

**American Arbitration Association
Tammy Brynie, Esq., Arbitrator**

In the matter between:

Stoughton Police Patrolmen's
Association

- and -

AAA No. 01-18-0000-7147
Prisoner Watch Overtime

Town of Stoughton

Decision and Award

For the Town

David C. Jenkins, Esq.

For the Union

Patrick N. Bryant, Esq.

Background

This matter was heard on October 16, 2018. At hearing the parties submitted the following stipulated issue:

Whether the Town violated the Collective Bargaining Agreement, including the Memorandum of Agreement, in the manner of assigning officers to prisoner watch overtime?

If so, what shall be the remedy?

The Union represents the Town's full-time patrol officers, with a total of 48 patrol officers working in Town and (at the time of hearing) an additional two officers at the Police Academy. Donna McNamara, who was hired as a patrol officer in 2001 and was promoted through the ranks to achieve her current position as permanent Police Chief in January 2017, provided details about the composition and operation of the Police Department. Article 9 of the parties' collective bargaining agreement sets a minimum staffing level of four patrol officers and one shift commander for each shift. Actual staffing patterns, however, may differ from day to day or shift to shift. Usually, for example, weekday day shifts are staffed by four patrol officers, with one officer assigned to in-station desk duty, while three officers are on the street. Some night and weekend shifts are covered by five patrol officers, with one officer working a desk position, and four officers on the road. In other words, within the Police Department, there is both a contractual staffing minimum level and a minimum staffing level set by the Chief, or her designee, by shift. One patrol officer, however, is consistently assigned to the desk officer position per shift.

An assigned desk officer is responsible for answering 911 calls (or other calls) to the station, dispatching calls for service and assisting individuals who arrive at the station. In addition, the desk officer is responsible for monitoring prisoners detained at the station, using both the in-station video system and by physically checking on a prisoner every 30 minutes, or every 15 minutes if a suicide watch is in effect. Prior to about June of 2017, one civilian dispatcher worked with the desk officer and, if absent, the desk officer would perform all of the duties alone. In 2017, after the completion of a new, consolidated dispatch area within the police station, two civilian dispatchers began performing fire and police dispatch duties, overseen by the desk officer. In addition to the ability to watch video of the detention area, audio monitoring of the prisoner area is now also available. The desk officer is still responsible for conducting in-person prisoner checks.

Patrol officers monitor prisoners when they are transported to a hospital and throughout their hospital

stay. Prior to 2016 and continuing thereafter, the police department, at times, used 'hospital watch' overtime, with an officer called in to work on an overtime basis rather having an officer pulled from street patrol for a hospital watch.

In 2016, the Union and the Town began negotiations for a successor to the collective bargaining agreement set to expire at the end of June. Throughout the bargaining the Town was represented by then-Town Manager Michael Hartman and Attorney Joseph Fair. Attorney Patrick Bryant and Union President Matthew Farwell represented the Union and they were, at times, accompanied by other officers. The first exchange of bargaining proposals occurred on May 25, 2016 when the Union proposed, among other items, a new 'prisoner watch overtime' provision, for inclusion at Article IX, Section 11. The proposal, in part, stated:

In the event a prisoner is being held at Stoughton Police Headquarters and the Stoughton District Court is closed (e.g., nights, weekends and holidays) the Overtime list will be called for prisoner watch overtime. The prisoner watch overtime "shall continuously monitor (24 hour monitoring) prisoner (detainees) while in the custody of the department. Prisoners (detainees) are physically checked (face to face) every 30 minutes or less unless there are extenuating circumstances. Suicidal or Q-5 positive detainees

shall be physically checked every 15 minutes" - per Stoughton Police Department Policy and Procedure, Holding Facility and Booking Area, Section 10.

If a prisoner(s) is in need of medical treatment, the Prisoner Watch Overtime shall provide security during the transportation and stay of the prisoner at the medical facility - per Stoughton Police Department Policy and Procedure, Prisoner Transport, Hospital Security and Control Section.

In the event there are more than one (1) prisoner being held at Stoughton Police station and one prisoner is being transported to medical facility, then the Overtime list will be called for additional Prisoner Watch Overtime to ensure the remaining prisoners are being held in accordance of Stoughton Police Department Policies and Procedures. . . . Joint Exhibit #11.

In conjunction with its proposal, Union President Farwell testified that he explained that it was intended to address staffing issues created when a prisoner was being held at the station or brought to the hospital. The Town's negotiator, on the other hand, recalled that, in effect, the Union presented its proposal as a means to address a situation when, otherwise, staffing on the street would be reduced.

