

IN THE MATTER OF ARBITRATION)
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 between)
)
 Roseau County, Roseau,)
 Minnesota)
)
 -and-)
)
 Law Enforcement Labor)
 Services, Inc., St.)
 Paul, Minnesota)
)
 February 27, 2014
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GRIEVANCE ARBITRATION

Deputy Nathan Cossentine -
Overtime Pay - Stonegarden

BMS Case No. 13-PA-0702

February 27, 2014

APPEARANCES

For Roseau County, Roseau, Minnesota

Terry Foy, Attorney, Ratwik, Roszak & Maloney, P.A.,
Minneapolis, Minnesota
Jeff Pelowski, Coordinator/Environmental Services Director
Steve Gust, Sheriff
Tobi Eidsmoe, Captain

For Law Enforcement Labor Services, Inc., St. Paul, Minnesota

Isaac Kaufman, General Counsel
Kelly Gustafson, Deputy
Matt Restad, Deputy
Nathan Cossentine, Grievant

JURISDICTION OF ARBITRATOR

Article VII, Grievance Procedure, Section 7.3, Procedure,
Step 4 of the 2011-2013 Collective Bargaining Agreement (County
Tab 2) between Roseau County, Roseau, Minnesota (hereinafter
"Employer" or "County") and Law Enforcement Labor Services,
Inc., St. Paul, Minnesota (hereinafter "Union") provides for an
appeal to arbitration of disputes that are properly processed
through the grievance procedure.

The Arbitrator, Richard John Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation. A hearing in the matter convened on December 20, 2013, at 9:00 a.m. at the Roseau County Courthouse, 606 5th Avenue Southwest, Roseau, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' legal counsel elected to file electronically post hearing briefs, with receipt by the Arbitrator no later than February 3, 2014. The post hearing briefs were submitted in accordance with that deadline date. The Arbitrator then exchanged the briefs electronically to the Parties' legal counsel on that date, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Did the County violate the Collective Bargaining Agreement by removing Deputy Nathan Cossentine from the overtime shifts under the federal Operation Stonegarden grant on January 11, February 8-9 and March 8-9, 2013?
2. If so, what is the appropriate remedy?

STATEMENT OF THE FACTS

Operation Stonegarden (OSPG) is a federal grant program administered by the Federal Emergency Management Agency, a component of the Department of Homeland Security, as part of the State Homeland Security Grant Program. The OSPG provides funding to state, local and tribal law enforcement agencies to enhance their capabilities to jointly secure U.S. borders and territories. Funds are to be used for additional law enforcement personnel, overtime pay for full-time employees, straight-time pay for part-time employees and travel and lodging for deployment of state and local personnel along the borders. (County Tab 5, p. 5; Tab 6, pp. 49, 50).

Beginning in 2008, the Roseau County Sheriff's Department began participating in the OSPG. Roy Dahlstrom, Supervisor for the U.S. Border Patrol, managed the OSPG. Roseau Deputies perform the OSPG duties in their County uniforms and drive County patrol cars. Deputies perform their regular duties unless contacted by dispatch to assist the U.S. Border Patrol.

Since the County pays overtime in compensatory time pursuant to the Contract (Article XI, Overtime, Section 11.7), the Parties negotiated a Memorandum of Understanding to allow payment of the OSPG funded overtime as cash compensation added to the regular payroll. (County Tab 4). The County submits monthly invoices to the Department of Homeland Security under

the OSPG and has always been reimbursed in full for wages paid to Deputies who work the OSPG shifts, including overtime wages.

For approximately three years, the County's practice has been to make available one shift on Friday nights and one shift on Saturday nights as part of the OSPG. About one week before the end of each month, a calendar for the following month is posted in the County Sheriff's office. For many months, the monthly calendar was posted on the door to Captain Tobi Eidsmoe's office; more recently, the calendar has been posted on the door to Sergeant Kevin Becker's office.

