be required to work a 16-hour shift.

At a June 16, 1994, staff meeting, procedures for filling the vacancy to be created by an impending family leave of a Communications Center employee were discussed. The minutes of

1/ "TIME" is apparently an acronym related to the computer system used for the National Crime Information Center. The words that comprise the acronym are not stated in the record.

that meeting were subsequently printed and made available for bargaining unit members. The pertinent portion of the minutes stated as follows:

6. Comm. Center.

. . .

C. LAN Family Leave cross-training has been accomplished. While LAN is on Family Leave Communications personnel will if at all possible fill as her replacement. If no one signs up for the shift a Comm. Center person will be assigned to the shift.

. . .

On June 26, 1994, Margaret Beuthin, a Communications Center employe, filed a grievance at step one, the oral step. The grievance asserted that, contrary to the City's stated intentions, the most junior member of the bargaining unit should be assigned to fill the vacancy without regard to whether that employe was a Communications Center employe or Patrol Officer.

Beuthin received a written response from Captain Michael Morehouse, which stated in pertinent part:

LAN VACANCIES (ASSIGNMENTS)

1. LAN vacancies that are not filled by the voluntary process shall be assigned using the reverse seniority process.
2. LAN vacancy assignments however shall first be made to persons who are communication employees or sworn officers that have TIME certification. This process shall utilize the reverse seniority process. [Emphasis in original].
3. When no employees have volunteered, and no certified employees are available to be assigned either before or after a vacant LAN's shift, it shall be assigned to Non-Certified Sworn Officers. This process shall utilize the reverse seniority process. [Emphasis in original].

On July 19, 1994, Beuthin filed a written, step two grievance. Chief of Police James W. Dobson replied on July 21, 1994 with the following letter:

YOUR GRIEVANCE 003 DATED 07-19-94 REGARDING ASSIGNMENT OF OVERTIME IS DENIED.

This situation and issues involved have been discussed numerous times at Staff Meetings with minutes of those meetings posted. Sgt. Trochinski, your Supervisor, informs me that he has had discussions with you as well as other Communications Officers regarding plans for departmental accommodation of the state mandate for TIME System certification and rationale for assignment of overtime.

I received a copy of Captain Michael R. Morehouse's response to your grievance filed on June 6, 1994 on this same issue. The Captain explained in detail the procedure we would use to cover the present authorized Leave of Absence.

I believe you have been adequately informed of all the details concerning the situation. It appears you simply don't like what you're hearing and that if you file a grievance the situation will somehow resolve itself.

I have not heard any alternative options for consideration better than the Staff plan which I approved.

I suggest you direct your time and energy toward improvement of the work environment to resolve conflicts with your co-workers and Supervisors so they don't become issues.

The grievance remained unresolved and is the subject of this Award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS

. . .

The Employer may adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin or any governmental agency having jurisdiction over the City, such rules shall be submitted for the Union thirty (30) days prior to their effective dates. The Union shall have thirty days from submission to decide whether to grieve the reasonableness of the rule or accept

it as reasonable.

ARTICLE 4 - HOURS

...

Once the Chief of Police decides to fill all or part of a vacancy, the existing policy for shift coverage shall be maintained to seek volunteers to fill the shift. If volunteers are not available, the Chief may assign employees to work the vacancy by reverse seniority.

...

ARTICLE 18 - GRIEVANCE PROCEDURE

...

All such grievances shall be processed as follows:

Step 1. If an Employee has a grievance, he shall first present the grievance orally to the Captain. Said grievance shall be presented within the Employee's first five (5) working days after the date of the event or occurrence which gave rise to the complaint, (sic) vacation or sick leave time not to be construed as working days. If such grievance is not presented within the specified time period, then it shall be deemed waived and abandoned and shall not thereafter form the basis of a grievance between the parties hereto.

Step 2. If the grievance is not settled in Step 1 within five (5) working days after having been presented to the Captain, then the grievance may be presented to the Chief of Police in writing. The Chief shall, in five (5) working days, give a written response to the grievance.

...

POSITIONS OF THE PARTIES

The Union

The Union asserts the Grievance involves a recurring contract violation and therefore it is arbitrable even if it was filed more than five days after the staff meeting in which the City announced its intentions to use only dispatchers for involuntary overtime. It asserts this approach to a continuing violation is especially appropriate when the alleged violation involves seniority rights.

As to the merits of the dispute, the Union asserts that seniority rights are strictly a creation of the contract and the City cannot now assert that these rights operate differently from the bargained intention. Similarly, the City cannot circumvent the seniority rights of the contract by the promulgation of work rules which contravene those contract provisions. The Union rejects the argument that the City must be allowed to ignore the contract in order to meet the state's regulations regarding TIME system certification. Indeed, the Union believes the need for qualified employees to staff the Communications Center was not the real reason for the City's actions. Finally, the Union believes its interpretation of the disputed provision is validated by Article 15 - INCORPORATION OF EXISTING BENEFITS BY REFERENCE.

The City

The City maintains that the grievance is not arbitrable because it was filed too late. The City argues that even if the Arbitrator should find the grievance arbitrable, the Union cannot prevail. It points out that arbitrators consistently uphold the employer's right to raise its minimum standards. Therefore, reasons the City, it has the right to require TIME system certification of the employee assigned involuntary overtime. It further defends the right to make the change in the minimum standards required for the position by noting that the establishment of minimum standards for a position is a permissive subject of bargaining. It also relies upon Article 3 of the Collective Bargaining Agreement which gives the City the right to take certain actions in response to directives from the state of Wisconsin, and concludes therefore that the Department of Justice's demand that the Communications Center employees be TIME system certified gave it the right to assign only those employees to involuntary overtime in the Center.