The parties provided their initial responses to each other's proposals at a June 16, 2016 bargaining session. At that time, the Town asked to "hold" the Union's

prisoner watch proposal for discussion at a later time. The Town, at a September 20, 2016 meeting, made a package proposal to settle the contract, and that package not including the Union's prisoner watch proposal. The Union did not accept the package proposal.

At the next negotiation session, held on November 1, 2016, it is undisputed that the Town addressed the Union's prisoner watch proposal. At that time, the Town indicated that it could not agree to the proposal, as it was too broad, but also indicated that it was not unsympathetic to the raised safety issues. Then, however, recollections of negotiation events appear to diverge. Although both parties understood that the Town made a prisoner overtime offer, at arbitration the offer details, and parties' intent, seemed to be in dispute. Fair, in effect, recalled indicating that when staffing was at the minimum and the presence of a prisoner would necessitate someone coming in to the station to watch that prisoner, the Town would be willing to call an overtime rather than reassigning one of the 'on the road' patrol officers.¹ The Union, however, disputes

¹Retained negotiators' bargaining notes are arbitration exhibits.

that the Town's proposal contained such limitations on the use of prisoner watch overtime. It appears, however, that both sides understood that the Union was accepting the Town's prisoner watch overtime counter proposal.

The parties' final face to face bargaining session took place on November 10, 2016. At that time, the Town provided the Union with a written package proposal. Joint Exhibit #14. The exchanged document included, at Item #6, "Prisoner watch overtime," as follows:

Effective as of funding of Agreement, prisoner watch overtime to be called whenever there is a prisoner and staffing is at the contractual minimum. Overtime will last until staffing is no longer at the minimum or a prisoner is no longer present, whichever occurs sooner.

Joint Exhibit #14.

The parties reached a tentative contract agreement at their November 10th bargaining session, that included agreement to the prisoner watch overtime provision included within the presented package. There is no indication that the parties had any discussion about prisoner watch overtime on that date.

Neither the Union nor Town notes, however, record this explanation of, or limitations governing, prisoner watch overtime circumstances. Town Exhibit #2; Union Exhibit #1.

The Town emailed the Union a draft Memorandum of Agreement (MOA), containing the terms of the parties' tentative agreement, on December 7, 2016. The Prison watch overtime portion of the draft MOA provided:

Effective as of funding of Agreement, prisoner watch overtime to be called whenever there is a prisoner and staffing is at the contractual and staffing is at the contractual minimum. Prisoner watch overtime will last until staffing is no longer at the minimum or a prisoner is no longer present, whichever occurs sooner.

Joint Exhibit #7.

On January 9, 2017, Bryant emailed Fair, noting a concern with the prison watch provision of the MOA.

Bryant wrote:

One issue is that while the contractual minimum per shift is four, the actual minimum for evening and weekend shifts is five. In other words, my understanding is that the Department hires to maintain a 5-person minimum. The purpose behind the proposal and the meeting of the minds is not served by the language, because we are concerned about reduced staffing created by the presence of a prisoner.

Therefore, can we modify the language to state: "Effective as of funding of Agreement, prisoner watch overtime to be called whenever there is a prisoner and staffing is at the minimum set by *the collective bargaining agreement or the Chief/designee at the beginning of the shift*. Prisoner watch overtime will last until staffing is no longer at the minimum or a prisoner is no longer present, whichever occurs sooner." (emphasis in original).

Joint Exhibit #8.

The Union's proposed amendment to the MOA was forwarded to Hartman. Hartman, in response, indicated that he was willing to accept the change, as the Union's position seemed reasonable to him. Town Exhibit #1.

The MOA was amended to reflect that change. Then, the amended MOA was signed by the parties (Joint Exhibit #1) and funded at Town Meeting.

On June 28, 2017 a Police Department memo issued, providing notice about prisoner watch overtime matters.

The notice, in part, stated:

-- Automatic filling of prisoner watch OT under the Chief's previous directive during the construction of the call center, in [sic] no longer in effect.

-- Please abide by the contractual obligation as worded in the Patrolmen's MOA as follows:

-- "Effective as of funding, prisoner watch overtime is to be called whenever there is a prisoner and staffing is at the contractual minimum. Prisoner watch overtime will last until staffing is no longer at minimum or a prisoner is no longer present, whichever occurs first." ...

