

**In the matter of Arbitration
between
Law Enforcement Labor Services,
Inc. and
The City of Roseville**

OPINION AND AWARD

**BMS Case Nos. 06-PA-1215, 1216,
1217, 1247, 1260 [Dropped by Union],
07-PA-0118, 0266, 0267, 0306, 0359, 0389,
0390, 0489, 0498, 0603, 0604, 0605, 0606,
0688**

GRIEVANCE ARBITRATION

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of LELS
Tiffany Schmidt, Esq.
Staff Attorney
St. Paul, Minnesota

On behalf of The City of Roseville
Michael J. Waldspurger, Esq.
Ratwik, Roszak & Maloney, P.A.
Minneapolis, Minnesota

JURISDICTION

In accordance with the Agreement between LELS and The City of Roseville; and, under the jurisdiction of the State of Minnesota, Bureau of Mediation Services, the above Grievance Arbitration was submitted to Joseph L. Daly, Arbitrator, on January 25, 2007. Post-Hearing Briefs were received by the arbitrator on March 5, 2007. The decision was rendered by the Arbitrator on April 11, 2007.

ISSUE AT IMPASSE

LELS defines the issue as:

Did the Employer violate the Labor Agreement each time it filled an available overtime opportunity with a sergeant/supervisor instead of an available police officer, therefore taking away this local's bargaining unit work. If so, what is the appropriate remedy? [Union's Post-Hearing Brief at 1].

The City of Roseville defines the issue as:

Did the City violate the Collective Bargaining Agreement by following its long-standing practice of distributing overtime as equally as practicable to both officers and sergeants? [Employer’s Post-Hearing Brief at 1].

The potentially relevant contract provisions are:

Article II—2.1

The employer recognizes the Union as the exclusive representative under Minnesota Statutes, Section 179.03, subd. 8 for all police personnel in the following job classification: Police Officer. [Joint Exhibit No. 1]

Article III

The Union member is “a member of Local 112, Law Enforcement Labor Services, Inc.”

Article V

The City retains the “full and unrestricted right” to select personnel, to establish work schedules, and to perform any inherent managerial functions not specifically limited by the Collective Bargaining Agreement. “Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the City to modify, establish or eliminate”.

Article XIV-14.2

Overtime will be distributed as equally as practicable. [Joint Exhibit No. 1]

FINDINGS OF FACT

1. Law Enforcement Labor Services, Inc. has filed a series of grievances alleging that the City of Roseville has violated Article II and Article XIV of the Collective Bargaining Agreement between the parties by continuing to follow its practice of distributing overtime to both police officers [members of LELS] and sergeants [members of Teamsters, Local 320] when the need for overtime results from an officer or sergeant being absent. These are multiple grievances over the same issue. As such, the Union and the City of Roseville agreed to combine the grievances for purposes of this arbitration hearing. One of the grievances [BMS No. 06-PA-1260] was dropped by the LELS on the date of the arbitration. The other grievances went forward.

2. Prior to 2002, the Roseville Police Department had no set policy or procedure for the distribution of overtime work. The police department administration tended to contact certain police officers and sergeants to fill overtime shifts.

Chief Carrol Sletner and Captain Rick Mathwig both testified that since the early 1990's, the City has openly assigned overtime to both sergeants and officers when the need for overtime has resulted from an officer's absence.

In April 2002, a Memorandum was drafted by Sergeant Eric Christensen dated April 11, 2002.

[Joint Exhibit No. 9] The document stated in its entirety:

MEMORANDUM

DATE: April 11, 2002
TO: Sworn Personnel
CC: Acting Chief Sletner, Lt. Mathwig, Officer Holtmeier
FROM: Sgt. Eric Christensen
SUBJECT: Procedures For Filling Minimum Staffing Needs With Overtime

We have slightly revised the procedures for covering overtime when staffing levels fall below department requirements. The change will affect the short notice filling by deleting the 4 hours prior to the shortage language and adding language when an officer/sergeant calls in sick for their assigned shift. Overtime will still be given out as fair as practical in the following manner:

Sick-Call-In Minimum Staffing Needs: (RED FILE BOX)

Sgts/Acting Sgts will fill overtime for minimum levels by holding over the on-duty Officer/Sgt next up in the overtime file system. The second half of the short shift will be filled by an Officer/Sgt. Coming in early from the next shift. These slots should be filled by Officers/Sgts already scheduled to work and who participate in the minimum staffing program. If the Sgt/Acting Sgt is unable to fill the OT by way of the filing system, they can cover the OT as needed.

