STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OSHKOSH PROFESSIONAL POLICE OFFICERS' ASSOCIATION, Complainant,

vs.

DAVID W. ERICKSON and CITY OF OSHKOSH, Respondents.

Case 308
No. 57964
MP-3552

Decision No. 29791-A

Appearances:

Frederick J. Mohr S.C., Attorney at Law, by **Attorney Frederick J. Mohr**, 414 East Walnut Street, Suite 261, Green Bay, Wisconsin 54305-1015, on behalf of Complainant Oshkosh Professional Police Officers' Association.

Davis & Kuelthau, S.C., by **Mr. William G. Bracken**, Employment Relations Services Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of Respondents David W. Erickson and City of Oshkosh.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Oshkosh Professional Police Officers' Association, on September 10, 1999, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that David W. Erickson and the City of Oshkosh had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats. On October 19, 1999, David W. Erickson and the City of Oshkosh filed an answer and also filed a cross-complaint of prohibited practices with the Commission alleging that the City of Oshkosh Professional Police Officers' Association had committed prohibited practices within the meaning of Secs. 111.70(3)(b), 1, 2 and 4, and Sec. 111.70(3)(c), Stats. The Commission ordered the

matters consolidated for purposes of hearing and appointed David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in the matters. Hearing was held in the matters before the Examiner on February 8 and May 24, 2000 in Oshkosh, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs by July 31, 2000. Having examined the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant Oshkosh Professional Police Officers' Association, hereinafter the Association, is a labor organization with its principal offices located in c/o Frederick J. Mohr, S.C., 414 East Walnut Street, Suite 261, Green Bay, Wisconsin 54305-1015. At all times material herein, the Association has been the recognized exclusive collective bargaining representative of all non-supervisory, non-confidential, sworn officers employed by the City of Oshkosh Police Department.

2. The Respondent City of Oshkosh, hereinafter the City, is a municipal employer with its principal offices located at 215 Church Avenue, Oshkosh, Wisconsin 54901. Respondent David W. Erickson has, at all times material herein, held the position of Chief of the City of Oshkosh Police Department, hereinafter the Department.

3. The Association and the City have been parties to a collective bargaining agreement at least since the 1970's, and are currently party to a collective bargaining agreement effective the first pay period of 1998 through December 31, 2000. Said Agreement contains the following provisions, in relevant part:

ARTICLE I

MANAGEMENT RIGHTS

> Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

ARTICLE II

WORK WEEK

The normal work day shall consist of eight (8) hours, and consist of the following schedule:

Five (5) days on duty and two (2) days off and

Five (5) days on duty with three (3) days off.

Officers shall be paid in accordance with the rates listed in Schedule A. These rates include a ten dollar ($10.00) Bi-Weekly briefing pay allowance. Those officers working the 5-2, 5-2 schedule shall be provided with 16 additional days to be taken as time off during the calendar year. Any days not taken off by December 31st shall be forfeited by the employee.

. . .

ARTICLE IV

COMPENSATORY TIME

Work done in excess of the normally scheduled work day or work week shall be compensated at the rate of time and one-half in either compensatory time or cash as the officer may choose. All compensatory time will be recorded and may be used during the month in which it accrues subject to the approval of the department head. Employees may maintain a compensatory time balance of no more than one hundred sixty (160) hours. Unused balances of compensatory time or time accumulated in excess of one hundred sixty (160) hours shall be paid on the first pay period following the quarter in which it was accrued at the effective rate of pay when such time was earned. Officers shall not be allowed to carry over more than eighty (80) hours from year to year. The formula for computing the hourly rate shall be: Bi-weekly rate + educational divided by 77.2 hours.

. . .

ARTICLE X

PREVIOUS BENEFITS

The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours and conditions of employment that are mandatory subjects of bargaining not specifically referred to or altered by this Agreement.

. . .

ARTICLE XIII

RULES & EVALUATION REPORTS

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective date.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

. . .

In addition, the parties' current Agreement contains a provision for final and binding arbitration of grievances.

4. At least since the early 1980's, there has been a practice of utilizing "payback days" in scheduling voluntary training an officer wishes to attend and which is scheduled to take place on what otherwise would have been the officer's day off and more than four hours in duration. The practice consists of an officer going to his/her shift commander and expressing an interest in attending training and if that training is scheduled to take place on what would otherwise be the officer's off day(s), the officer and shift commander attempt to work out a mutually-agreeable rescheduling of the off day(s) within 28 days of that day. The Association is not consulted or advised in this regard. In instances where the officer wishes to reschedule the off day to a particular date which would conflict with Department staffing

needs, the officer must either choose a different day where there is no conflict, or forget about the training, unless the Department decides the training is of sufficient value to the officer and the Department to incur the overtime cost. The latter rarely occurs and is at management's discretion. When an officer's off day(s) have been rescheduled and he/she attends the training on what otherwise would have been the officer's day(s) off, the officer is paid his/her regular pay on a straight-time basis and the payback days are on a straight-time basis as well.

The Department's "Policies and Procedures" manual contains the following policies issued in January of 1992 regarding training, in relevant part:

> 125.03 DEFINITIONS
>
> Mandatory Training –Training an employee is required to attend.
> Voluntary Training – Training that the employee has the option of attending.
>
> . . .
>
> 125.06 TRAVEL AND COMPENSATION
>
> Mandatory Training
>
> Mandatory training on off-duty days shall be compensated as outlined in the labor contract, including time spent in transit between the safety building and the training site. Officers attending mandatory training on normal work days will have their hours changed, with proper notice, to conform to the training schedule, and will be compensated for time spent in excess of the normal work day, including travel time. Travel time will be included in any business time given and not be paid as overtime. If business is concluded and employees are able to return to the safety building before an eight hour shift is completed, they will contact the shift commander for duties to finish a full shift.
>
> Voluntary Training
>
> Employees attending voluntary training will have work schedules adjusted to conform to the training dates. Time spent in excess of normal work days, including travel time is not compensated.

