

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 392
	:	No. 47803 MP-2628
THE CITY OF MILWAUKEE, A MUNICIPAL CORPORATION, and PHILIP ARREOLA, CHIEF OF POLICE OF THE CITY OF MILWAUKEE,	:	Decision No. 27348-A
	:	
Respondents.	:	
	:	

Appearances:

Adelman, Adelman & Murray, by Mr. Kenneth J. Murray, Esq., and Ms. Laurie A. Eggert, 1840 North Farwell Avenue, Milwaukee, Wisconsin, 53202, on behalf of the Complainant.

Mr. Grant F. Langley, Esq., City Attorney, by Mr. Thomas C. Goeldner, Assistant City Attorney, 200 East Wells Street, Room 800, Milwaukee, Wisconsin, 53202, on behalf of the Respondents.

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Milwaukee Police Association, herein "Association", filed a prohibited practices' complaint with the Wisconsin Employment Relations Commission, herein "Commission", on July 20, 1992, alleging that the City of Milwaukee, herein "City", and Chief of Police Philip Arreola had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, herein "MERA", by unlawfully refusing to bargain over creation of a new 10:00 a.m. - 6:00 p.m.

shift in the summer of 1992. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusion of Law, and Order as provided for in Sec. 111.07(5), Wis. Stats. The City filed its answer on August 26, 1992, and hearing was held in Milwaukee, Wisconsin on August 31, 1992. The parties thereafter filed post-hearing briefs which were received by July 23, 1993.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. The Association - a labor organization which maintains its principal place of business at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin - represents for collective bargaining purposes certain non-supervisory law enforcement police officers of the Milwaukee Police Department. At all times material herein, Bradley DeBraska has been its president.

2. The City - a municipal employer which maintains its principal place of business at 200 East Wells Street, Milwaukee, Wisconsin - operates a police department in Milwaukee, Wisconsin. At all times material herein, Philip Arreola has been Chief.

3. The Association and the City are privy to a collective bargaining agreement which provides in pertinent part in Article 5, entitled "Management Rights":

MANAGEMENT RIGHTS

1. The Association recognizes the right of the City, the Chief of Police and the Board of Fire and Police Commissioners to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Board of Fire and Police Commissioners and/or the Chief of Police to establish and maintain departmental rules and procedures for the administration of the Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.
2. The City has the exclusive right and authority to schedule overtime work as required in the manner most advantageous

to the City. The City shall have the sole right to authorize tradeoffs of work assignments.

3. It is understood by the parties that every incidental duty connected with operations enumerated in job descriptions is not always specifically described; nevertheless, it is intended that all

such duties shall be performed by the employee.

4. The City reserves the right to discipline or discharge for cause; except that discharge of a probationary employee in the Police Officer position classification shall not have to be for cause. The City reserves the right to layoff personnel of the department.
5. The City shall determine work schedules and establish methods and processes by which such work is performed.
6. The City shall have the right to transfer employees within the Police Department in a manner most advantageous to the City.
7. Except as otherwise specifically provided in this Agreement, the City, the Chief of Police and the Fire and Police Commission shall retain all rights and authority to which by law they are entitled.

. . .

4. Said agreement also provides in Article 14, entitled "Hours of Work":

1. The normal hours of work for employees covered by this Agreement shall consist of work shifts of eight (8) consecutive hours which in the aggregate results in an average normal work week of forty (40) hours.
2. Within the normal hours of work, any shift assignment of eight consecutive hours, which is of 10 consecutive eight-

hour work shifts in duration or longer, with each eight-hour work shift starting at the same hour or in the case of special assignments such as vice-squad with possible differing starting times for each eight-hour work shift shall be deemed to be a regularly scheduled eight-hour shift assignment; except that within the normal hours of work Christmas Store detail or Summerfest detail shall also constitute a regularly scheduled eight-hour shift assignment.

3. The regularly scheduled eight hour shift shall be established by the Chief of Police in accordance with the requirements set forth above.

5. The standard daytime shifts for many years have been either 7:30 a.m. - 3:30 p.m. or 8:00 a.m. - 4:00 p.m. The vast majority of officers work the 8:00 a.m. - 4:00 p.m., 4:00 p.m. - Midnight, and Midnight - 8:00 a.m. shifts. There have been exceptions over the years to the regularly-scheduled shifts - such as the vice squad, a SWAT-like team, special assignments, override cars, and a "power shift" which ran from 7:00 p.m. to 3:00 a.m. Such shifts usually have been provided for in various police department orders.

6. At various times over the years, Association and City representatives have met and discussed such matters before they were implemented. At no time in these discussions did City representatives ever expressly waive the City's contractual right to establish shifts.

7. Arbitrator Martin Wagner in 1973 issued a municipal interest-arbitration award wherein he determined, inter alia, that the City could change the regularly-scheduled shifts without offering any premium pay if it gave police officers seven days' advance notice.

8. Arbitrator Arthur A. Malinowsky subsequently issued a municipal interest-arbitration award wherein he determined, inter

alia, that the City no longer had to give advance notice before changing an officers' regularly-scheduled shift.

9. A grievance thereafter was filed asserting that the City had violated the contract by changing his 4:00 p.m. - 12:00 a.m. shift. Arbitrator Arlen Christenson subsequently sustained the grievance.