Only document and move an Officer/Sgt to the back of the file when they

- Accept
- Refuse or
- (NR) No Response

Do not move or document an Officer/Sgt that isn't contacted. When calling the two given contact numbers allow a 10-minute response. Do not call officers who are on approved time off.

Advance Notice Minimum Staffing Needs: (BLUE FILE BOX)

When minimum staffing needs occurs with advanced notice, ie: Training, IOD, Extended Sick or other reasons, the Sgt/Acting Sgt will use the blue card file system until the OT is filled. Sgts/Acting Sgts should allow a reasonable amount of time for officers to respond when filling the OT, especially if they have more than a week of notice. Sgt/Acting Sgt will call both numbers listed on the call-out card.

The Sgt/Acting Sgts will document the date and time the call was made and the date and time the hours were

- Accept
- Refuse or
- (NR) No Response

and move the card to the rear of the file.

DO NOT move an Officer/Sgt if they are Working, Training, on Vacation, Comp, Personal Holiday or Sick time during the hours that are being offered. Leave them in their current spot and go to the next card.

[Joint Exhibit No. 9]

Testimony from various police officers acknowledged that they received a copy of the April 11, 2002 Memorandum describing the procedures for distributing overtime among sergeants and officers.

3. “Initially, the members of Law Enforcement Labor Services, Inc. . . . Local No. 112 accepted this system”. [Union’s Post-Hearing Brief at 3]. “The reasons the LELS members did not grieve this system sooner was (1) any system for the fair distribution of overtime was better than none; (2) the sergeants really weren’t interested in working the overtime shifts and didn’t accept very many; and (3) the membership was not aware that there was an inherent conflict with the sergeants, who are represented by Teamsters 320, working LELS patrol shifts”. [Id.]

4. The City contends “without protest from the Union, the City openly and consistently adhered to the practice of assigning overtime to both sergeants and officers for a period of at least 15 years. If the Union believed that such a practice violated the language of CBA, it would have filed a grievance challenging the practice. The Union did not do so until April 2006.” [Employer’s Post-Hearing Brief at 4]

5. The parties have not negotiated any change to the provisions of the Collective Bargaining Act related to Article II (The Recognition Clause) and Article XIV (The Overtime Clause). The specific language of the recognition clause and the overtime clause has been in the past previous contracts.

6. The basic contentions of the Union are:

- a. The Employer violated the clear language of the Labor Agreement when it had sergeants work overtime patrol shifts;
- b. There is no present past practice of allowing sergeants to fill police officer overtime shifts;
- c. Past practice isn't applicable because LELS appropriately placed the City on Notice it would grieve any continuing actions by the City to use sergeants to fill police officer overtime slots. Business Agent for LELS, Jack Chambers, testified he had no knowledge of the City's practice until the members brought it to his attention in conjunction with recent contract negotiations for the present contract. When the City refused to change the contract language to allow police officer members of LELS first opportunity to work overtime, Mr. Chambers notified the City at the third negotiation session on March 1, 2006 that the Union "would grieve and proceed to grievance arbitration over the sergeants doing patrol officer work and taking patrol officer overtime". [Union Post-Hearing Brief at 9]
- d. Past practice isn't applicable due to Article XXVI—Waiver. Article XXVI in the Labor Agreement reads: "36.1 any and all prior agreements, resolutions, practices, policies, rules and regulations regarding terms and conditions of employment, to the extent inconsistent with the provisions of this agreement are hereby superseded".