Business Time

Employees scheduled to attend any business or training session of four or more hours shall not work during the eight hours preceding the scheduled departure. For mandatory training or when off day schedules cannot be adjusted to the shift before the school, the employee will be relieved from duty on business time for the portion of a scheduled shift falling within 8 hours before the time the employee would depart from the Department for the training. Additional arrange-ments for business travel time may be made by the training section.

. . .

5. The Association has not made any proposals in bargaining in at least the past nine years to alter the practice of scheduling payback days for voluntary training occurring on an officer's off days. Association officials, including its Board members and President, have utilized the practice in the past, and were aware of, and acquiesced in, the practice.

6. On or about June 1, 1999, Chief Erickson received the following memorandum from the Association:

TO: Chief Erickson and His Staff

FROM: All OPPA Board Members

REF: Payback Days

The OPPA Board is requesting that days off commonly referred to as payback days, cease as of midnight June 30th, 1999. It is our understanding that payback days may be a violation of Federal Labor Laws.

A more in depth letter from OPPA attorney Fred Mohr will follow. If after midnight on 6-30-99 any OPPA members are granted payback days the OPPA Board will have no other recourse than to grieve the matter.

We have decided to allow the Department to grant payback days until the end of June to make it fair to all involved.

Thank you

OPPA Board Members

Steve Kaiser /s/
Steve Kaiser

Mike Novotny

Tom Lichtfuss

Gary Sagmeister

Cyndi Thaldorf

Brian Schuldes

The Association's legal counsel subsequently further explained the Association's position by a letter of June 3, 1999 to Chief Erickson, including reiterating the Association's position that the practice of utilizing "payback days" for training on off days violates the parties' labor agreement and that the Association would no longer recognize the practice after June 30, 1999. Neither the Association's memorandum of June 1, 1999, nor its legal counsel's letter of June 3, 1999, constituted a demand to bargain.

7. Despite the Association's continued objection, and at Chief Erickson's direction, the Department has continued the practice of scheduling payback days with individual officers for voluntary training that is scheduled to take place on what would otherwise be the requesting officer's off days, instead of giving the officer the option of receiving overtime pay or compensatory time off at the rate of time and one-half for attending such training.

8. The parties' Collective Bargaining Agreement does not specifically refer to payback days or their use, and with the exception of a Memorandum of Understanding regarding mandatory in-service training, it is silent as to the scheduling of, and compensation for, attending mandatory or voluntary training. The practice of scheduling payback days with regard to voluntary training occurring on what would have been an officer's off day(s) is a benefit, policy and/or procedure related to wages, hours and conditions of employment and is a mandatory subject of bargaining within the meaning of Article X of the parties' Agreement.

9. By announcing that the Department would continue the practice of scheduling payback days for voluntary training that fell on what would have been an officer's off day(s), and continuing said practice after being notified that the Association objected to its continuation, Chief Erickson and the City did not violate the parties' Collective Bargaining

Agreement, did not engage in individual bargaining with the officers who requested to attend voluntary training on their off day(s), and said action did not have a reasonable tendency to coerce or intimidate officers in the exercise of their Sec. 2 rights under MERA.

10. Chief Erickson and the City had a valid business reason for refusing to approve voluntary training on what would otherwise be an officer's off day(s) in instances where the requesting officer requested that he/she receive overtime pay or compensatory time at the rate of time and one-half for attending such training rather than scheduling a payback day, due to the fiscal impact that granting such requests would have on the Department's training budget. Chief Erickson's conversations with individual officers wherein he stated that training would be cut if the Association prevailed in its litigation regarding payback days did not contain a threat of reprisal and did not have a reasonable tendency to coerce or intimidate the officers in the exercise of their rights under MERA, as it merely stated the likely practical result and was not otherwise linked to the exercise of such rights.

11. Refusing to approve voluntary training on what would otherwise be an officer's off day(s) in instances where the requesting officer requested that he/she receive overtime pay or compensatory time at the rate of time and one-half for attending such training, rather than scheduling a payback day, was consistent with existing practice, and did not have a reasonable tendency to interfere with, restrain or coerce such employees in the exercise of their Sec. 2 rights under MERA

12. The parties stipulated at hearing that the issue of the alleged contract violation by the City's continuation of the practice of utilizing payback days where an officer requests to attend voluntary training on what would otherwise be his/her off day(s) would be addressed by the Examiner in the decision in this case.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The matter of the use and scheduling of payback days when voluntary training falls on what would have been an officer's off day(s) is primarily related to wages, hours and conditions of employment and is a mandatory subject of bargaining.

2. Article X, Previous Benefits, of the current Collective Bargaining Agreement between the Oshkosh Professional Police Officers' Association and the City of Oshkosh requires that the City continue the existing practice regarding the scheduling of payback days when an officer requests to attend voluntary training on what would have been his/her off day(s) at least during the term of said Collective Bargaining Agreement.

3. Article IV of the parties' Agreement is ambiguous as to whether adjusting an officer's schedule to accommodate voluntary training on what would otherwise be the officer's off day(s) creates an overtime situation of "work done in excess of the normal. . .work week", and the parties' existing practice is binding in that regard.

4. Respondents City of Oshkosh and Chief David Erickson, their officers and agents, did not directly or derivatively interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2), Stats., by refusing to approve officers' requests to attend voluntary training on what would otherwise have been their off day(s) in instances where the officers requested to receive compensatory time or overtime pay at the rate of time and one-half for such attendance, rather than schedule a payback day, or by informing individual officers that if the Association prevailed in its litigation to end the practice that the amount of training available to officers would be cut.