10. In 1981, the parties submitted their collective bargaining dispute to interest-arbitration before Arbitrator Arvid Anderson. Arbitrator Anderson subsequently determined that the City could change a regularly-scheduled shift without paying any penalty if the new shift lasted for ten (10) or more consecutive days and that premium pay would have to be paid if the new shift lasted nine or fewer consecutive days. His award was codified in subsequent collective bargaining agreements and it is now contained in Article 14, supra.

11. In 1992, the City and Chief Arreola were contemplating establishing an "Initiatives for the Summer" program which called for providing additional police manpower between the hours of 10:00 a.m. and 6:00 p.m. and the assignment of police officers to that shift. The City wanted to establish such a new shift because it believed that crime increases during the summer and because it wanted more officers on the street later in the day.

12. By letter dated May 29, 1992, to Chief Arreola, Association President DeBraska demanded on behalf of the Association "to negotiate work shifts other than those currently existing."

13. By letter dated June 3, 1992, Arreola informed DeBraska, "I will not accede to your demand for such negotiations, as none are called for" because the collective bargaining agreement between the parties "grants to the Chief the right to establish employee work schedules, and in particular, the right to establish and change employe's regularly-scheduled eight hour work shifts."

14. By letter dated June 8, 1992, to Chief Arreola, DeBraska again demanded to bargain over this issue.

15. By letter dated June 17, 1992, to DeBraska, Arreola again stated that the City would not bargain over this issue.

16. By letter dated July 2, 1992, Arreola informed DeBraska:

. . .As recently indicated to you by Inspector Thomas E. Harker, the shift changes will involve approximately ten 1- or 2-person squads on a rotating basis over the interim of the 1992 Summer Initiative period which runs through September 15, 1992 and is to involve all Districts. The regularly scheduled work shift of these squads will be changed from 8:00 A.M. -4:00 P.M. to 10:00 A.M. - 6:00 P.M. The affected members will work this new shift assignment for a period of at least 10 consecutive work shifts. . .

17. Effective July 2, 1992, the City and Chief Arreola implemented the new 10:00 a.m. - 6:00 p.m. shift referred to in Arreola's July 2, 1992, letter. The City initially asked for volunteers to man this shift, but not enough came forward. As a result, the City assigned about 13-15 police officers with the least seniority to the shift. The City did not pay any premium pay to those officers who worked ten or more consecutive days on the new shift; however, it did pay premium pay to those officers who worked nine or less consecutive days.

Upon the basis of the foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The City has not violated Sec. 111.70(3)(a)(4), or any other provision, of the Municipal Employment Relations Act in unilaterally establishing and implementing the 10:00 a.m. - 6:00 p.m. shift.

On the basis of the above Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

It is ordered that the instant Complaint be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 12th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 1/ appears on the next page.)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

THE CITY OF MILWAUKEE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Association primarily argues that the City unlawfully refused to bargain over creation of the 10:00 a.m. to 6:00 p.m. summer shift because "the definition of the starting and ending time of the day shift is a mandatory subject of bargaining"; because the parties since 1978 have defined the day shift in departmental orders "and have bargained any proposed changes prior to implementation"; and because the Association has never contractually waived "its right to bargain changes in the starting time for the day shift." As a remedy, the Association requests that the City be enjoined from making such changes in the day shift.

The City, in turn, maintains that the complaint should be dismissed because the "clear and unambiguous" contract language in Articles 5 and 14 gives it the right to establish work schedules and regularly-scheduled eight hour shifts and that, moreover, it has never waived its contractual right to unilaterally establish such shifts.

DISCUSSION

The City is right; the Association is wrong.

Nothing could be clearer than the contract language found in Article 5 which expressly reserves the City's right to "determine work schedules and establish methods and procedures by which such work is to be performed." (Emphasis added).

Article 14, Section 3, also clearly states that: "The regularly scheduled eight hour shift shall be established by the Chief of Police in accordance with the requirements set forth above." (Emphasis added).

In the absence of other contract language specifying particular shift hours, this language must be given its plain and

ordinary meaning - i.e., that the Chief retained the right to create the 10:00 a.m. - 6:00 p.m. eight-hour shift which is the subject of this controversy, subject only to the premium-paying requirements of Article 14, Section 2, which deal with whether such a shift lasts ten or more consecutive days. Here, the City has clearly complied with that requirement because it has paid premium pay to those officers who worked the 10:00 a.m to 6:00 p.m. shift for nine or less consecutive days.

The only possible basis for finding otherwise is the Association's claim that the City has waived its rights by negotiating with the Association in the past over prior shift changes which it points out constitute a mandatory subject of bargaining. But even assuming arguendo that it is proper to consider parol evidence in the face of such clear and unambiguous contract language, there is no merit to this claim because a waiver, by definition, means the voluntary relinquishment of a known right. Here, there is no proof that any such voluntary relinquishment occurred, as City representatives viewed any such discussions to be merely informational in nature. In the absence of any such waiver, the contractual language in Articles 5 and 14, therefore controls.

In light of the above, the complaint therefore must be dismissed in its entirety.

Dated at Madison, Wisconsin this 12th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner