

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION

and

MILWAUKEE COUNTY

Case 596
No. 65776
MA-13322

(Steven Karabon Grievance)

Appearances:

Cermele & Associates, S.C., by **Attorney Rachel L. Pings**, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, on behalf of the Union.

Attorney Timothy R. Schoewe, Milwaukee County Deputy Corporation Counsel, Milwaukee County Courthouse, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233, on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, Milwaukee Deputy Sheriffs' Association (herein the Union) and Milwaukee County (herein the County) were parties to a collective bargaining agreement dated January 4, 2006 and covering the period from January 1, 2005 through December 31, 2006. On April 4, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the County's alleged assignment of overtime to a less senior employee instead of bargaining unit member Steven Karabon. The undersigned was appointed to arbitrate the dispute. The parties submitted the dispute for decision upon a stipulation of facts and exhibits. The parties submitted briefs on July 27, 2006, and reply briefs on August 7, 2006, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the County violate Section 3.02 of the Agreement when it failed to offer the 12/09/05 overtime assignment to Deputy Karabon?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

1.03 MANAGEMENT RIGHTS

The County of Milwaukee retains the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

- The right to determine the number, structure and location of departments and divisions;
- the kinds and number of services to be performed;
- The right to determine the number of positions and the classifications thereof to perform such service;
- The right to direct the workforce;
- The right to establish qualifications for hire, to test and to hire, promote and retain employees;
- The right to assign employees, subject to existing practices and the terms of this Agreement;
- The right, subject to civil service procedures and Secs. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;
- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing management rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in s. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management.

3.02 OVERTIME

...

(2) Overtime needs and required staffing levels shall be determined by the Sheriff.

(3) All scheduled overtime shall be assigned within classification as follows:

(a) Employees shall volunteer for overtime and their names shall be placed on a list in seniority order within each work unit.

(b) When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list within the work unit where the overtime is being scheduled.

(c) In the event an employee refuses to accept an overtime assignment or there are insufficient volunteers for the work unit where overtime is required, the least senior employee in the classification in the work unit shall be required to work the overtime assignment.

(d) Employees will not be scheduled for overtime when they are liquidating accrued time off or during an approved leave of absence or disciplinary suspension.

(e) For an event identified by the Sheriff as a Special Event, the above procedure shall be utilized on a departmental basis. In the event there are insufficient volunteers for a Special Event overtime assignment the Sheriff shall rotate in the inverse order of seniority among all employees in the department in the classification.

(f) Employees shall not be permitted to volunteer to work during a period of scheduled vacation, personal time, holiday time or compensatory time unless approved to work by the Sheriff. However, for Special Events as defined in (e) above, employees shall have the opportunity to work overtime hours in accord with the above procedures

when they are on vacation, on their normal off days, or are using holiday or personal days only under the condition that the Sheriff's Department is under contract to be reimbursed for the non-tax levy overtime expenses incurred for the Special Event.

(5) Any overtime in excess of thirty-two (32) additional hours worked in a pay period will require the advanced approval of the Sheriff or his designee.

STIPULATION OF FACTS

1. The issue to be decided by the Arbitrator is:

Did the County violate Section 3.02 of the Agreement when it failed to offer the 12/09/05 overtime assignment to Deputy Karabon? If so, what is the appropriate remedy?
2. Deputy Karabon is more senior than the Deputy who was offered the 12/09/05 overtime assignment, as Deputy Karabon was hired on 9/22/94 and Deputy Jackson on 9/11/98.
3. Detention Services is a work unit.
4. Deputy Karabon's name was on the volunteer list for 12/09/05.
5. On 12/09/05, Deputy Karabon was on a regular off-day. Thus, he was not liquidating accrued time off, was not on leave of absence, was not on a disciplinary suspension, and was not using scheduled vacation, personal time, holiday time or compensatory time.
6. Three (3) first shift Deputies called in sick for 12/09/05. The first call was made on 12/08/05 at approximately 6:30 p.m.; the second call was made on 12/09/05 at approximately 1:30 a.m.; and the third call was made on 12/09/05 at approximately 5:15 a.m.
7. Other than Sec. 3.02 of the Agreement, there is no document containing guidelines or procedures for overtime assignments.
8. The 8 hour shift on 12/09/05 would not have caused Deputy Karabon to be in excess of 32 additional hours as described in Sec. 3.02(5) of the Agreement.
9. 12/09/05 was not a "Special Event" as described in Sec. 3.02(3)(e) and 3(f) of the Agreement.

10. Primary briefs shall be postmarked by 7/21/06. Reply briefs shall be postmarked by 8/04/06. All briefs shall be exchanged through the parties.
11. The grievance packet filed on March 31, 2006 shall be considered **Joint Exhibit 1**. It includes the Grievance Initiation Form dated 12/12/05, the Grievance Disposition Form dated 2/01/06, the Labor Relations Disposition dated 3/14/06, and the 2005-2006 Agreement. This Stipulation shall be considered **Joint Exhibit 2**. **No other documents or facts shall be made a part of this record unless mutually agreed by the parties.**

POSITIONS OF THE PARTIES

The Union

The Union asserts that the grievance is supported by the plain language of the contract. Section 3.02 clearly states that overtime is to be allocated by seniority among the volunteers within each unit. The sole criterion is seniority, without reference to other factors, such as convenience, unanticipated absences, or shifts. The Grievant was in the Jail work unit, was on the volunteer list and was senior to the employee who was offered the overtime. Based on the plain language of the contract, the grievance should be upheld.

Section 3.02 provides exceptions, but none apply here. The County appears to believe that there is a practice of disregarding seniority in cases of “unanticipated absence,” which contravenes the contract language. A practice, even if it exists, however, does not supersede plain contract language.