4. Respondent City of Oshkosh and Chief David Erickson, their officers and agents, did not violate Sec. 111.70(3)(a)3, Stats., by continuing the practice regarding the scheduling of payback days when an officer requests to attend voluntary training on what would have been his/her off day(s), or by refusing to approve such requests of officers who requested to receive overtime pay or compensatory time off at the rate of time and one-half for attending voluntary training on what would have been their off days.

5. Respondents City of Oshkosh and Chief David Erickson, their officers and agents, did not refuse to bargain collectively within the meaning of Sec. 111.70(3)(a)4, Stats., by continuing the practice regarding the use and scheduling of payback days when officers request to attend voluntary training on what would have been their off day(s), rather than giving them the option of receiving overtime or compensatory time at the rate of time and one-half, there being no duty to bargain in that regard during the term of the parties' Collective Bargaining Agreement.

6. Respondents City of Oshkosh and Chief David Erickson, their officers and agents, did not violate the terms of the parties' existing Collective Bargaining Agreement in violation of Sec. 111.70(3)(a)5, Stats., by continuing the practice regarding the use and scheduling of payback days when officers request to attend voluntary training on what would have been their off day(s), rather than giving them the option of receiving overtime or compensatory time off at the rate of time and one-half for such attendance, after being notified that the Association objected to the practice.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint of prohibited practices filed in this matter is dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

CITY OF OSHKOSH

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Association filed a complaint of prohibited practices wherein it alleged that the City and Chief Erickson violated, and are violating, Secs. 111.70(3)(a)1, 2, 3, 4 and 5, Stats., by refusing to end the practice of scheduling "payback days" where an officer requests to attend voluntary training on what would otherwise have been his/her off day(s), rather than giving the officers the option of receiving compensatory time off or paying overtime at the rate of time and one-half for such attendance, by refusing to approve requests for voluntary training on an officer's off day(s) where the officer requested the option of receiving compensatory time off or overtime pay at time and one-half, and by announcing that the practice regarding payback days would continue, all of which occurred after the Association had notified the City and the Chief that it objected to continuation of the practice, and by advising employees that the Department's training would be cut if the Association prevailed in its litigation.

The City filed an answer wherein it admitted that the practice regarding payback days was continued after it was placed on notice of the Association's objection, admitted that it had refused requests to attend voluntary training on what would otherwise have been the officer's day(s) off where the officer requested that he/she receive compensatory time off or overtime pay at the rate of time and one-half, and admitted that the Chief had informed personnel that the practice would continue. The City denied that its actions had violated the Municipal Employment Relations Act (MERA) and also filed a cross-complaint alleging that the Association violated MERA by failing to respond to the City's request for information of specific incidents regarding the Association's allegations that the City was violating the Fair Labor Standards Act, by posting the names of officers who continued to utilize the practice of scheduling payback days for voluntary training, by advising officers not to utilize the practice and by filing a complaint and grievance and related actions against the City and Chief Erickson for continuing what constitutes a binding past practice, the Association having known, or should have known, that its allegations were without merit. A separate decision will be issued in the City's cross-complaint.

Association

The Association asserts that by continuing the practice of payback days after the Association notified the City that it objected to continuation of the practice, the City violated Sections 111.70(3)(a)4, 5 and 1, Stats. It is a prohibited practice for a municipal employer to negotiate directly with employees. The practice regarding payback days directly affects compensation and hours of work, i.e., mandatory subjects of bargaining. The parties' Agreement sets strict parameters on an officer's hours of work and compensation beyond the

normal hours. For voluntary training, officers who receive training outside the normal work week are not being paid according to the Agreement and instead are being required to take a "payback day". This violates both the Hours clause and the Compensatory Time clause of the Agreement.

The Agreement also outlines a specific 5-2, 5-3 work week for officers. The Chief testified there is nothing in writing between the parties which serves as an agreement to alter the normal work week in order to accommodate payback days. By definition, an officer assigned to training outside the normal work week is working overtime, however, they are not being given the option of taking these overtime hours as pay or as compensatory time and are instead required to take a payback day at straight time for the actual day of training. While Policy 125 authorizes management to alter work schedules, it does not address the compensation to be received by officers for working beyond their normal work week. The clear and unambiguous language of the Agreement requires that officers be compensated at time and one-half for such training days and that they be given the option of taking the compensation as pay or compensatory time off. While hours and compensation are mandatory subjects of bargaining, the City is individually bargaining with officers when they request training days. While the Agreement mandates that officers be given the option of selecting pay or compensatory time off, the Chief acknowledged that they are not given that option of receiving pay for the day. If an officer does attempt to exercise the option under the Agreement and requests pay, he is not allowed to go to training. That refusal to grant the pay if the officer so requests, constitutes coercion and intimidation.

Although the City argues that the payback day procedure is a long-standing practice, once the Association put the City on notice that the practice must cease, the continuation of the practice was no longer valid. It is a well-established principle that a contrary past practice will not supersede clear and unambiguous contract language and is irrelevant in interpreting the agreement. Elkouri and Elkouri, *How Arbitration Works*, (4th Edition, page 454). SAUK COUNTY V. WERC, 158 WIS. 2D 35, 42, 461 N.W. 2d 788, 790 (Ct.App. 1990). Here, the City is violating the clear and unambiguous language of the Agreement, as well as being guilty of individual bargaining with the officers.