Essentially the Union contends that: "the City repeatedly violated the LELS Labor Agreement when it used sergeants to fill police officer overtime shifts, resulting in overtime compensation being paid to the sergeants. The sergeants did and continue to do LELS Bargaining Unit work every time they fill a police officer shift. The Union does not have any issue with the process the City uses to fill overtime, only that sergeants are filling patrol officer slots. Police officers should cover police officer overtime and sergeants should cover sergeant overtime. This would honor the intent of both the LELS Labor Agreement and the Teamsters Labor Agreement which states, "overtime will be distributed as equally as practicable". [Id. at 12]

7. The basic contentions of the City are:

a. The City's practice of distributing overtime as equally as practical to both officers and sergeants does not violate the Collective Bargaining Act. The Union's argument confuses the concepts of unit description and unit jurisdiction. In the instant case, all agree that the sergeants are outside the LELS Bargaining Unit. The present issue, then, is not one of unit description. Rather, the issue in this case is one of unit jurisdiction. Specifically, the issue is whether any overtime work that results from an officer's absence must be performed by a member of the LELS Bargaining Unit. The recognition clause in the CBA merely identifies the exclusive representative and describes who is included in the Bargaining Unit. Thus the recognition clause addresses the issue of unit description. Contrary to the Union's argument, the recognition clause does not address the issue of unit jurisdiction. The CBA does not limit the distribution of overtime to officers. Article XIV of the CBA simply states "overtime will be distributed as equally as practicable". This language is consistent with the City's longstanding practice of assigning overtime to both sergeants and officers.

b. The City has a managerial right to assign overtime outside the LELS Bargaining Unit.

c. Sergeants are qualified to work overtime resulting from an officer's absence.

d. The City's longstanding practice of distributing overtime to officers and sergeants is controlling. A binding past practice exists. "Since the early 1990's, the City has openly adhered to a practice of distributing overtime as equally as practicable to both sergeants and officers whenever the need for overtime has resulted from a sergeant or officer being absent". [City Post-Hearing Brief at 8].

Most recently, on April 11, 2002, the City issued a memorandum to all sworn personnel refining that practice.

e. The Union cannot unilaterally eliminate a binding practice that is based on a management right.

f. The Union cannot unilaterally eliminate a binding past practice that is and has been used to interpret an ambiguous contract provision. The CBA does not define the phrase “as equally as practicable”. The City’s past practice of assigning overtime to sergeants and officers gives meaning to this ambiguous phrase “as equally as practicable”. There has been a longstanding tenure of that practice without any protest from the Union, until recently.

g. Past practice is controlling on issues of unit jurisdiction.

Essentially the City contends “in the case at hand, the City’s past practice of assigning overtime to both sergeants and officers is controlling. Three years of silence, the Union has tacitly agreed to that practice. The Union cannot now be heard to claim that the overtime work belongs exclusively to the unit it represents”.

[City Post-Hearing Brief at 17].

DECISION AND RATIONALE

The Union contends that the plain meaning of the Collective Bargaining Agreement is clear “patrol officer overtime should only be distributed to police officers and not sergeants”. [Union Post-Hearing Brief at 5-6]. The Union further contends “there is no present past practice of allowing sergeants to fill police officer overtime shifts”. [Id. at 6]. The Union bolsters this argument by saying that Business Representative Jack Chambers notified the City during the third negotiation session of March 1, 2006 that it “would file grievances over the issues of sergeants working patrol overtime shifts”. This resulted after the City refused to change the language in the contract to clarify the meaning of “as equally as practical” to include that only police officers could work police officer overtime.

The City counters the Union's argument by saying the Collective Bargaining Agreement does not and has not limited the distribution of overtime to only police officers. The language "overtime" will be distributed as equally as practicable [Article XIV] "is consistent with the City's longstanding practice of assigning overtime to both sergeants and officers". [City Post-Hearing Brief at 3]. The City further contends "the Union cannot assert on the one hand that the CBA clearly prohibits the practice, while asserting on the other hand that for 15 years it did not realize the CBA prohibited the practice". [Id. at 4]

Where a Collective Bargaining Agreement does not contain any language requiring that overtime be assigned exclusively to the specific bargaining unit which is a party to the agreement, typically the employer has a managerial right to assign overtime to qualified individuals outside that unit. On this issue, Minnesota's arbitration decisions evidence an overwhelming unanimity of opinion. *See, e.g., Midwest Coca-Cola Bottling Co. v. Teamsters*, FMCS Case No. 981002-10043-7 (1999) (Reynolds, Arb.) (denying grievance and holding that contract did not require employer to assign OT to forklift driver when OT was created by absence of another forklift driver); *Independent Sch. Dist. 191 and SEIU, Local 284*, BMS Case No. 02-PA-214 (Jacobs, Arb.) (denying grievance and holding that employer could assign OT outside of custodial unit because no contract language or practice required OT to be assigned only within the unit); *Bay State Milling Co. and BCTGM, Local 133G*, FMCS Case No. 02-05785-7 (2002) (Arb. Bard) (denying grievance and holding that contract did not prohibit employer from assigning OT outside of classification in which the vacancy occurred); *Metropolitan Transit Comm'n v. Amalgamated Transit Union, Local 1005*, BMS Case No. 94-PA-688 (1994) (Koehler, Arb.) (denying grievance and holding that employer did not have a practice limiting management right to assign OT to different unit); *Kahler Corp. v. Hotel Employees and Restaurant Employees Int'l Union, Local 21*, BMS Case No. 92-RA-114 (1991) (Prior, Arb.) (holding that because the contract did not contain jurisdictional limitation employer had management right to assign OT between jobs or units); *Watonwan and LELS, Local 117*, PERB Case No. 89-PP-1153 (1989) (Lindquist,

Arb.) (denying grievance and holding that county did not bargain away management right to assign OT to non-unit members); *St. Paul Library Board and IUOE, Local 70*, PERB Case No. 89-PP-141-B (1989) (Bognanno, Arb.) (denying grievance and holding that employer had management right to assign OT work to more than one unit where CBA did not contain limiting language and no past practice existed); *City of Duluth and AFSCME, Counsel 96, Local 66*, PERB Case No. 89-PP-47-B (1989) (Bergquist, Arb.) (denying grievance and holding that OT work was within the jurisdiction of more than one unit and which unit would perform the work was a managerial decision).

In the instant case, the CBA does not contain any language requiring that overtime be assigned exclusively to LELS unit members. Instead, the CBA expressly reserves the City's managerial rights. For example, Article V of the CBA states the City retains "the full and unrestricted right" to select personnel, to establish work schedules, and to perform any inherent managerial functions not specifically limited by the CBA. Article V further states: "Any term and condition of employment not specifically established or modified by this Agreement shall remain solely within the discretion of the City to modify, establish, or eliminate." In accordance with this reservation of rights and the long line of cases cited above, the City has the managerial right to assign overtime to qualified individuals outside the LELS unit.

Further, the City has had a longstanding practice of distributing overtime to officers and sergeants. This past practice has existed since the mid-1990's. Most recently, on April 11, 2002, the City issued a Memorandum to all sworn personnel refining that practice. The practice of distributing overtime put into effect on April 11, 2002 is the same practice that remains in effect today.

The past practice becomes binding on both parties when it is (1) an unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. *See Elkouri and Elkouri, How Arbitration Works*, 608 (6th Ed. 2003). The City has a documented past practice of assigning overtime to sergeants and officers. It meets each of the criteria of a binding past practice as described by *Elkouri and Elkouri*. The City has

uniformly, consistently and conspicuously followed the current practice in response to a recurring situation—the need to assign overtime to meet minimum staffing levels when an officer or sergeant is absent.

Based on the above rationale, all the above grievances filed by the respective LELS members on this issue are denied.

Dated: April 11, 2007.

Joseph L. Daly
Arbitrator