

**SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR & MANAGEMENT**

**BRYAN BRINK, JEFF DESCHEPPER,
DAVE DUNTEMAN, ERIC LEWIS,
JUSTIN OLSEN, THADDEUS
OPENHOWSKI, AL PHILLIPS, THOMAS
POLZIEN, and PETER ZIMBELMAN,
Petitioners/Grievants,**

HF Nos. 7G, 20010/11

DECISION

vs.

**CITY OF SIOUX FALLS,
Respondent/Employer.**

The Petitioners, members of the Sioux Falls Fraternal Order of Police Lodge #1 (FOP), filed with the Department of Labor and Regulation, pursuant to SDCL §§ 3-18-1.1 and 3-18-15.2, a Grievance Petition against Respondent, the City of Sioux Falls (City). A hearing on the above matter was conducted by the Department on March 24, 2011. Attorney Thomas K. Wilka represents FOP. Attorney Gail D. Eiesland represents City. Both parties have submitted post hearing briefs and the Department being advised fully, hereby makes this Decision.

FACTS

1. The City employs members of the FOP under a Collective Bargaining Agreement (CBA). The effective dates of the CBA pertinent to this grievance are from January 1, 2008 through December 31, 2010.
2. Article 21 of the CBA regarding Reserve Officers is as follows: "Whenever a reserve officer is allowed to work any assignment, vehicle, area, street, or guard duty with the department, the work will be performed under the direct supervision of a full-time employee of the Police Department, except in an emergency. In events where traffic or crowd control is needed, such as parades, there may be several reserve officers under the supervision of one or more full-time employees of the Police Department."
3. Article 35 of the CBA detailing Management Rights reads in part: "Except to the extent expressly modified by a specific provision of this Agreement, the City of Sioux Falls reserves and retains solely and exclusively all of its statutory and common law rights to manage the operation of the Police Department of the City of

Sioux Falls, South Dakota, as such rights existed prior to the execution of this Agreement with the Union, including, but not limited to the right to:

A. Operate and manage all manpower, facilities, and equipment.

C. Determine work assignments and establish, alter, or eliminate work schedules, locations or functions in accordance with municipal and departmental needs, and to contract or subcontract all or any of the functions of the Police Department that do not take work away from the bargaining unit.

H. Determine the utilization of technology and manpower and to modify organizational structures; to select, direct, and determine the number of personnel engaged in total functions or any particular part thereof.

I. Establish work schedules and perform any inherent managerial functions not specifically limited by this Agreement and to take such other measures as the City or Police administration may deem necessary for the orderly and efficient operation of the department of the Police for the City so long as it does not conflict with this Agreement.

4. During the summer of 2010, Sioux Falls had record rainfall amounts.
5. On August 4, 2010, City activated the Emergency Operations Center (EOC) to coordinate potential emergency or disaster situations caused by the rainfall. The EOC remained active and operational through August 9, 2010.
6. On August 4, 2010, a large section of the City sewer system collapsed due to a large rainfall event. The sewer system released raw sewage into Covell Lake, a small inland lake between Terrace Park and Veterans Park in Sioux Falls.
7. The period of time between August 4 and August 9 was a period of an "emergency" in Sioux Falls.
8. City officials continued to test the contaminant levels at Covell Lake. On Friday, August 6, City and EOC decided to shut down Covell Lake to the general public as contamination levels were very high and unsafe. Signs were posted at the lake to warn the public.
9. A large number of events were scheduled to be held at both Veterans Park and Terrace Park during the weekend of August 6 to 8. EOC wanted the City to have staff guarding the park to warn people not to swim or fish in the lake.
10. The Parks Department did not have any extra employees to guard the lake.
11. The EOC decided to request the City use Police Reserve Officers to keep people away from Covell Lake.

12. At no time did the Police Captain Richard (Skip) Miller ever contemplate calling in officers to work overtime to patrol Covell Lake. Captain Miller testified that if Reserve Officers could not have been used, then the regular officers were to make extra patrols in the area of Covell Lake.
13. Captain Miller sent the following e-mail (in pertinent part) to the four Lieutenants on Friday, August 6:

There have been some concerns about the sewage that washed into Covell Lake and Veterans Park. ... Because of the concerns we are going to have reserve officers assigned to keep people away from the water at both of these locations. They will be given a marked patrol vehicle and our red 4x4 ATV. They will be there from 0700-1500 and 1500-2200 hours on both Saturday and Sunday. During the hours the reserves are not there we need to make sure we have some routine patrols through the two parks to check on them. We also need to routinely check on Falls Park throughout the weekend. ... If we do not get all of the shifts covered by reserves it is important that we get a strong Police presence during these times at both Covell Lake and Veterans Park.
14. Eight reserve officers were used on August 7 and 8 to keep the public away from Covell Lake. Two reserve officers were on duty during each of the four shifts; from 7 am to 3 pm and from 3 pm to 10 pm.
15. The reserve officers were assigned and put under the supervision of the shift sergeant. The reserve officers were instructed about the information to give the public around Covell Lake and to contact the shift sergeant if any issues arose. The shift sergeant was instructed to assign vehicles to the Reserve Officers.
16. The reserve officers did not have on-site supervision by a police officer during the day, except to have detailed instructions from the captain and a phone number of the shift sergeant.
17. During special events, a number of reserve officers may be under the supervision of the same police officer who is not on-site with the reserve officer. Usually the reserve officers are assigned to crowd or traffic control or other non-enforcement type duties.
18. On August 7 and 8, the police shifts were below minimum staffing levels, as set out in the 2010 Shift Guidelines. The shift scheduling minimum is 17 on Saturday and 16 on Sunday.
19. The Shift Guidelines are guidelines that a shift supervisor follows when considering requests from officers for time off. The supervisor does not always

schedule the minimum number of officers on each shift for various reasons. Not having the minimum number of officers on each shift does not automatically require a "hire-back" situation where officers are called back for overtime duty.

20. Some of the police officers on shift on August 7 and 8 were not aware that the reserve officers were patrolling the area around Covell Lake and Veterans Park. The Lieutenants knew the Reserve Officers were patrolling Covell Lake at that time. The Shift Supervisor or Sergeant knew that the Reserve Officers were patrolling Covell Lake.

ANALYSIS

Petitioner has filed a grievance under SDCL §3-18-1.1, which reads:

The term "grievance" as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a "grievance" and is not subject to this section.

SDCL §3-18-1.1.

The FOP is of the opinion that because the number of police officers on duty on August 7 and 8, 2010 were less than the minimum set by the guidelines, that off-duty officers should have been called in to work overtime before reserve officers were assigned to patrol Covell Lake. FOP has brought this grievance petitioning that the City violated the terms of the CBA, specifically Section 21: Reserve Officers, and Section 35: Management's Rights. FOP also alleges that the 2010 Shift Guidelines regarding minimum staffing was also violated.

The 2010 Shift Guidelines set a minimum number of officers to be scheduled per shift. The evidence presented shows that the number is discretionary and is left in the hands of the shift supervisor. The minimum number is taken into consideration when setting a schedule and when allowing officers to schedule time off for vacation or sick leave. Failing to schedule the minimum number of officers does not require hire-backs or overtime for off-duty police officers.

Section 21 of the CBA regards Reserve Officers and is set out in the Facts above. Reserve officers are trained volunteers who help the regular police force at special events or in

emergency situations when there are not enough officers available to meet the required needs. The reserve officer usually works alongside a police officer in most situations. There are special cases when a number of reserve officers are supervised by only a couple of officers and are in contact by radio or telephone.

The patrol of Covell Lake in August 2010 was a special detail. Captain Miller was clear when he said that the City was not going to hire-back officers to patrol Covell Lake. This event was an “emergency”, in that this was an unforeseen event. If the volunteer reserve officers could not be used or found, Captain Miller’s e-mail to the Lieutenants ordered more patrols of the area by the regular officers on duty, and to give the Lake “special attention.”

Although the supervision was only by phone, it was direct supervision by the shift supervisor. The reserve officers had received detailed instructions from the Captain or the Lieutenants and they knew their job. The CBA does not define “direct supervision” and since this was not an assignment that would be given to a police officer, the Captain thought the supervision was sufficient. The shift supervisor assigned a patrol car and ATV to the reserve officers as instructed.

Section 35 of the CBA is the Management’s Rights section. There are 10 different subsections in Section 35. Sections A, C, H, and I are listed in the Facts above. Management’s Rights are broadly written. The City has the ability to determine work assignments, work schedules, manpower needs, organizational structures, and other managerial type functions not listed in the agreement. Despite the broad language, there are specified exceptions to the general rights. Two of those exceptions are that the Management cannot take work away from the bargaining unit and cannot make decisions that conflict with the CBA.

The Decision to use Reserve Forces by the City and the EOC, in an emergency situation, did not conflict with the CBA. The City was in the middle of a declared “emergency” as the EOC was activated to help with the needs due to flooding and an inundated sewer system. A large part of the sewer collapsed and the City learned that Covell Lake was severely contaminated on August 6. Instead of closing two major public parks in Sioux Falls, the City decided to utilize the volunteer reserve officers. As this was an emergency, the regular rules regarding the ratio of reserve officers to police officers do not apply, according to the CBA.

The FOP’s concern with the reserve officers wearing police uniforms, reserve officer badges, and carrying weapons without the ability to enforce the law, is understandable. The public may have reason to believe a reserve officer in uniform to be an on-duty police officer. This uniform issue, in and of itself, does not create a violation of the CBA or other policy of the police force.

The City did not take work away from the bargaining unit. Despite the City's ability to hire-back bargaining unit members to perform overtime work, that was not going to happen in this situation. No work was taken away from the FOP by engaging the Reserve Officers to guard Covell Lake. The members of the FOP would never have been asked by either the EOC or the City to guard Covell Lake full-time for eight-hour shifts. The evidence is clear that that was not even an option for Captain Miller or the EOC. At the most, the Captain had ordered extra patrols by the regular shifts if the volunteers were not available to help. The use of the reserve officers on August 7 and 8, 2010 is supported by the language of the CBA.

The evidence does not support a grievance by the FOP against City. City did not violate, misinterpret, or inequitably apply the CBA on August 7 and 8, 2010. FOP's petition is denied.

City shall submit Proposed Findings of Fact and Conclusions of Law and an Order, consistent with this Decision, within 10 days from the date of receipt of this Decision. FOP will then have 10 days to make written objections. The parties may stipulate to waiver of Findings of Fact and Conclusions of Law and if they do so, the parties will submit such Stipulation, along with an Order in accordance with this Decision.

Dated this 18th day of August, 2011.

Catherine Duenwald
Administrative Law Judge
Department of Labor & Regulation
Division of Labor & Management