Joint Exhibit #5.

The Union filed a grievance challenging the issued Notice and the Town's failure to acknowledge and follow the language of the amended MOA. Joint Exhibit #3. The grievance has been processed, without resolution, to

arbitration. In addition, both parties have filed comprehensive post-arbitration written submissions.

Contentions of the Parties

The Union asserts that this matter should be decided based upon the clear and unambiguous language of paragraph 6 of the amended MOA. Under that clear language there are two, and only two, conditions that must be met before the Town is obligated to provide prisoner watch overtime. First, there must be a prisoner; and, second, staffing must be at the minimum level set by the collective bargaining agreement or the Chief/designee at the beginning of the shift. Once those conditions have been established, the Town must call in an officer to work prisoner watch overtime. There is no ambiguity in this language. Moreover, the Town drafted this language and, pursuant to well-established rules of contract interpretation, any ambiguity in contract language is to be interpreted against the drafter of the language.

The bargaining history here does not support the Town's interpretation of the relevant language. There is no indication that the parties reached a mutual understanding that the relevant provision would only be applicable in situations when a prisoner goes to the hospital or a patrol officer is required to leave his/her street patrol as a result of the presence of a prisoner. None of the concerns that the Town now expresses are addressed, or even insinuated, in the drafted language. And, it was the Town that was in the best position to draft a provision expressing such concerns.

Further, there is no indication that either party ever stated that the application of the contested language is limited in the manner now claimed by the Town. When the actual proposals made by each party are compared, it is clear that the parties were not discussing the types of limitations on prisoner watch overtime that the Town now seeks to impose. Further, the Town's current interpretation was first expressed long after the MOA was executed.

The Town has violated the Agreement in multiple ways. First, it distributed a notice which contained the wrong contract language and then failed to correct that notice. Then, the Chief's interpretation -- that an on-duty supervisor merely has 'authorization' to call for overtime when staffing is at the minimum and a prisoner is being sent to the hospital -- is incorrect. The amended MOA, instead, obligates the Town to call for a prisoner watch when its described conditions are met. Finally, the further Town contention -- that prisoner watch overtime need only be called if a patrol officer is taken off the street due to the presence of a prisoner -- is contrary to the clear and unambiguous language of the MOA. The imposition of the additional limitations by the Town are not required by the relevant negotiated provision and their imposition is a violation of the Agreement.

As remedy, the negotiated Agreement should be enforced, the Town should be instructed to comply with the relevant MOA language, and the officers impacted by the Town's violation of the Agreement should be made whole.

* * *

The Town contends, at the outset, that this matter is not substantively arbitrable. The issue here concerns the circumstances under which an overtime assignment for the purpose of watching a prisoner must be called. It is, however, well-established that a police chief's right to assign officers to overtime is a non-delegable right that cannot be superseded by a collective bargaining agreement or delegated to an arbitrator. Here, the Chief has made the policy decision that if a desk officer is available to watch a prisoner, or if staffing for a given shift is above the applicable minimum that is followed for that shift, there is no need for an officer to be called in for an overtime prisoner watch. This approach relative to the deployment of services remains exclusively with the Police Chief and cannot be bargained away or delegated. As such, the grievance is not substantively arbitrable.

The Union failed to meet its burden of establishing a contract violation in the manner asserted in the grievance. The grievance, as filed, addressed the

failure of a Notice to include the language contained within the amended MOA. Nonetheless, notwithstanding the non-issuance of a revised memo, the police department has been applying the additional language in actual practice. Since the Union has failed to establish that the Town is disregarding the Department minimum language of the MOA in connection with prisoner watch, the Grievance should be denied.

Overall, the record evidence does not support the Union's interpretation of the MOA. The arbitrator's review here is not limited to the four corners of the MOA. By its very words, 'prisoner watch overtime' implies a scenario where there is a prisoner present and the circumstances are such that an officer is needed to be brought in to watch the prisoner. In other words, the agreement was identifying a particular set of circumstances under which the Town would be contractually committed to calling for an overtime. As the provision's title suggestion, a prisoner watch overtime only arises when there is an actual need for a prisoner to be watched. For each and every shift, there is a desk officer assigned whose job duties already

include watching prisoners that are present at the station.

The parties' bargaining history does not support the Union's interpretation of the MOA. When submitting its prisoner watch overtime counterproposal, the Town expressly stated that the Union's proposal was too broad. At that same time, the raised safety issues were noted. As a result, the Town counter proposed that when prisoner watch circumstances would otherwise necessitate an officer being pulled from the road, overtime would be called. The bargaining history clearly indicates that the parties agreed that Section 6 of the MOA was limited to those situations in which the presence of a prisoner was going to require that an officer be pulled road to watch a prisoner, when the Town was already at the minimum staffing level that was applicable to that shift.

Finally, the Union's interpretation would violate a fundamental tenet of contract interpretation in that it would produce absurd results. In its original proposal, the Union sought prisoner watch overtime when a prisoner

was being held, and the local district court was closed (e.g., nights, weekend, holidays). The Union, however, now argues that the amended MOA requires a prisoner watch to be called anytime a prisoner was at the station, and staffing was at the contractual or Departmental minimum. In other words, accepting the Union's contract interpretation would, in effect, result in the absurd finding that the Town agreed to a more expansive provision than initially proposed. For all of these reasons, the Town maintains that it has not violated the collective bargaining agreement, including the MOA.

Opinion

The Town asserts that the present matter is not substantively arbitrable, as it relates to a non-delegable right retained by the Chief to assign officers. I disagree. The parties, in their recent MOA, reached an agreement concerning prisoner watch overtime. Previously, the parties had agreed-upon minimum staffing levels per shift. The present agreement may be viewed in a similar vein, as it relies

on the contractual minimum staffing level (or the level established by the Department at the beginning of a shift) to trigger the calling of a police officer, on an overtime basis, to watch a prisoner. Thus, the instant grievance constitutes a challenge to the interpretation and application of the negotiated contract language relating to prisoner watch overtime. As a result, I determine that the matter is substantively arbitrable.

Well-established principles of contract interpretation are applicable, and dispositive, here. I determine that the prisoner watch overtime language in the MOA, as amended, is clear and unequivocal. The Town is obligated to provide prisoner watch overtime when there is a prisoner and when patrol officer staffing is at the minimum staffing level set by the collective bargaining agreement or by the Department at the beginning of the shift. The further pre-condition for prisoner watch overtime now cited by the Town -- namely, that prisoner watch overtime would be called when circumstances would otherwise require an officer to be pulled from the road -- is notably absent from the clear and plain language of the agreed-upon prisoner watch overtime provision.

As I have indicated, I find no ambiguity in the negotiated and agreed-upon prisoner watch overtime language. Even assuming, without deciding, that an ambiguity arguably exists, the Town's position is unavailing. It is a standard rule of contract interpretation that ambiguous language will be construed against the party who drafted it.

Here, that is the Town.²

Nor does the bargaining history convincingly support the arguments advanced by the Town at arbitration. Somewhat divergent testimony about pertinent bargaining session conversations were presented at arbitration. As a result, I have examined the relevant bargaining notes. Overall, I find no indication that the parties mutually understood and expressly agreed that prisoner watch overtime would be called in circumstances that would otherwise necessitate an officer being pulled from the road.

² Nor do I find that the Union's contract interpretation would produce absurd results, as the Town argues. While the Union's original proposal sought prisoner watch overtime during hours the local district court was closed, it also sought additional overtime opportunities when there was more than one prisoner and a prisoner was being transported to a medical facility. Thus, I am not persuaded that the amended MOA language necessarily represents a more expansive position than the Union initially proposed.

In conclusion, I determine that the Town has violated the governing MOA in the manner it has assigned officers to prisoner watch overtime. The amended MOA requires that when there is a prisoner and when patrol officer staffing level is at the contractual minimum level or at the level set by the Chief or her designee at the beginning of the shift, prisoner watch overtime will be called. As remedy, the Town shall re-issue the June 28, 2017 notice of prisoner overtime matters to reflect the language of the amended MOA; the Town shall comply with that negotiated prisoner watch overtime provision; and officers impacted by the Town's violation shall be made whole.

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AWARD

The Town violated the Collective Bargaining Agreement, including the Memorandum of Agreement, in the manner of assigning officers to prisoner watch overtime.

As Remedy, the Town shall:

- Reissue the June 28, 2017 Police Department notice of prisoner overtime matters to reflect the language of the amended MOA;
- Comply with the negotiated prisoner watch overtime provision; and,
- Make whole patrol officers impacted by the Town's prisoner watch overtime contract violation.

I will retain jurisdiction of this matter for 60 days, renewable upon request, for the sole purpose of resolving remedial disputes, if any.

/s/ Tammy Brynie
Tammy Brynie
Arbitrator
February 11, 2019