In the event the Arbitrator finds the contract language to be unclear, however, the Union also asserts that there is no evidence of a past practice that would support the County’s action. The record contains no evidence of the Union’s knowledge of, or acquiescence to, such a practice, nor is any instance cited where it was followed. Even if evidence of the practice were provided, however, that would not establish acquiescence and, therefore, would not bind the Union. In fact, Sec. 3.02 already provides for unanticipated absences by providing a volunteer list of employees prepared to work on particular days. The County was bound to follow the contractual procedure and the grievance should be sustained.

The County

The grievance is brought under Section 3.02 of the contract, which deals with “scheduled overtime.” The overtime in question here was both unscheduled and late developing. The sergeant learned of three absences within an hour of the beginning of the shift. The Grievant was not on duty. In such cases, the Department uses an overtime book, the pertinent entries of which are unavailable for this arbitration. The book would show whether

the Grievant signed up for overtime, but in its absence it is the Union's burden to establish that fact. Due to the short time before the shift and the critical need for adequate staffing, the sergeant asked the employees on the preceding shift for volunteers and assigned two of them, one of whom was junior to the Grievant.

There is no evidence that the procedure followed by the County was inconsistent with existing practice under such circumstances and the contract language cited deals with only scheduled overtime. Thus there was no established violation of the contract. The Union would have the Arbitrator apply Sec. 3.02(3) to all overtime, but words have meaning and "scheduled" means scheduled. If the parties intended the section to have a different meaning they would have said so. They did not and the Arbitrator should apply the contractual language according to its terms.

The Union in Reply

The County's defense is limited to just one word – "scheduled." The County would have the Arbitrator take that word out of context and give it an absurdly narrow interpretation. Sec. 3.02(3) refers to scheduled overtime in the sense that the County, according to Sec. 3.02(2) has determined that overtime is necessary. A determination by the Sheriff that overtime is needed, which happened here, triggers Sec. 3.02(3). There is no contractual distinction between "scheduled" and "unscheduled," which would be the case if the parties had intended such. The Union recognizes the potential for late developing overtime, which is why there is a sign up book for volunteers available to come in on short notice. Finally, the County asserts it is the Union's burden to show that Deputy Karabon was on the overtime list, but the parties stipulated to that fact, which should resolve the issue.

The County in Reply

The Union ignores the use of the critical word "scheduled" in Sec. 3.02(3). The overtime here was unanticipated and unscheduled, so Sec. 3.02(3) is irrelevant to this proceeding. Sec. 3.02(2) is not and vests the Sheriff with authority to determine overtime needs and staffing levels. Absent contrary language the County retains that management right. The lack of language in Sec. 3.02 regarding unscheduled overtime requires the Arbitrator to rely on the practice applied by the Sheriff or the County's reserved management rights under Sec. 1.02.

DISCUSSION

The Union asserts that under Sec.3.02 of the contract, the Grievant was entitled to be called in for overtime on November 9, 2005 ahead of a less senior Deputy, who was offered the overtime instead. In its rebuttal, the County appears to argue in the alternative that (1) in the absence of the relevant entries in the overtime book, the Union has failed to establish that the Grievant was signed up for voluntary overtime on the day in question and (2) even if he was signed up, paragraph 3.02(3) only applies to scheduled overtime, as opposed to the overtime arising here which the County characterizes as unanticipated and unscheduled.

The County's first assertion can be dealt with quickly. Stipulation #4, above, states: "Deputy Karabon's name was on the volunteer list for 12/09/05." Since the parties agreed to this admission of fact being entered into the record, I take it as established that the Grievant was signed up for voluntary overtime on the date in question. That being the case, the discussion moves to the question of whether the County was required to refer to the overtime list in filling the shift openings in this instance.

The second question centers on the use of the word "scheduled" contained in paragraph 3.02(3). The County asserts that "scheduled" means anticipated overtime, which is planned in advance, not overtime that arises as a result of an unexpected contingency. In this regard, the County distinguishes Sec. 3.02(2), which states that: "Overtime needs and required staffing levels shall be determined by the Sheriff," and does not use the word "scheduled." In the County's opinion, this gives the Sheriff authority to fill "unscheduled" overtime by any reasonable means. I disagree.

The entire section regarding overtime must be read together in order to properly discern the intended process for filling overtime. Paragraph 3.02(2) refers to the Sheriff's discretion to address "overtime needs." Paragraph 3.02(3)(a) establishes the use of a voluntary overtime list on which employees' names shall be listed by seniority. Paragraph 3.02(3)(b) states: "When necessary to schedule overtime the assignment shall be rotated by seniority among all volunteers on the list within the work unit where the overtime is being scheduled." In my view, the phrase "when necessary to schedule overtime" in 3.02(3)(b) relates back to a finding by the Sheriff under 3.02(2) that there are overtime needs. So, a determination by the Sheriff that there are overtime needs under 3.02(2) necessitates scheduling of overtime under 3.02(3)(b), which is to be done by first using the volunteers on the overtime list. In fact, in its initial brief the County admits that the overtime book is ordinarily used in such circumstances. While it may be that on this occasion the scheduling sergeant felt there was not time to refer to the overtime list to fill the shift, the procedure to be followed is clearly delineated in the contract and there is no evidence of an established contrary practice being used under these circumstances.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The County violated Section 3.02 of the Agreement when it failed to offer the 12/09/05 overtime assignment to Deputy Karabon. The County shall make the Grievant whole by

paying him for the overtime shift on November 9, 2005 at one and one-half times his normal rate of pay as of that date and shall henceforth follow the contractual procedure set forth in Sec. 3.02 in assigning overtime.

Dated at Fond du Lac, Wisconsin, this 10th day of November, 2006.

John R. Emery /s/

John R. Emery, Arbitrator