Through the actions of the shift supervisors, individual officers are intimidated and threatened in their attempt to exercise their guaranteed rights. The City acknowledges that an officer who attempts to enforce his contractual right to demand pay for training days is rebuffed and denied the opportunity to train. This can only have a chilling effect on the individuals it affects and both directly and derivatively violates Sec. 111.70(3)(a)1, Stats. Further, Chief Erickson is directly guilty of interfering with and restraining and coercing employees. He acknowledged that he had spoken to individual members of the Association

and told them that if this prohibited practice and accompanying grievance were successfully pursued, training would be cut. It is only reasonable to assume that such statements by the Chief to individual officers would have a "tendency to interfere with the employee's right to exercise MERA rights." CEDAR GROVE-BELGIUM EDUCATION ASSOCIATION, DEC. NO. 25849-A (Burns, 12/89).

The City has also violated Sec. 111.70(3)(a)4, Stats., by refusing to bargain. A municipal employer has the duty to bargain collectively with a representative of its employees with respect to mandatory subjects of bargaining that arise during the term of an existing agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakenly waived. RACINE COUNTY, DEC. NO. 26288-A (Shaw, 1/92). The Chief testified that there was no reference in the Agreement to payback days and that the only reference to payback days in the Policy and Procedure Manual was contained in Policy 125. Policy 125 does not address the amount of compensation an officer is to receive for a payback day. Reliance must instead be on the contractual provision involving work outside of a normal work schedule. While the City denies that provision applies, the Association put the Chief on notice that the payback day practice must cease in that the Association no longer recognized its unilateral implementation. At a minimum, this served as a notice to bargain. Instead of bargaining compensation for payback days, the Chief continued the practice, and by continuing the unilateral implementation of payback days for training days, violated MERA. While the Association has attempted to negotiate compensation for training days for years, and has made several attempts to negotiate a practice, management has refused to do so.

The Association also asserts that the City has violated the provision of the Agreement that clearly and unambiguously requires the City to pay time and one-half for "work done in excess of the normally scheduled workday or workweek," and also that it be paid "in either compensatory time or cash as the officer may choose." The Chief acknowledged that the language of the Agreement setting forth the work week is not ambiguous, and the shift commanders were unanimous in their understanding of what constituted a normal work week. Although the contract language is clear and unambiguous, the City has not followed the language. Its excuse for doing so has been the past practice. Past practice is irrelevant if contract language is clear and unambiguous and the Chief could not explain what ambiguity exists in the actual language of the Agreement. There is no other agreement outside the contract which addresses pay for training days. While Policy 125 addresses compensation for mandatory training on off-duty days, it makes no other reference regarding compensation to be received for training. There being no agreement between the parties authorizing the City to compensate officers at straight time for training days, and the only agreement addressing the matter being the specific contract language which the City has continued to violate, by refusing to compensate officers under the term of the Agreement for training days, the City is in violation of Sec. 111.70(3)(a)5, Stats.

In its reply brief, the Association reasserts that the law is clear that because the language of the Agreement is plain and unambiguous, the parties' past practices are immaterial. The City ignores the case law, and instead relies on cases and arbitration awards over 50 years old to support its position. Contrary to the City's assertion that the contractual language defining a work week is ambiguous, every witness who testified admitted there is no ambiguity in the language. The exceptions to the 5-2, 5-3 work schedule cited by the City do not serve to create an ambiguity. The exception for military leave is required under federal law. The exception as to "comp switches" does not have specific contract language, but is a practice and exception that was negotiated and agreed to by the parties. Further, comp switches are initiated by and for the benefit of individual officers and, unlike payback days, there is no supervisory involvement determining who participates and on what days switches are made. As to the claim that the City has the right under Management Rights to change an officer's work schedule, management's rights regarding scheduling must be exercised within the confines of the contractual language or other policies and procedures agreed to by the parties. Thus, while management has the right to change an officer's work schedule to accommodate voluntary training, the clear and unambiguous language of the Agreement requires that officers be paid time and one-half when such changes are made. It also requires that the employee be able to exercise the option of receiving the compensation in the form of pay or compensatory time.

The Association concludes that the pivotal issue in the dispute is whether the clear and unambiguous language of the Agreement prevails over an existing practice. The law in Wisconsin is clear contract language supersedes a contrary practice. The language of the Agreement is clear, mandatory and there are no exceptions. The City has failed to comply with the clear language and has continued the practice after receiving notice from the Association of its intent to enforce the contract language. The City has compounded that violation by continuing to individually bargain with Association members, and has further threatened individual members that if they prevailed in the exercise of their right to enforce the contract language, future training would be greatly curtailed.

City

The City asserts it has conclusively proved that there is a binding past practice of adjusting the work schedules of employees in order to accommodate their requests for voluntary training. Witnesses testified that the practice goes back to the 1970's. Wilkinson, who was at one time the Association President, testified that the practice existed at that time and was the same as exists at the current time, and was never contested by the Association. Thus, proving that the Association has been aware of the practice as it exists and has accepted it. Witnesses were consistent in defining the term "payback days", as well as in explaining the procedure by which employees avail themselves to obtain voluntary training. Training requests are typically known far in advance, and the shift commander and employee mutually

agree on the rescheduling of the "payback day". If an employee is unwilling to accept the concept of "payback days", their training request is denied. All of the witnesses testified that the Association, as well as all of the officers, knew and understood the practice.

Also, Department Policy 125.06 states, "Employees attending voluntary training will have work schedules adjusted to conform to the training dates." That has occurred for the past 20 years. Thus, the altering of an employee's work schedule is a well-established and accepted practice that has existed between the parties and is even referred to in Department policy. It is also significant to note that the practice developed under the existing contractual language in Articles II and IV in the Agreement, the first sentences of those Articles having remained the same since 1972.

The City asserts that it did not violate Sec. 111.70(3)(a)1, Stats., when it adjusted the work schedule of employees in order to accommodate their training requests. The evidence shows the City is doing nothing more than continuing the practice that has existed in the Department for the past 20 years.

