

and Jonathan A. McHaney. Post-hearing briefs were received by the Arbitrator on February 1, 2007.

FACTS

The City of Prior Lake (the "Employer" or the "City") is a suburb of Minneapolis, Minnesota. The Union is the collective bargaining representative of employees who work in the Employer's Police Department (the "Department") as Patrol Officers. The Union is also, in a separate bargaining unit, the collective bargaining representative of the Department's Sergeants. The present grievance alleges a violation of the parties' labor agreement that covers the Patrol Officers' bargaining unit, effective from January 1, 2003, through December 31, 2005.

The following provisions of the labor agreement are made relevant by the parties' arguments:

ARTICLE 3: DEFINITIONS:

- 3.1. The terms used in this agreement shall be defined as follows:
- (D) OVERTIME: Work performed at the express authorization of the Employer in excess of the Employee's scheduled shift.
 - (F) SCHEDULED SHIFT: A consecutive hour scheduled work period including two rest breaks and a lunch break.

ARTICLE 5: EMPLOYER AUTHORITY

- 5.1. The Employer retains the sole right to operate and manage all manpower, facilities, and equipment in accordance with applicable laws and regulations of appropriate authorities.
- 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.

ARTICLE 13: OVERTIME

13.1. Employees shall be compensated at one and one-half (1 1/2) times the Employee's regular base pay rate for all hours worked in excess of the Employee's regularly scheduled shift. Changes of shift do not qualify an Employee for overtime under this Article.

13.2. Overtime Assignments:

- (A) The Employer retains its full authority to determine if duties will be completed by overtime assignment and the nature of such assignments.
- (B) Overtime will be distributed on a volunteer basis to the most senior officer available. If the Employer determines to fill a shift, then it shall be filled to determine the availability of the most senior officer according to the following procedure. An offer of an overtime assignment will be made in sequential order from the most senior to the least senior qualified individual. For purposes of this section, the word "qualified" means an employee who has successfully completed the Field Training Officer program. For purposes of assigning contract overtime work, the word, "qualified" shall include all sergeants/supervisors. If no one wants to work it, the overtime shall be assigned to the junior qualified employee. This provision shall not apply if the employee has not had at least twelve (12) hours off duty.
- (C) Individuals contacted for overtime duties shall respond to the contact immediately, and in no event later than ten (10) minutes after the contact is made. Failure to respond will be considered a rejection. In the event of unforeseen circumstances or exigent circumstances which reasonably require an Employee to immediately respond, then the Employer may assign duties to an Employee without regard to Section 13.2.

13.8. Any shift altered by the Employer with less than fourteen (14) days notice, with the exception of training, shall be compensated at the rate of time and one-half (1 1/2) for all hours worked outside of the Employee's normal shift.

ARTICLE 15: CALL BACK TIME

15.1. An Employee who is called back to duty during his scheduled off-duty time shall receive a minimum of two (2) hours pay at one and one-half (1 1/2) times the Employee's base pay rate. An extension or early report to a regularly scheduled shift for duty does not qualify the Employee for the two (2) hour minimum.

ARTICLE 30: VACATION COVERAGE

30.1. The parties agree that when Employees fill in for other Employees on vacation, the Employer will take into consideration the shift that the Employee is currently on, the shift he/she is filling in for, and the effect on the Employee's health and sleep schedule resulting from a shift change. For example, an Employee would not be expected to change shifts in the middle of the week and back again to cover for an Employee on vacation. This does not prevent the Employer from making shift changes in such cases due to an emergency, or an unscheduled absence.

ARTICLE 31: JURY DUTY

31.1. Leave shall be granted for service upon a jury. Compensation shall be at the Employee's regular base rate of pay. Employees whose scheduled shift is other than a day shift shall be reassigned to a day shift during the period of service upon a jury. When not empaneled for actual service and only on call, the Employee shall report to work. If an Employee is excused from jury duty prior to the end of the work shift, the Employee shall return to work as directed by the Employer or make arrangements for a leave of absence.

On December 2, 2005, from 6:00 p.m. to 9:00 p.m., the City held its annual holiday festival, "Downtown Dazzle." The festival, which features fireworks and exhibitions by local merchants, had been held the previous three years to promote shopping in the City. For the 2005 festival, the City added a parade for the first time and decided to have three extra Patrol Officers on duty during the evening of the festival.

The usual schedule of all the Department's Patrol Officers is to work four consecutive ten-hour days before having off-duty days. On November 28, 2005, Lieutenant Randy Hofstad, who is responsible for filling the Department's available overtime, assigned three Patrol Officers to work overtime during Downtown Dazzle. Officer Rick Denmark was assigned to work on December 2 from 6:00 p.m. to 8:00 p.m. -- two hours in addition

to his regular shift, which started at 8:00 p.m. on December 2 and ended at 6:00 a.m. the following morning. Officer Duane Goldammer was assigned to work on December 2 from 6:00 p.m. to 9:00 p.m. -- three hours in addition to his regular shift, which started at 9:00 p.m. on December 2 and ended at 7:00 a.m. the following morning. Officer David Honican was assigned to work on December 2 from 5:00 p.m. to 7:45 p.m. -- two hours and forty-five minutes in addition to his regular shift, which started at 7:00 a.m. on December 2 and ended at 5:00 p.m. that afternoon.

All of these assignments to work additional hours were what the parties refer to as "shift extension" overtime -- for Denmark and Goldammer, extensions that preceded their regular shifts, and for Honican, an extension that came after his regular shift. All three patrolled the Downtown Dazzle during this shift extension overtime.

The grievant McHaney has greater seniority than Denmark, Goldammer and Honican, and the grievant O'Hehir has greater seniority than Denmark and Honican. On January 13, 2006, the Union brought the present grievance in behalf of the grievants, alleging the following violation of Section 13.2(B) of the labor agreement:

On 12-2-05 Officers Honican, Goldammer and Denmark were assigned overtime. The officers were assigned to work this overtime on 11-28-05 for the 12-2-05 overtime. Officers McHaney and O'Hehir were senior officers, were available to work, but were never offered the overtime opportunity.

Some overtime work that the Department makes available to its sworn personnel is what the Employer refers to as "outside"

overtime -- work in police service that is paid for by organizations that contract with the City for such work, usually for events such as a school dance or a school athletic game.

In order to categorize the several kinds of overtime that are relevant to this dispute, I describe below the way in which Hofstad has filled available overtime since he became responsible for doing so, in 2001. As I discuss hereafter, the Union does not accept his interpretations of the labor agreement -- interpretations consistent with those of the Employer -- but his testimony distinguishes several kinds of overtime opportunity that he has recognized and used to fill them.

I summarize Hofstad's testimony as follows. He described three kinds of overtime. First, overtime that is subject to the seniority bidding system established by Section 13.2(B) of the labor agreement is overtime for a "shift" -- a word that he and the Employer interpret according to the definition for "scheduled shift," given in Section 3.1(F) of the labor agreement, i.e., "[a] consecutive hour scheduled work period including two rest breaks and a lunch break."

Second. Some overtime is available because the City has contracted with outside organizations to provide police service for particular events -- usually for periods ranging from two and a half hours to eight or nine hours. Hofstad testified that he refers to this kind of overtime as "outside" overtime, but that it is the same kind of overtime referred to in the fifth sentence of Section 13.2(B) as "contract" overtime, thus: "For purposes of assigning contract overtime work, the word, 'qualified' shall

include all sergeants/supervisors." Hofstad testified that the labor agreement that covers the Sergeants' bargaining unit has a provision that is absent from the agreement covering the Patrol Officers -- one that requires the City to post outside overtime for seniority bidding by the Sergeants. Though Hofstad does not interpret the Patrol Officers' labor agreement as requiring the posting of outside overtime for seniority bidding, he does post all outside overtime, regardless of length, for bidding by Patrol Officers and Sergeants. He does so to maintain a consistent system for both classifications. Because such overtime is usually contracted for well in advance of its use, bidding even for short periods of outside overtime can be accomplished without difficulty.

Third. Hereafter, for ease of reference, I refer to overtime that is not outside overtime as "City-provided" overtime. As noted above, Hofstad uses the seniority-based bidding system established by Section 13.2(B) to fill City-provided overtime for a shift of eight to ten hours. He testified that he also uses that system to fill City-provided overtime that is less than a shift of that length, but at least four hours in length. Hofstad uses seniority bidding to fill those shifts, even though he and the Employer do not think that the labor agreement requires bidding for overtime periods less than a shift of eight to ten hours.

To fill City-provided overtime of less than four hours, however, Hofstad has always used shift extensions rather than seniority bidding. He uses shift extensions for City-provided

overtime periods shorter than four hours 1) because the need to fill such short periods usually arises without much notice and it is easier to fill them by shift extension than by bidding, and 2) because extending a shift for less than four hours will not cause great fatigue to the Officer so assigned. He does not use shift extensions to fill overtime periods of four hours or more because he does not want officers to become fatigued by working fourteen hours or more without relief.

The parties agree that the overtime periods at issue in this case -- periods of work less than four hours in length that Denmark, Goldammer and Honican were assigned to perform on December 2, 2005 -- were City-provided overtime and not outside overtime.

DECISION

The Union argues that Section 13.2(B) is unambiguous and that, by its plain meaning, the Employer must use seniority bidding to fill overtime periods of any length -- except in exigent circumstances. The Union interprets the word "shift" in the second sentence of that provision to mean a period of any length -- not the shift of eight to ten hours that the Employer reads into that word. The Union notes that Section 13.2(C) establishes an efficient procedure that allows seniority bidding on short notice, permitting the use of bidding to fill overtime periods of any length, provided that there is time to use that procedure. The Union urges that, in the present case, Hofstad knew four days before December 2 that the overtime at issue would be required on that date for Downtown Dazzle -- clearly

enough time to use the seniority bidding procedure and clearly not short notice that could be considered to create "unforeseen" or "exigent" circumstances.

The Employer also argues that Section 13.2(B) is unambiguous, but it finds a different clear meaning in the provision from the meaning proposed by the Union. As noted above in my description of Hofstad's testimony, the Employer reads the word "shift" in the second sentence of Section 13.2(B) as consistent with the definition given in Section 3.1(F) for "scheduled shift" -- "[a] consecutive hour scheduled work period including two rest breaks and a lunch break." The Employer argues that a period that includes the three breaks must be a full shift of eight to ten hours. The Employer also argues that the labor agreement's other uses of the word "shift" are consistent with its interpretation, noting that Sections 30.1 and 31.1 clearly describe procedures for filling full shifts during vacations and leaves for jury duty.

The Employer argues that Section 15.1 of the labor agreement, which establishes a two-hour minimum at overtime rates for a "call-back" to duty, disqualifies an "extension or early report to a regularly scheduled shift" from the call-back minimum, thus implying that the labor agreement recognizes that the Employer is permitted to assign overtime work by shift extension.

Though both parties argue that the labor agreement unambiguously establishes their bargain about filling available overtime, both also argue that, if I decide that the agreement

is ambiguous, I should use past practice to resolve the ambiguity. As I discuss below, they disagree about the way in which practice should affect interpretation of the labor agreement.

The evidence shows the following practice. At least since 2001, the Employer has filled available overtime substantially as described in Hofstad's testimony. All outside overtime has been filled by seniority bidding. Many, if not most of those periods were less than four hours in length. City-provided overtime for periods of four or more hours has been filled by seniority bidding, and City-provided overtime for periods of less than four hours has been filled by shift extension.

The Union argues that the use of seniority bidding to fill many overtime periods of less than four hours negates the Employer's argument that the word "shift" in Section 13.2(B) means a full shift of eight to ten hours. The Union urges that the distinction the Employer makes between outside overtime and City-provided overtime is not relevant and that what is relevant is the Employer's use of seniority bidding to fill periods less than four hours, regardless whether they are outside overtime or City-provided overtime.

The Employer argues that what is important in past practice is the consistent past use of shift extensions to fill short periods of City-provided overtime and the consistent past use of seniority bidding to fill short periods of outside overtime -- a distinction made for practical reasons and within

the Employer's discretion under Section 5.2 of the labor agreement.

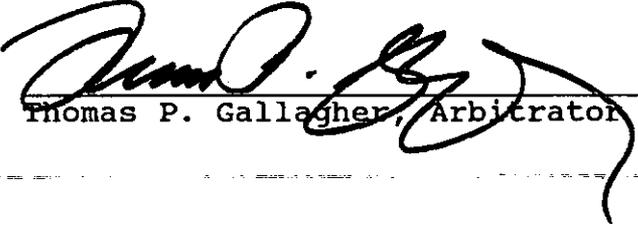
I rule that the word "shift" in Section 13.2(B) means a full work shift -- consistent with the definition of "scheduled shift" given in Section 3.1(F) of the labor agreement, i.e., a period of work that includes the three work breaks that come with a full work shift, and also consistent with the meaning of "shift," as used in Sections 30.1 and 31.1 of the labor agreement.

Because the labor agreement is not ambiguous, extrinsic evidence -- about past practice or bargaining history -- should not be used in its interpretation. Nevertheless, it appears that the practice used to fill overtime periods, at least since 2001, does not obviate the interpretation that Section 13.2(B) refers only to full work shifts. The Employer has consistently assigned all City-provided overtime of less than four hours in length by shift extension, and it has consistently assigned outside overtime of less than four hours in length by seniority bidding. The basis for the distinction the Employer makes between these two methods of assignment is reasonable -- that it is convenient to assign short periods of outside overtime in the same manner that must be used to assign such overtime to Sergeants, whose labor agreement requires bidding for outside overtime. Though Section 13.2(B), by its unambiguous terms, requires seniority bidding only for full shifts, the Employer has the discretion to fill some, but not all, shorter overtime periods by the same method.

AWARD

The grievance is denied.

April 25, 2007


Thomas P. Gallagher, Arbitrator