A Deputy signs up for the OSPG shifts by writing his name or badge number on the calendar, along with the hours that he proposes to work - for example, "18-06" or "18/06" is shorthand for 1800 to 0600 hours. Generally, shifts were assigned on a first come, first serve basis, but occasionally a senior Deputy would bump a less senior Deputy from an OSPG shift.

Prior to 2013, when more than one Deputy wanted to work an OSPG shift, the shift was awarded to the Deputy with the most seniority with the Sheriff's Department. As one of many examples, Deputy Arlen Block wrote his name on the calendar to sign up to work the OSPG shift on September 24, 2011. The Grievant in this case, Deputy Nathan Cossentine, who has been a full-time Deputy since December 11, 2006, and had more seniority than Deputy Block, crossed off Deputy Block's name and wrote in

his own badge number (1912). (Union Exhibits #1, 2). This practice of "bumping" based on seniority was a consistent and accepted practice prior to 2013.

In December 2012, Sheriff Steve Gust spoke with County Coordinator Jeff Pelowski regarding using part-time Deputies to equal out the OSPG shifts among Deputies. In addition, since full-time Deputies were paid time and one-half and part-time Deputies were paid at straight time, the County could get more "bang for the buck" by greater use of part-time Deputies. In fact, the amount of the OSPG funds that would pay for four months of additional patrols using full-time Deputies would pay for twelve months of patrols using part-time Deputies.

County Coordinator Pelowski agreed with Sheriff Gust, especially in light of the County's financial condition due to reduced state and property tax revenues, and that the OSPG funding was reduced from one million dollars to \$82,000.

(County Tab 3). Sheriff Gust sought and received approval for using part-time Deputies on the OSPG shifts from U.S. Border Patrol Supervisor Dahlstrom. (County Tab 7).

In December 2012, a calendar for January 2013 was posted on Captain Eidsmoe's door. Using his badge number (1912), the Grievant signed up for several OSPG overtime shifts during that month, including Friday, January 11, 2013. Sheriff Gust identified by "11," which is short for his badge number (1911)

crossed off the Grievant's badge number and replaced it with Deputy Gene Pearson's badge number (1915). (Union Exhibit #1). Deputy Pearson was a part-time Deputy with less seniority than the Grievant. (Union Exhibit #2). The Parties stipulated that at that time, Deputy Pearson was not a public employee as defined under Minn. Stat § 179A.03, subd. 14, and therefore was not a member of the Union bargaining unit pursuant to Article II, Recognition, of the Collective Bargaining Agreement.

On or about January 9, 2013, the Grievant discovered that he had been removed from the January 11, 2013 OSPG shift. Deputy Pearson worked the January 11, 2013 shift. The Grievant considered this to be a departure from the past practice regarding the assignment of the OSPG shifts since Sheriff Gust had not announced that there would be any change to the seniority-based system for assigning these shifts, nor had he engaged the Deputies in any discussion of those OSPG shift changes.

On January 15, 2013, in accordance with the Collective Bargaining Agreement, the Grievant initiated a grievance by e-mailing Sheriff Gust. In his e-mail response, Sheriff Gust stated in part that "[t]he Stonegarden shifts are not regular scheduled shifts but are all voluntary and therefore the Sheriff may delegate them as needed to any employee." (County Exhibit #1).

When the February 2013 calendar was posted on Captain Eidsmoe's door, the Grievant again signed up for several OSPG shifts, including Friday, February 8 and Saturday, February 9, 2013. Sheriff Gust crossed off the Grievant's badge number on both dates and wrote in the badge number for Deputy Garrett Berg (1919). (Union Exhibit #1). At that time, Deputy Berg was a part-time Deputy with less seniority than the Grievant. The Parties have stipulated that despite being a part-time employee, Deputy Berg was at that time a public employee as defined under Minn. Stat. § 179A.03, subd. 14, and therefore a member of the Union bargaining unit pursuant to the Recognition clause.

Deputy Berg worked the February 8 and 9, 2013 OSPG shifts. The Parties agreed to include these shifts in the grievance that the Grievant had already filed in January regarding the OSPG overtime issue.

When the March 2013 calendar was posted, the Grievant signed up for several OSPG shifts, including Friday, March 8 and Saturday, March 9, 2013. The Grievant's badge number (1912) again was crossed off - on March 8, 2013 by Captain Eidsmoe and on March 9, 2013 by Sheriff Gust - and was replaced with Deputy Berg's badge number (1919). (Union Exhibit #1). Deputy Berg worked both of those shifts.

On April 10, 2013, the Grievant sent Sheriff Gust an e-mail indicating that he was going to grieve his removal from the

March 8 and 9, 2013 OSPG shifts. (Union Exhibit #9, p. 2). Sheriff Gust later agreed on May 6, 2013, to combine the contested January, February and March OSPG shifts into a single grievance for final and binding decision by the Arbitrator. Id., p. 1.

UNION POSITION

Section 11.2 of the Collective Bargaining Agreement is ambiguous and, thus, the Arbitrator should utilize past practice to interpret this Contract language. Based upon the evidence in the record, the County's practice of assigning the OSPG shifts based on seniority meets the elements of a binding past practice. In accordance with this practice, Deputies who wanted to earn overtime working the OSPG shifts routinely bumped less senior Deputies who had signed up to work the same shifts; conversely, Deputies were routinely bumped from the OSPG shifts by more senior Deputies. This binding past practice has been in existence since 2008. It also should be noted that before departing from this practice in January 2013, Sheriff Gust took no steps to repudiate the practice by notifying his Deputies that the OSPG shifts would no longer be assigned based on seniority. Thus, the specific and well-established practice of assigning the OSPG shifts based on seniority must be given precedence over the more general, "catch-all" Employer Authority provision.

The County should not be allowed to assign the OSPG shifts based on budgetary concerns since there is a binding past practice in effect of paying Deputies at the overtime rate and the County is reimbursed in full through the federal grant for the wages paid to Deputies on the OSPG shifts regardless of whether those wages are paid at straight time or overtime rates.

The County violated the Collective Bargaining Agreement by assigning the January 11, 2013 OSPG shift to a part-time Deputy outside the bargaining unit.

Based upon the foregoing, the County violated the Collective Bargaining Agreement by removing the Grievant from the OSPG overtime shifts that he signed up for on the dates in question and reassigning those shifts to other employees. The Grievant should be made whole for the resulting lose of overtime pay.

COUNTY POSITION

The Grievant is not entitled to receive overtime payment for OSPG shifts he did not work on January 11, February 8-9 and March 8-9, 2013. The Grievant was removed from the OSPG shifts for economic reasons and in order to equalize overtime. The Union has failed to show that the County unreasonably denied the Grievant the opportunity to work overtime.

The Grievant had no right under the Collective Bargaining Agreement to work overtime on any particular date that it was

available. The Union failed to establish that the County unreasonably by-passed the Grievant in opportunities to work overtime.

The Union's reliance that a past practice demonstrated that overtime was distributed on the basis of seniority is misplaced. Since the Collective Bargaining Agreement does not address assignment of overtime by seniority, the County had the express authority to eliminate such a practice at its sole discretion.

The change in economic circumstances justified the County's decision to use part-time Deputies to fill the OSPG shifts in order to receive "more bang for the buck" during harsh economic times.

Finally, the County's reasonable exercise of its managerial rights in assigning one out of the five disputed OSPG shifts to a non-bargaining unit member did not violate the Contract. The rights of the Employer Authority clause prevail over the Union Classification clause, particularly in light of the changed economic environment.

For the foregoing reasons, the County respectfully requests that the grievance be denied.

ANALYSIS OF THE EVIDENCE

Because arbitration is a creature of contract, an arbitrator's authority stems entirely from the express grant of power given by the parties themselves. Neppi v. Signature

Flight Support Corp., 234 F. Supp.2d 1016 (D.Minn. 2002). Clear and unambiguous contract language is expected to be applied as the reasonable and common usage of the terms would dictate. National Can Corp., 77 LA 405 (1981); Selig Mfg. Co., Inc., 71 LA 86 (1978). A contract clause is not ambiguous if the arbitrator can determine its meaning with no other guide than knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. An arbitrator cannot "ignore clear-cut contractual language" and he "may not legislate new language, since to do so would usurp the role of the labor organization and the employer." Clear Coverall Supply Co., 47 LA 272, 277 (1966). Moreover, any attempt by the Arbitrator to "legislate" or "usurp" the role of the Parties would be in direct violation of Article VII, Grievance Procedure, Section 7.4, Arbitrator's Authority, of the Collective Bargaining Agreement, wherein "[t]he arbitrator shall have no right to amend, modify, nullify, add to or subtract from the terms and conditions of this Agreement."

The primary rule in construing a collective bargaining agreement is to determine, not alone from a single provision or word, but from the contract as a whole, the true intent of the parties and to interpret the meaning of the questioned part with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker

Corp., 7 LA 767 (1947); Great Atlantic & Pacific Tea Co., 70 LA 1006 (1978); Anaconda Co., 74 LA 347 (1980); Warren Molded Plastics, Inc., 76 LA 743 (1981); Milton Roy Co., 77 LA 379 (1981). Arbitrators are expected to provide an interpretation that will give meaning and effect to all words used by the parties in their collective bargaining agreement. Kaiser Permanente, 76 LA 635 (1981); American Federation of Government Employees, 75 LA 1288 (1980).

Article V, Employer Authority, of the Collective Bargaining Agreement addresses the County's managerial rights as follows:

- 5.1 It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Employer in all its various aspects, including, but not limited to, the right to direct the working forces; to plan, direct and control all the operations and services of the Employer; to determine the methods, means, organization and number of personnel by which such operations and services are to be conducted; to assign overtime; to determine whether goods or services should be made or purchased; to hire, promote, demote, suspend, discipline, discharge or relieve employees due to lack of work or other legitimate reasons; to make and enforce rules and regulations; and to change or eliminate existing methods, equipment or facilities.
- 5.2 Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

The foregoing contractual language specifically grants to the County the right to direct the workforce (Deputies) and determine the means by which operations are to be conducted,

including the assignment of overtime to Deputies; however, this right to assign overtime is modified by the expressed limitations contained in the Collective Bargaining Agreement.

The overtime language is contained in Article XI, Overtime, of the Collective Bargaining Agreement, as follows in relevant part:

- 11.1 Employees will be compensated at one and one-half (1½) times the employee's regular base rate for hours worked in excess of the employee's regularly scheduled shift. Changes of shifts do not qualify an employee for overtime under this Article. All overtime must be approved in advance.
- 11.2 Overtime will be distributed as equally as practicable.

Article VI, Seniority, of the Collective Bargaining Agreement defines seniority and its application to other terms and conditions of employment in the Contract, as follows:

- 6.1 Seniority shall be determined by the length of full-time compensated service by classification within the bargaining unit. Reduction of the work force will be accomplished on the basis of classification seniority with the least senior employee in the classification laid off first and recalled last.
- 6.2 The Employer is committed to hiring the most qualified candidate for County service. When all other qualifications, as determined by the Employer, are equal, the Employer shall select the applicant with the greater service seniority for the job opening.
- 6.3 Positions where incumbents are reclassified or transferred shall not be considered vacant or newly created for the purpose of bidding.

6.4 The Employer shall post a seniority list annually. If there is a grievance relating to seniority, additional seniority lists shall be produced.

The Union argues that the County's right to assign overtime is limited by the language contained in Section 11.2, but that this language is ambiguous and, therefore, the well-established past practice that Deputies can bump less senior Deputies who sign up to work on the OSPG shifts must prevail. Accordingly, the Union argues that the County's decision not to assign the Grievant, who had signed up to work the OSPG shifts on January 11, February 8-9 and March 8-9, 2013, and was more senior than any of the Deputies who worked those shifts, was in violation of this well-established past practice, which clarifies the intent of the Contract language in Section 11.2.

It is axiomatic in arbitration that while custom and past practice are used very frequently to determine the purpose and intent of contract provisions, which are so ambiguous or so general as to be capable of different interpretations, they generally are not used in such interpretation of contract provisions which are clear and unambiguous. Phelps Dodge Copper Products Corp., 16 LA 229 (1951); Tide Water Oil Company, 17 LA 829 (1952); Magnode Products, Inc., 47 LA 449 (1966); Paterson Parchment Company, 47 LA 260 (1966).

Based upon the Contract as a whole, the language in Section 5.1, when commingled with Sections 11.1, 11.2 and 6.1, is clear

and unambiguous, and means that after the County determines that a need to work overtime exists, all overtime must be approved in advance and that overtime will be distributed as equally as practical without regard to seniority. The Contract does not contain an overtime or seniority guarantee.

Pursuant to the clear and unambiguous language of the Contract, the County has the explicit right to determine when overtime exists and the right to assign the overtime. Clearly, seniority is not a contractual requirement in the assignment of any overtime, including the OSPG shifts. Since the Employer determined that it was not necessary to work overtime in order to fill the OSPG shifts on January 11, February 8-9 and March 8-9, 2013, there was no overtime to be distributed. Therefore, any past practice that more senior Deputies can bump less senior Deputies who sign up to work on the OSPG shifts is "trumped" by the clear and unambiguous Contract language.

Even assuming arguendo that there was overtime to be equally distributed as practical during the OSPG shifts at issue, "equal" means possessing the same privileges or rights. Websters II New Riverside Dictionary, (Houghton Mifflin 1984).

The Grievant worked an average of one or two OSPG shifts per month in 2011. In 2013, the Grievant averaged approximately three to four OSPG shifts per month, the most of any Deputy. (County Tabs 8, 9). In fact, the Grievant received

approximately \$21,112 in overtime during 2011, 2012 and 2013, which was highest amount among all Deputies. This was followed by two Deputies (Matt Restad and Nat Adams) who received approximately \$16,648 and \$16,299, respectively. The lowest overtime amount was approximately \$450 (Captain Eidsmoe). (County Tab 8).

This evidence establishes that the Grievant worked the most OSPG shifts, and earned the most overtime, of anyone in the Sheriff's Department. Thus, it was proper for the Sheriff's Department to remove the Grievant from the disputed OSPG shifts in order to equalize overtime. The Union has failed to establish that the Sheriff's Department unreasonably denied the Grievant the opportunity to work overtime under the Contract language of Section 11.2.

A well-founded principle in arbitration is that the mere failure of a party, over a long period of time, to exercise a legitimate right under the contract is not a surrender of the right to start exercising that right. Mere non-use of a right does not entail the loss of it. Greif Bros. Corp., 114 LA 554 (2000); Groendvk Mfg. Co., 113 LA 656 (1999); Shawnee County Kansas Sheriff's Department, 97 LA 919 (1991); Esso Standard Oil Co., 16 LA 73 (1951). Since the Contract does not address assignment of overtime by seniority, the County had the express authority to eliminate such a practice at its sole discretion.

The Union argues that the change in assigning OSPG overtime was implemented without notice to the Union. It is noteworthy that after the first grievance was filed based on the denial of the January 11, 2013 shift, the Union was clearly on notice of the change in assigning the OSPG shifts. This work was no longer being paid at the overtime rate and it was not being assigned by strict seniority. The Union did not raise the issue of assignment of OSPG overtime during negotiations for the 2014 contract, and the contract contains no language assigning overtime by seniority. (Joint Exhibit #4). Since negotiations failed to change any provision of the contract relative to this issue, the County had the right to assign the OSPG shifts without regard to seniority.

The Union alleges that the County violated the Collective Bargaining Agreement by assigning the January 11, 2013 OSPG shift to a part-time Deputy outside the bargaining unit. The nature of the work performed by Deputies participating in the OSPG program clearly falls within the parameters of the sworn Deputies' bargaining unit: Deputies working OSPG shifts wear County uniforms, drive County squad vehicles and take calls from County dispatchers. Moreover, these Deputies perform ordinary County patrol duties unless and until they are contacted by the U.S. Border Patrol to assist with border enforcement. Although Sheriff Gust stated during the grievance

process that he could assign the OSPG shifts "as needed to any employee," he acknowledged at the arbitration hearing that only sworn Deputies are allowed to perform these duties.

The Parties stipulated that at the time Sheriff Gust removed the Grievant's from the January 11, 2013 OSPG shift and assigned the shift to Deputy Pearson, Deputy Pearson was not a member of the sworn Deputies' bargaining unit as defined by the Recognition clause contained in Article II of the Collective Bargaining Agreement. This Arbitrator and many other arbitrators have reasoned that a union member's job, being listed in the labor agreement, is itself part of the agreement; therefore, transferring bargaining unit work to non-bargaining unit employees plainly violates the contract. This principle was amply stated:

Job security is an inherent element of the labor contract, a part of its very being. If wages are the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. . . . The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.

Elkouri and Elkouri, How Arbitration Works, (5th ed., p. 760) (quoting New Britain Mack Co., 8 LA 720, 722 (1947)).

The same issue was addressed in Douglas County Hospital and IUOE Local No. 70, BMS Case No. 11-RA-0211 (Flagler, Jan. 26,

2011), where the employer assigned bargaining unit cooking shifts to a supervisor who did not belong to the bargaining unit. The employer argued that because there was no language in the collective bargaining agreement expressly prohibiting such transfer of bargaining unit work, the employer authority clause - which gave the employer the right to perform any inherent managerial function not specifically limited by the agreement - was controlling, and authorized the employer's action. Arbitrator John fgFlagler rejected this argument:

This position fails to sustain the test of elemental logic to wit: if a public sector employer could transfer work out of a bargaining unit at will in the absence of an explicit prohibition against such action, employer would have the unfettered means to decimate the bargaining unit.... [The contract] provide[s] a firm guarantee that work regularly and commonly performed by members of the bargaining unit will not be transferred to employees not members of that certified unit.

Past practice does have an application in this case. The past practice has been that in the majority of times only bargaining unit Deputies have been assigned to the OSPG shifts. The rare occasions that this practice did not occur was when Deputy Pearson worked occasional OSPG shifts in 2011 and 2012. (County Tabs 8, 9). This is no convincing evidence, however, that when Deputy Pearson worked these OSPG shifts that any of the bargaining unit Deputies wanted to work these same shifts. In other words, the OSPG shifts were assigned by default to Deputy Pearson.

As noted previously, mere non-use of a right does not entail the loss of it. Arbitrators routinely find that though a party has not grieved an issue in the past, it retains the right to do so in the future. City of Cincinnati, 122 LA 622 (2006); Girard School District, 119 LA 1476 (2004). There is no evidence that the Union has waived or modified its right to pursue a grievance protesting the use of non-Union members working the OSPG shifts. Thus, even assuming arguendo that Deputy Pearson was assigned the OSPG shifts over the objection of bargaining unit Deputies, the Union can exercise its legitimate right in this arbitration to have only bargaining unit Deputies perform the OSPG work.

Clearly, the County erred when they assigned the January 11, 2013 OSPG shift to Deputy Pearson, a non-Union Deputy, rather than the Grievant, a bargaining unit member.

AWARD

Based upon the foregoing and the entire record, the grievance is denied in part and sustained in part. The Employer did not violate the Collective Bargaining Agreement when it did not assign the February 8-9 and March 8-9, 2013 OSPG shifts to the Grievant, but erred in not assigning the January 11, 2013 OSPG shift to the Grievant. The Grievant is to be paid the overtime rate for those hours worked by Deputy Pearson, a non-Union Deputy, on January 11, 2013.

Richard John Miller

Dated February 27, 2014, at Maple Grove, Minnesota.