The City further asserts that it was required to maintain the *status quo* regarding adjusting the work schedules in order to accommodate their requests for training pursuant to Articles X and XIII of the Agreement. Article X states, "The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours and conditions of employment that are mandatory subjects of bargaining not specifically referred to or altered by this Agreement." Thus, Article X requires the City to maintain the benefit of allowing employees to attend training, the policy of shifting days within the employee's work schedule to accommodate their training request, and the procedure for altering the employee's work schedule via discussions between the employee and his/her supervisor.

Article XIII provides for the adoption and publishing of rules, regulations, policies, etc., as well as a procedure for notifying the Association and allowing it to challenge the rule via the grievance procedure. Policy 125.06 was promulgated pursuant to Article XIII and the Association submitted no evidence to show it had objected to the policy when it was originally implemented. Thus, the City was maintaining the *status quo* as required by the Policy, and did not commit a prohibited practice.

The City also asserts that it did not individually bargain with employees, but merely exercised its rights to modify an employee's work schedule under the practice. There has been no "negotiation" going on in the collective bargaining sense, rather, the employee and the supervisor are merely altering the work schedule, as is done in many other situations without the Association being involved. A payback day is the rescheduling of an off day because an

officer wants to work that off day for a variety of reasons. While the dominant reason for use of payback days is to attend voluntary training sessions, there are also other reasons such as military training, special events and participation in assessment centers. Chief Erickson testified that if an officer wants off, or wants their schedule changed, they approach their shift commander with the proposed change and the shift commander will look at the schedule to determine if staffing concerns or other issues permit the requested change and if so, it is rescheduled. Payback days are scheduled just as any of these other changes are scheduled and the Association is not notified, just as they are not notified in the other instances. Further, under Article I, Management Rights, the City retains the right to schedule employees, and there is no provision in the Agreement that prohibits the City from doing so.

The City contends that there has been no evidence presented showing that its conduct contained either a threat of reprisal or a promise of benefit which interfered with, restrained, or coerced employees in the exercise of their Section 2 rights. It is unlikely that the decision to alter employees' work schedules to accommodate their training request interfered with their Section 2 rights under MERA, as it has been standard operating procedure for over 20 years and there has been no sudden decision on the part of the City to institute a change in the method.

The Association's case rests on its belief that the City is violating the parties' Agreement by continuing the practice after the Association placed the City on notice that it wanted the practice ended and claimed that the City was "bargaining" with its employees when it continued the practice. The Association's position would be correct if it had received a favorable grievance arbitration award. Where, as here, the City disagrees with the Association's interpretation, it is only obligated to change its ways after an arbitrator has so ruled. Until the dispute is resolved, the City is under no obligation to stop the practice or change the *status quo* during the term of the Agreement.

The City asserts that it has valid business reasons to deny requests for training if an employee is unwilling to alter his/her work schedule. The past practice has been shown to be that if on a rare occasion an employee requests payment at time and one-half for engaging in training on their off day, the City would deny the request for training. This denial was not retaliatory, nor did it contain a threat of reprisal, it is simply due to the limited resources the City has to accomplish training. The Chief testified that if the City had to pay time and one-half for voluntary training, this would have a major impact upon the Department's budget priorities. It is only because the employee's work schedule can be altered that the City can afford to grant the request for training. Given the City's valid business reasons for its actions, the denial of a request for voluntary training on an employee's off day at the rate of time and one-half pay is not a prohibited practice.

With regard to the alleged violation of Section 111.70(3)(a)2, Stats., the Association has presented no evidence to prove a violation in this regard, and the allegation should be deemed to have been dropped. BROWN COUNTY SHERIFF - TRAFFIC DEPARTMENT LABOR ASSOCIATION, DEC. NO. 17258-A (Houlihan, 8/80).

Next, the City asserts that it did not violate Sec. 111.70(3)(a)3, Stats., when it adjusted the work schedules of employees in order to accommodate their requests for training. The Association has the burden of showing that all the required elements are present: protected activity, employer knowledge of protected activity, employer hostility toward protected activity, and employer's decision being derived in part from such hostility, to establish a violation. The City was merely continuing the *status quo* with regard to the practice concerning altering employee work schedules to facilitate training requests made by employees. The Association now seeks to change that practice. Until the merits of the Association's allegation have been decided, the City has every right to continue to operate as it has for the past 20 years. Further, the Association has failed to prove that either the City or Chief Erickson, or any other member of management of the City acted with any anti-union animus in scheduling payback days. Even Association President Kaiser admitted the practice has been that unless there is a schedule change for payback days, employees would not be allowed to go to the training. Kaiser could not give any details regarding his belief that some people were paid time and one-half to go to voluntary training, and admitted that such cases " . . . would be a small proportion" of the total. Kaiser also admitted that shift commanders "generally speaking" try to reach consensus with employees in terms of when the payback day will be scheduled. Since the Association failed to present any evidence to show that the City acted with hostility toward the Association, and because the only evidence in the record proves that the practice has existed for 20 years, the elements necessary to establish a violation of (3)(a)3 have not been proved.

The City denies that it has violated Sec. 111.70(3)(a)4, Stats. by adjusting the work schedules of employees in order to accommodate their requests for training. The Association has not produced any evidence showing that the City has refused to bargain or even that the Association has demanded to negotiate. In fact, the parties are working within the term of the existing collective bargaining agreement. If the Association wants to change the practice that has been accepted by the parties, it has an obligation to pursue it at the bargaining table, and because it has not done so, the Association has waived its right to bargain on the issue during the term of the Agreement. While apparently the Association believes the City is "bargaining" with individual employees, for reasons explained above, the City has shown that it is merely continuing the *status quo*.

The City asserts that it has not violated Sec. 111.70(3)(a)5, Stats., by adjusting the work schedules of employees in order to accommodate their request for training. While the Commission generally refuses to assert jurisdiction over an alleged violation of a contract

where an agreement provides for final and binding arbitration, and the employer has not attempted to avoid the procedure, in this case, the parties have agreed that the Examiner will address the merits of whether the parties' Agreement was violated.

As to the Agreement itself, Article I, Management Rights, gives the City the inherent right to schedule and assign employees to a particular shift on a particular day. Article II, Work Week, requires that regular patrol officers normally be assigned a work day of eight hours under a 5-2, 5-3 work schedule, but expressly allows certain officers to work a 5-2, 5-2 schedule, with the proviso that an additional 16 days may be taken off during the calendar year. Employee work schedules are altered for a variety of reasons including vacation, compensatory time, emergency leave, funeral leave, sick leave, birth of a child, as well as training, special details, and comp time switches, etc. Exceptions to the 5-2, 5-3 work schedule are inherent in the operation of the Department, and training has been recognized by both parties as an exception to the 5-2, 5-3 work schedule.

Also, Article II and Article IV, Compensatory Time, of the Agreement are ambiguous. While Article II defines the normal work day and lists the 5-2, 5-3 schedule, Article IV references the "normally scheduled work day or work week". The "normally scheduled work week" referenced in Article IV may be different than the work schedule referenced in Article II. The 5-2, 5-3 work schedule in Article II is only a general standard for scheduling a regular officer. Some officers work a 5-2, 5-2 schedule and other exceptions have been granted as noted previously. The phrase "normally scheduled" in Article IV modifies the 5-2, 5-3 general work schedule referenced in Article II. The "schedule" referred to in Article IV reflects the most current and up-to-date information from which the City is assigning employees to a particular schedule. In the case of "payback days", once an employee's 5-2, 5-3 schedule is modified, the new, revised schedule becomes the "normally scheduled work week" for that individual. As Article IV is more specific, it controls and modifies the more general statement of "schedule" in Article II.

Also, as the City has the authority under Article I, Management Rights, and Policy 125.06 to adjust an employee's work schedule to accommodate training, the specific reference to adjusting work schedules in Policy 125.06 means that the employee's 5-2, 5-3 generic work schedule, as modified through the assignment process, is now the normally scheduled work week referred to in Article IV.

Use of the word "normal" in Articles II and IV implies that there can be an "abnormal" or "unique" situation, and also means the parties have agreed that there could be exceptions to the traditional and common officers' regular or routine work schedule.

The ability for an employee to engage in voluntary training is a benefit and also a mandatory subject of bargaining. It is clear from the language of Article X of the Agreement, that the City is obligated to maintain in substantially the same manner, the policy and procedure relating to payback days in allowing employees to pursue voluntary training.

Further, all of the witnesses testified that the concept of payback days is not specified in the Agreement. Arbitrators have turned to past practice when the contract is ambiguous and/or silent to establish a binding working condition. In order to uphold the intent of the parties, the Examiner should rely on the parties' practice to find that the City did not violate the Agreement.

Article IV requires that an employee work in excess of the normally scheduled work day or work week to be compensated at the rate of time and one-half in either compensatory time or cash. An officer who receives a payback day does not work any additional time in excess of the normally-scheduled work day or work week. No more hours or days of work are involved; rather, it is simply a matter of shifting work days within a 28-day period, as is mandated by the Fair Labor Standards Act. As the Association can cite no clause in the contract which prohibits the City from altering employees' work schedules at their request, and the City retains the right to do so pursuant to Article I, Management Rights, the City has not violated any provision in the Agreement.

In its reply brief, the City denies the contention that it negotiated directly with employees, and thereby refused to bargain collectively in violation of Sec. 111.70(3)(a)4, Stats. In accord with the long-standing practice, the City merely adjusted the schedule of work days and work week upon the request of the officers who attended voluntary training, through the normal scheduling process.

The Association's contention that the parties have agreed to "strict parameters on an officer's hours of work and compensation beyond the normal hours" is inaccurate. The Agreement does not establish strict parameters other than stating that the "normal work day shall consist of eight (8) hours." The Association also misstates the language of Article IV, using the words "outside" and "beyond" as being synonymous with "excess". They in fact mean entirely different things in the context of Article IV. While the Association contends that the use of payback days also violates Article II of the Agreement, it offers no explanation as to how it does so.

The Association's contention that there is nothing in writing between the parties to alter the normal work week ignores Policy 125.06.

The Association also has contended that Chief Erickson has directed and authorized shift commanders to negotiate directly with officers regarding payback days. Again, shift commanders schedule officers, taking into account their request to attend voluntary training. Further, the contention that the City coerces and/or intimidates officers by refusing to grant voluntary training if they request time and one-half pay, ignores the mutually-accepted 20 year practice of the parties. There can be no intimidation or coercion in that regard until it is determined that the City has violated the terms of the Agreement. The Association also contends that the statements made by Chief Erickson to individual officers interfered with, restrained and coerced those employees. The Chief acknowledged he spoke to individual members and informed them that if the City was required to pay officers time and one-half to attend voluntary training, the City would not be able to afford said training. Those statements do not constitute a prohibited practice, but are a statement of fact.

With regard to the contention that the City has refused to bargain with the Association over compensation for payback days, the City was under no obligation to do so. There has been a long-standing practice with regard to payback days and there is nothing new. Even if the Association's contention was accurate, the City would be under no obligation to bargain during the term of the Agreement with regard to payback days. The Association also mischaracterizes the long-standing practice as being unilaterally implemented. However, the payback day practice is one that has been long-standing and mutually-accepted. The Association also makes a substantial leap in logic by arguing that the notice provided by the Association to the Chief to rescind the payback day practice served as a notice to bargain. That is inconceivable. The Association also has argued that it attempted to negotiate compensation for training days for years, but failed to offer any evidence to support that assertion. The Association's President in fact admitted the opposite.

DISCUSSION

(3)(a)1

Sec. 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., referred to above, states:

> Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through

> representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

In order to establish a violation of Sec. 111.70(3)(a)1, Stats., a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC V. EVANSVILLE, 69 Wis. 2d 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84). However, employer conduct which may well have a reasonable tendency to interfere with an employee's exercise of Sec. 111.70(2) rights will generally not be found to violate Sec. 111.70(3)(a)1, Stats., if the employer had valid business reasons for its actions. CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91).

The Association asserts that the City and Chief Erickson interfered with employees' rights under MERA, both directly and derivatively, by individually bargaining with employees in scheduling payback days, by refusing to grant requests to attend voluntary training on what would have been the officer's off day(s) where the officer requests he/she receive compensatory time off or overtime pay at the rate of time and one-half, by announcing the practice regarding payback days would continue after the Association had advised the City and the Chief that it objected to the practice and considered it to be terminated, and by telling employees that the Department training would be cut if the Association prevailed in its litigation.

It must first be concluded that the City did not commit a direct violation of Sec. 111.70(3)(a)1, Stats., by continuing the practice regarding payback days after the Association made its position known, but before there was any legally-binding finding by a third party that the practice violated the parties' collective bargaining agreement or state or federal laws. Such conduct would be a derivative violation and only if there was such a legally-binding finding that the practice had violated the agreement. There is no evidence from which to conclude that these parties have anything other than a good faith dispute as to what is required or permitted under their collective bargaining agreement. In such a situation it could not reasonably be concluded that maintaining the *status quo* until the dispute was resolved would reasonably tend to interfere with the employee rights under Sec. 111.70(2), Stats.

The Association also asserts that the City directly interfered with individual officers' MERA rights by refusing their requests to attend voluntary training on what would have been their off day(s), when they demanded to be paid overtime or to receive compensatory time off at time and one-half, rather than schedule a payback day. However, that is merely another way of arguing that the City was required to cease the practice and accede to the Association's position on the parties' contractual dispute before there was a legally-binding resolution of that dispute. The City's continuation of the practice pending such a resolution, whether it be in the face of the Association's demands or an individual officer's demands, does not constitute intimidation or a threat of reprisal. It also does not constitute "individual bargaining". The officers who request to attend voluntary training on their off days, but demand that they receive overtime pay or compensatory time off at time and one-half if they do, are asking to be treated differently from the manner in which officers have been treated in the past under the parties' practice. By maintaining the practice and refusing such requests, while granting requests consistent with the practice, the City is simply maintaining the status quo, and is not engaging in individual bargaining, nor interfering with the exercise of those officers' rights under Sec. 2 of MERA.

As to Chief Erickson's statements to individual officers that training would be cut if the Association prevailed in its litigation to end the practice of using payback days, the Chief testified that voluntary training constitutes 85% to 90% of all training that occurs in the Department. Of necessity, by having to pay overtime or compensatory time at time and one-half, it would increase costs and result in less training being available without increasing the Department's training budget. The Commission has previously explained that

> . . .it is important to acknowledge certain realities of the collective bargaining process which the facts of this case demonstrate. In our view, it is generally appropriate for one party to advise the other during the collective bargaining process of the potential negative consequences if a proposal or position ultimately is included in the collective bargaining agreement. Thus, for instance, if an employer advises a union that acceptance of the union's wage demands might or would require the layoff of employes and the totality of the circumstances surrounding the employer's statement establish that the employer is not motivated by a desire to threaten employes for the exercise of their right to collectively bargain, that employer is acting in a legal manner consistent with the collective bargaining process. The employer in such circumstances is not seeking to deter employes from exercising their rights but rather seeking to persuade employes to change the position they are taking at the collective bargaining table when exercising their rights. Simply put, parties are free to take whatever positions they wish at the collective bargaining table, but cannot expect to be insulated from any consequences if they are successful in having those proposals become part of the collective bargaining agreement.
>
> CITY OF BELOIT, DEC. NO. 27779-B (WERC, 9/94).

More recently, the Commission reiterated that view in GREEN LAKE COUNTY, DEC. NO. 28792-B (WERC, 12/97). In Footnote 1/ of its decision in that case, the Commission again explained its rationale:

> For instance, in CITY OF BELOIT, Dec. No. 27779-B (WERC, 9/94), we concluded that the municipal employer did not violate MERA by advising employes of the potential negative consequences which would be produced if the union successfully bargained a contract including the proposal then being sought by the union. Such a comment does not reflect hostility toward the exercise of the right to bargain a contract but rather states the response to a result. So long as the response is based on the employer's understanding of the impact of a result on its operation, and not on hostility toward the exercise of the right to seek the result, no violation of law is present.

As Chief Erickson was merely acknowledging the fact that if the Association prevailed, the voluntary training was going to cost the City half again as much as it had in the past, and therefore, that there would be less such training available, the Chief's statements fall within the bounds of the above rationale. There is no evidence linking the Chief's statements to animus towards the exercise of the employees' rights under MERA. Thus, there is no finding of a violation of Sec. 111.70(3)(a)1, Stats.

(3)(a)2

As the City notes, the Association cites no evidence presented, nor makes any arguments, in support of its allegation of a violation of Sec. 111.70(3)(a)2, Stats. Therefore, there have been no findings of fact or conclusions of law made in that regard and the alleged violation has been dismissed.

(3)(a)3

Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer

> 3. To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

To establish a violation of Sec. 111.70(3)(a)3, Stats., the complainant must establish by a clear and satisfactory preponderance of the evidence: (1) that a municipal employee engaged in lawful concerted activity; (2) that the municipal employer, by its officers or agents, was aware of said activity and hostile thereto; and (3) that the municipal employer took action against the municipal employee based at least in part upon said hostility. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS. 2D 540 (1967); EMPLOYMENT RELATIONS DEPT. V.

WERC, 122 WIS.2D 132 (1985); GREEN BAY AREA PUBLIC SCHOOL DISTRICT, DEC. NO. 28871-B (WERC, 4/98). As concluded previously, the evidence establishes that the City has continued the practice regarding the use and scheduling of payback days when officers have requested to attend voluntary training on what would have been their off day(s), and the denial of such requests where the officers instead requested to receive overtime pay or compensatory time off for such attendance. The Association has failed to establish that the City's or the Chief's actions in continuing the practice over the Association's objection were based on hostility toward the Association or individual officers for having engaged in the lawful, concerted activity of challenging the validity of the practice. Again, there has been no showing of anything beyond the parties' having a good faith dispute regarding what is required and/or permitted under their collective bargaining agreement. That being the case, a violation of Sec. 111.70(3)(a)3, Stats., has not been established.

(3)(a)4 and 5

Section 111.70(3)(a)4, Stats., provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . .

The duty to bargain during the term of an agreement is limited to mandatory subjects of bargaining which are not already covered by the agreement or as to which the right to bargain has not been waived through bargaining history or specific contract language. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29659-B (WERC, 4/00).

Sec. 111.70(3)(a)5, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, . . .

While the Commission ordinarily would not exercise its jurisdiction to determine a contract violation where the agreement contains a provision for final and binding arbitration, the parties have agreed the Examiner should address that issue in this case.

Much of the Association's case is based upon its conclusion that it effectively terminated the practice regarding payback days by notifying Chief Erickson that it was doing so effective July 1, 1999. That conclusion is in error for several reasons. First, the record establishes that the past practice regarding the use and scheduling of payback days in instances where an officer requests to attend voluntary training on what would otherwise be his/her off day(s) has existed for more than twenty years, has been well known and mutually accepted by the parties for that time, and has been consistent in its application, including management's

discretion to approve or to turn down such requests in instances where a payback day cannot be scheduled and overtime would otherwise be incurred. The only change has been that in recent years, the payback day must be scheduled to occur within twenty-eight (28) days of the day that was rescheduled for training.

Secondly, the Association's action to terminate the practice comes during the term of the parties' current collective bargaining agreement. The Association asserts that the wording of Articles II and IV is clear and unambiguous, and thus supersedes any practice that might have existed. That argument, however, ignores the impact of Article X, Previous Benefits, and accords that provision no effect. Article X provides,

> The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours, and conditions of employment that are mandatory subjects of bargaining not specifically referred to or altered by this Agreement.

The practice regarding the scheduling and use of payback days where the officer requests to attend voluntary training on what would otherwise be the officers' normally-scheduled day(s) off is a "benefit" and/or a "policy" or "procedure" that is related to wages, hours and conditions of employment and is a mandatory subject of bargaining. The parties' Collective Bargaining Agreement is silent with regard to the scheduling and use of payback days. Thus, Article X would seem on its face to require the City to maintain the practice regarding payback days for the term of the Agreement, even assuming the wording of Article IV is clear and unambiguous.

Third, while at first blush the wording of Article IV might appear to be clear as to what constitutes "Work done in excess of the normally scheduled. . .work week" , the parties have not given those words the meaning for which the Association argues. They also have a practice of rescheduling an officer's off days where the officer has requested such a change so that he/she is able to work special events or participate in assessment centers or simply wishes to take a different day off. There is also the situation where officers agree to "comp switches" between themselves and notify the shift commander for approval. As is the case with attending voluntary training on what would have been the officer's off day(s), in those situations as well the officer does not receive overtime pay, rather, the officer's off day is rescheduled. It is noted that the Association does not assert that the wording should be given its "clear" meaning in those situations. The Association argues that while comp switches are not specifically addressed in the Agreement, it is a negotiated exception to the clear contract language. There is no evidence in the record as to the extent of negotiations that took place regarding payback days or any of the other situations the parties have accepted as exceptions as to what constitutes work done in excess of the normally scheduled. . .work week." That being the case, the practice of using payback days to schedule voluntary training on what would have been an officer's day(s) off cannot be meaningfully distinguished from comp switches as far as the interpretation and application of Article IV. In essence, the parties have interpreted "normally

scheduled work week" in Article IV to mean something other than the 5-2, 5-3 schedule set forth in Article II in certain situations.

The parties' practice has contained the element of the officer requesting voluntary training on his/her off day, bringing the request to his/her shift commander, and working out the rescheduling of the off day. Contrary to the Association's assertion, that does not constitute individual bargaining. The requirement of taking a payback day, as opposed to receiving overtime, and the attempt to work out a mutually-agreeable day for the payback day do not involve negotiating a separate benefit for that officer that differs from what others would receive in the same context. The attempt to work out a mutually-agreeable date for the payback day is also no different than what occurs when officers otherwise reschedule an off day for various reasons.

For the foregoing reasons, it is concluded that the City has no duty to bargain during the term of the agreement regarding the use and scheduling of payback days where an officer requested to attend voluntary training on what would have been his/her off days, and that the City is required by the terms of the parties' Agreement to continue their practice in that regard. Therefore, the City's and the Chief's actions in continuing the practice regarding the use and scheduling of payback days in the factual context of this case, does not constitute a violation of Secs. 111.70(3)(a)4 or 5, Stats.

Based upon the foregoing, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of November, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
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