According to the City, its right to require TIME system certified employees for involuntary overtime is not eliminated by its decision to allow non-certified employees to staff the Communications Center on some occasions. The tolerance of non-certified employees on these occasions only shows the City's reasonableness in seeking to, sometimes, but not always, comply with the Department of Justice standards in order to lessen the overtime burden on employees. The City points out that its use of patrol officers for voluntary overtime even when they lacked proper certification created additional financial burden for the City but occurred in order to spread the need for overtime among all its employees.

ADDITIONAL FACTS AND DISCUSSION

I. Arbitrability

The City points to step one of the Grievance Procedure, (set forth above) and points out that Grievant learned of the plan for filling vacant shifts by reading the minutes of the staff meeting of June 16, 1994 but the oral grievance was not filed until June 26, 1995, when Grievant left a message on Captain Michael Morehouse's voice mail. According to the City, this course of events exceeds the five day time limit required by the contract and renders the grievance not arbitrable.

The record does not show when Grievant learned what had been decided at the staff meeting or when she had opportunity to see the minutes. The copy of the minutes received into the record was date-stamped "June 21, 1994," which might have been the day when they were prepared and distributed. Rather than stumble into the evidentiary void regarding when the Grievant had knowledge of the City's plan, the Arbitrator finds it more appropriate to note that the City never raised a challenge to the timeliness of the grievance prior to the arbitration hearing. (The City asserts the Chief raised such an objection in his July 21, 1994, reply to Beuthin, set forth at page four, above. Although the Chief's letter maintains that the situation had been "discussed numerous times at Staff Meetings", that reference is insufficient to maintain an objection to timeliness.)

Grievance timelines help to promote good labor relations by facilitating the speedy resolution of problems. In spite of the usefulness of timelines, however, parties occasionally find it appropriate to waive them. Such a waiver may be made either explicitly through agreement, or impliedly, through action or inaction. I conclude that by failing to object at any time prior to hearing to the timeliness of the grievance, the City effectively waived that objection as to this grievance. The grievance procedure timeline, therefore, does not operate to bar this particular grievance and the grievance is arbitrable.

II. The Merits

The plain language of the contract provision at the heart of this dispute provides that the involuntary overtime must be assigned by reverse seniority. The provision is not modified by any reference to classification. There are no exemptions from the reverse seniority selection process, either to exclude employes who are not Communications Center employes, the City's intent stated at the June 16 staff meeting, or to exclude employes who are not TIME system certified, as stated in Captain Morehouse's June 26 response to the grievance.

The parties' collective bargaining agreement is presumed to state their intended meaning. Here that presumption is supported by the parties' mutually accepted practice in voluntary overtime: any bargaining unit employe, either Communications Center personnel or patrol officer, regardless of TIME system certification, is allowed to volunteer for overtime to fill vacant shifts at the Communications Center.

It is unnecessary to belabor the plain meaning of the provision, for the City does not

dispute its meaning, but rather, it argues that it acquires additional rights as a result of its need to have a TIME system certified employe at the Communications Center. According to the City, because of this staffing requirement, it is entitled to raise the minimum qualification for performing involuntary overtime to require the employe to have TIME system certification. It also believes that it has the right to establish that minimum qualification under its right to establish reasonable work rules.

There is no doubt that the City reasonably perceived an urgency to have TIME system certified personnel at the Communications Center. The letters entered into the record from the state Director of the Crime Information Bureau were models of tactfulness and only made reference to an accompanying audit. Moreover, there is no indication what, if any, sanctions the state was preparing to impose on the City for not having appropriately trained personnel at the Communications Center. Nevertheless, witnesses from both the management and the Union agreed that the City was under increasing pressure from the State to comply with training requirements.

Notwithstanding the urgency of the City's need to staff the Communications Center with qualified personnel, and notwithstanding the general rule that the management has the right to establish minimum qualifications, a crucial question remains: Did the City, in fact, raise the qualifications for working at the Communications Center to require TIME system certification?

Although the City required TIME system certification when making involuntary overtime assignments, in two other circumstances the alleged requirement was ignored. The first instance occurs three shifts a week when the Communications Center is regularly staffed by patrol officers without regard to TIME system certification and the second instance occurs wherever an open shift is filled by voluntary overtime, in which case TIME system certification is not required.

This internally inconsistent staffing procedure, one that calls for requiring TIME system certification in some instances and not in others, with the determining factors being the regularity of the three open shifts or the availability of volunteers for overtime, demonstrates that the City did not, in fact, raise the minimum qualifications for the Communications Center.

Having found that the plain meaning of Article 4 calls for mandatory overtime to be assigned to the least senior employe without regard to classification, and having found that the City did not raise minimum qualifications for staffing the Communications Center to require TIME system certification, the undersigned concludes that the collective bargaining agreement requires the City to assign involuntary overtime in the Communications Center to all members of the bargaining unit, based on reverse seniority.

The Union did not seek a retrospective remedy and this Arbitrator finds no need to order one. The finding of a contract violation, does, of course, have implications for the City's future conduct.

Based on the record and the above discussion, the Arbitrator issues the following

AWARD

The City violated the Collective Bargaining Agreement when it determined to fill vacant shifts in the Communications Center by assigning overtime only to employees with TIME system certification.

Dated at Madison, Wisconsin this 13th day of April, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator