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In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	Case 40 Case 41
PRAIRIE DU CHIEN POLICE DEPARTMENT	:	No. 41103 No. 41104
EMPLOYEES UNIT OF LOCAL 1972, AFSCME	:	MA-5285 MA-5286
	:	
and	:	
	:	Case 43 Case 44
CITY OF PRAIRIE DU CHIEN	:	No. 41106 No. 41107
(POLICE DEPARTMENT)	:	MA-5288 MA-5289
	:	

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, on behalf of Prairie du Chien Police Department Employees Unit of Local 1972, AFSCME.

Mr. Thomas F. Peterson, City Attorney, on behalf of the City of Prairie du Chien.

Prairie du Chien Police Department Employees Unit of Local 1972, AFSCME, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and the City of Prairie du Chien, hereinafter the City, in accordance with the grievance arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned was appointed to arbitrate in the disputes. A hearing was held before the undersigned on January 19 and 27, 1989 in Prairie du Chien, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 19, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Awards.

The parties could not agree on a statement of the issues. The Union would frame the issues as follows:

1. (#87-4) Does the City's policy of leaving shifts open violate the contract? If so, what is the appropriate remedy?
2. (#87-6) Did the City violate the contract when it filled open shifts caused by the retirement of 1st Sergeant Lee Weber with Thomas Lessard rather than fill said shifts with full-time officers? If so, what is the appropriate remedy?
3. (#87-3) Did the City violate the contract by failing to post and fill a Patrolman position that became open with the retirement of Leo Weber? If so, what is the appropriate remedy?
4. (#88-2) Did the City violate the contract when the Chief filled an open shift, rather than utilizing unit employees? If so, what is the appropriate remedy?

It is concluded that the issues may be stated as follows:

1. (Grievance 87-4) Did the City violate the parties' Agreement by its practice of not filling open shifts that occur Sunday through Thursday, its practice of having officers on day shift voluntarily "shift down" to fill an open shift and its practice of having the officer on 7 a.m. - 3 p.m. shift start at 6 a.m. when the 11 p.m. - 7 a.m. shift is left open? If so, what is the appropriate remedy?
2. (Grievance 87-6) Did the City violate the parties' Agreement when it used Officer Lessard to fill the slot in the shift rotation left vacant by 1st Sergeant Weber's retirement from July 4, 1987 through December 31, 1987? If so, what is the appropriate remedy?
3. (Grievance 87-3) Did the City violate the parties' Agreement when it did not post and fill a Patrolman position that became vacant following Sergeant Weber's retirement? If so, what is the appropriate remedy?

4. (Grievance 88-2) Did the City violate the parties' Agreement when the Chief left his regular shift early and returned at 3:00 p.m. and worked until 7:00 p.m. on February 9, 1988, after the officer scheduled to work the 2-10 p.m. shift called in sick? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1986-87 Agreement are cited:

WHEREAS, in order to increase general efficiency, to maintain the existing harmonious relationship between the Employer and their employees, to promote the morale, well being and security of said employees, to maintain a uniform minimum scale of wages, hours and conditions of employment among the employees and to facilitate a peaceful adjustment of all grievances and disputes which may arise;

. . .

ARTICLE III - FUNCTIONS OF MANAGEMENT

- 3.01 Except as herein otherwise provided, the Employer retains the rights as established by law, including the management of the work and the direction of the working forces, including the right to hire, promote, demote, suspend, or discharge, or otherwise discipline for proper cause, or transfer; and the right to determine the structure of the organization is retained and vested in the Employer.
- 3.02 The Employer agrees that in its exercise of the authority provided for in Section 3.01, that it will not use such authority to undermine the Union.

. . .

ARTICLE VI - COOPERATION

- 6.01 The Employer and the Union agree that they will cooperate in every way possible to promote harmony, efficiency and safety among all employees.

. . .

ARTICLE IX - JOB POSTING AND TRANSFERS

- 9.01 A vacancy shall be defined as a job opening within the bargaining units (sic) not previously existing or a job opening within the bargaining unit created by the termination of employment, promotion or transfer of existing personnel.
- 9.02 All vacancies shall be posted on the bulletin board. The posting notice shall remain posted for seven (7) calendar days and shall state the prerequisites of the job, including the duties, qualifications desired, rate of pay, shift and any other pertinent information concerning the open position. A copy of the notice shall be furnished to the Union. The stated prerequisites shall be consistent with the requirements of the job classification.

. . .

- 9.04 The Employer may make an immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined. However, all vacancies, as defined in 9.01, shall be filled in not more than thirty (30) calendar days, unless it can be established that the need for the job no longer exists.

. . .

ARTICLE XI - WORK DAY AND WORK WEEK - OVERTIME

- 11.01 The guaranteed work day and work week as the present schedule, shall be kept in effect:
- | | |
|-------------|---------------------------|
| Patrolmen - | Six (6) days on and three |
| (3) | days off; |

Sergeants - Six (6) days on and three
(3) days off;
Investigator - At the discretion of the
chief.

11.02 Standard shift schedules for the police officers are:

7 a.m. - 3 p.m.
3 p.m. - 10 p.m.
7 p.m. - 3 a.m.
10 p.m. - 6 a.m.
11 p.m. - 7 a.m.

In case of illness, vacation or other circumstances when there is a shortage of employees to fill the schedule, the chief shall have the discretion of calling whatever employees are available to fill the shift. The policy of the Employer is to retain sufficient personnel to maintain full coverage of shifts, including vacation and other leave periods, however, the chief shall have discretion in this matter.

A) In the event a work scheduling change is required due to vacations, sick leave, or other reasons, the following procedure of call-up is required.

1. Off duty full-time patrolmen will first be offered the work hours as fill-in for employees who are on vacation, sick leave or off for other reasons. The off duty person has the option of accepting the work time or passing up the offered time. If he/she accepts, he/she will receive time and one-half pay for time worked or compensatory time at time and one-half. The same shall apply to all other full-time employees.
2. The next priority falls to regular part-time patrolmen according to seniority.

11.03 Work schedules shall be posted for at least six (6) weeks in advance. Officers and other employees may,

upon request, check the work schedule further in advance.

- 11.04 Overtime. Overtime shall be paid for all time worked outside of the employees' regular work schedule as required by the chief at the rate of one and one-half (1 1/2) time for actual time worked, except as provided for in Section 11.02-A. Overtime shall be divided as equally as possible among employees normally assigned to the work available.
- 11.05 Employees who shall be called to work or court duty in City cases outside of their regularly scheduled shift shall be entitled to at least two (2) hours work or pay thereof at the overtime rate. 7/

BACKGROUND

The City maintains and operates the Prairie du Chien Police Department. Since 1975 the Union has represented the regular full-time and regular part-time nonsupervisory sworn personnel in the Department. At the time of the hearing there were eight regular full-time employees in the Department and the Chief. There are no regular part-time employees in the Department, but are approximately four part-time employees who work on a call-in basis.

The Department operates twenty-four hours per day with five shifts: 7 a.m. - 3 p.m., 2 p.m. - 10 p.m., 7 p.m. - 3 a.m., 10 p.m. - 6 a.m., 11 p.m. - 7 a.m. The Chief normally works the day shift, 8 a.m. - 4 p.m., and at times works 7 a.m. - 3 p.m. or 6 a.m. - 2 p.m. The Detective's hours are at the Chief's discretion. Prior to his retirement 1st Sergeant Weber worked in the rotation and the 2nd Sergeant worked the day shift. After Weber's retirement on June 1, 1987, the 1st Sergeant works the day shift and the 2nd Sergeant and the Patrolmen rotate through the four other shifts in pairs, i.e., a pair of officers work the same six days on and three days off, but on different shifts.

Since the end of 1980 or early 1981 the Department has followed a practice of not filling open shifts that occur Sunday through Thursday, unless a special event is taking place, and of maintaining full coverage on shifts on Friday and Saturday. The practice was initiated when two officers retired and the City decided to fill only one of the positions. At the direction of the Mayor and City Council and in order to reduce overtime costs in the Department, the practices of using "shift downs" and running open shifts were started. At times shifts are filled by asking an officer on the day shift to "shift down" in order to cover an evening shift that is open due to an officer calling in sick or being on vacation. This is done with the voluntary agreement of the officer on the day shift and then that officer's day shift is left open. If the officer on day shift refuses to "shift down," the later shift is left open. If the 11 p.m. - 7 a.m. shift is left open, the officer on the 7 a.m. - 3 p.m. shift is asked if he will come in at 6 a.m., and if he agrees, he then works 6 a.m. - 2 p.m. In the case of either a "shift down" or the day shift officer coming in an hour early, no overtime is paid. If two shifts are open, one shift will be filled and one will be left open. In 1987 shifts were left open approximately 99 times and there were approximately 22 "shift downs." Since 1981 the City has not budgeted for sufficient overtime to cover anticipated absences such as vacation and holidays.

In early May of 1987 Sergeant Weber notified the City he was retiring as of June 1, 1987. The 1st Sergeant position was posted on June 2, 1987 and taken down on June 15, 1987. The Chief made his recommendation to the Police and Fire Commission (PFC) on July 2, 1987 that 2nd Sergeant Schmidt be promoted to the 1st Sergeant position, and the PFC approved the promotion on July 13, 1987. Prior to Weber's retirement the Chief had made a request to the City Council for an Assistant Chief position. The Council began debating in June of 1987 whether to create and fill an Assistant Chief position or to fill as a patrol position 8/ or whether to fill the vacancy at all. The Council sent the question to the PFC and the question went back and forth between the Council and the PFC. Lessard, a part-time officer, began to work Weber's spot in the rotation on a regular basis on July 4, 1987, initially being hired on a temporary basis for thirty days. As the debate continued the Chief sought and received approval from the Council every thirty days to continue hiring Lessard. Near the end of August the Council decided to abandon the idea of creating an Assistant Chief position and on September 2, 1987 the 2nd Sergeant position was posted and the position was ultimately filled by Officer Ostrander whose promotion was approved October 14, 1987. After deciding to fill the Patrolman position, the PFC then debated whether or not to use the "old" hiring

7/ The parties stipulated that Article XI in their 1988-89 Agreement is unchanged from their 1986-87 Agreement.

8/ It was presumed that if the Sergeant position were filled, it would be from within the ranks and would ultimately create a vacancy in the Patrolman position.

list or a "new" list. Lessard continued to work in the rotation as a full-time patrolman and ultimately was hired as a regular full-time patrolman, the hiring being approved by the Council on December 31, 1987. From July 4, 1987 through December 31, 1987 Lessard was treated as a call-in part-time employee for the purpose of wages and benefits, and received \$7.42 per hour and no benefits for that period of time. The shifts Lessard worked from July 4, 1987 through December 31, 1987 were not first offered to regular full-time officers.

On February 9, 1988 the officer on the 2 p.m. - 10 p.m. shift, Officer Fulcher, called in sick shortly before his shift was to start. The Chief attempted unsuccessfully to contact full-time officers who were on other shifts that day -- to shift up or down. The Chief did not call and offer the shift to any full-time officers who were off duty that day. The Chief left his scheduled shift early and returned at approximately 3 p.m. and worked until 7 p.m. when Officer Cuff came on duty for his scheduled 7 p.m. - 3 a.m. shift.

POSITIONS OF THE PARTIES

GRIEVANCE 87-4

Union

The Union takes the position that Section 11.02 of the Agreement obligates the City to "fill all open shifts, except for a few intermittent occasions, through the established procedure of offering such work to off-duty full-time officers." According to the Union, the City's failure to fill open shifts violates the Agreement. In support of its position, the Union notes that Section 6.01 of the Agreement states that the parties pledge that they "will cooperate in every way possible to promote harmony, efficiency and safety among all employees" and that in Section 3.02 the City promises that it will not use its authority to undermine the Union. It is within that context that the City pledged in Section 11.02 that "the policy of the Employer is to retain sufficient personnel to maintain full coverage of shifts ...". In Article XI the employees are granted certain rights with respect to scheduling which not only guarantees a certain level of work opportunity, but also serves "to fulfill the City's pledge for safe working conditions." The provision also guarantees a certain work schedule rotation, requires advance notice of changes in work schedule and requires overtime payment for all hours worked outside the employee's work schedule. Standard shifts cannot be changed without the Union's concurrence, and in order to fulfill its commitment to a safe working environment the City pledged in Section 11.02 to "retain sufficient personnel to maintain full coverage of shifts ...". Full coverage is to be maintained by following the procedure for offering overtime in the contract. The Union contends that the City's interpretation of the wording in Section 11.02, which states that "the Chief shall have discretion in this matter," ignores the preceding wording in that provision and violates the intent of the parties. Read together, the Chief's discretion is limited to "an occasional decision not to fill an open shift." The City's policy of not filling open shifts Sunday through Thursday exceeds the discretion granted. It is argued by the Union that although the open shift policy is longstanding, it has also long been in dispute. The Union has never agreed to the practice of leaving shifts open and, therefore, the element of mutuality which is necessary to establish a binding practice is not present in this instance. Further, the language of Section 11.02 "clearly and unambiguously establishes the full coverage pledge." Hence, the City must follow the provision regardless of any practice to the contrary.

The Union also asserts that the evidence demonstrates the City's intention of not maintaining full coverage, i.e., that is not the policy of the City to maintain full coverage of shifts. Further, the discretion is vested with the Chief, yet he was not given discretion, but was ordered by City officials to leave shifts open as a cost saving device. The Union concludes that the City's policy of not maintaining full shift coverage and of "purposely underbudgeting the cost of filling anticipated open shifts" violates the intent of the contract. According to the Union, the Chief's use of "shift downs" compounds the problem. Having a day shift officer voluntarily "shift down" to fill an open shift violates the mandated procedure in the Agreement which requires that the work be offered to off-duty full-time officers, and it also creates another open shift since the Chief does not fill the day shift officer's shift. The same would be true if a night shift officer voluntarily "shifts up." Similarly, when the officer on the 7 a.m. - 3 p.m. voluntarily comes in at 6 a.m. in an open shift situation on the 11 p.m. - 7 a.m. shift, one hour of the latter shift is filled improperly. As relief, the Union requests that the City be ordered to cease and desist from violating the Agreement and to make the employees whole for lost compensation.

City

The City takes the position that it has the authority under the Agreement to determine when shifts will be filled or how many men will be on a shift. In support of its position the City asserts that the language of Section 11.02 of the Agreement is specific and unambiguous, and that while it is clear from that language that it is the City's policy to maintain full shift coverage, the language is also clear that it is within management's sole discretion whether

or not to fill a particular shift or to decide how many employees will be working on any one shift. The City contends that it has been past practice since 1981 to maintain full shift coverage on Friday's, Saturday's and days of special events and not to fill all open shifts that might occur during the rest of the week. The reason for the practice is that on Fridays, Saturdays and special events there is a need for extra coverage and because there are budget restraints set by the City's Common Council that dictate that when it is not necessary, open shifts will not be filled. That is a management decision specifically reserved by Section 11.02 and more generally by Section 3.01, Functions of Management, of the Agreement. With regard to the Union's argument that it is dangerous not to fill all shifts or to run one officer shifts, it is contended that that is an emotional argument. While police work can be dangerous, the practical side is that the City has budgetary limitations and it has determined how much is to be budgeted for police protection. If that amount is not sufficient to fill all shifts or to fill shifts with two men at certain times, that is a proper function and decision of management. Further, regarding the complaint that the "dropping down" practice violates the Agreement, that practice has occurred since 1981 with the agreement and consent of the Union members. Therefore the evidence establishes that this practice has occurred continuously since 1981 with the Union's knowledge and consent.

GRIEVANCES 87-6 and 87-3

Union:

The Union takes the position that the retirement of 1st Sergeant Weber created a vacancy in the shift schedule and that the City's actions with regard to that vacancy violated the contract in several ways. First, call-in employees cannot be used unless all regular officers are unavailable or unwilling to work, yet it is undisputed that from July 4, 1987 until December 31, 1987 the City utilized a call-in employee, Lessard, to fill Weber's open shift. He was placed directly into Weber's rotation in the schedule and worked in the capacity of a patrolman. The City did this without seeking or obtaining approval from the Union. Regarding the City's contention that Lessard was in the role of a temporary assignment under Section 9.04, the Union asserts that that provision does not apply to nonunit employees such as Lessard, and even if it did, that section clearly limits such an assignment to thirty calendar days. Section 9.04 also does not permit the City to serialize thirty day appointments. The use of Lessard denied unit employees the opportunity to work and violated the Agreement and overtime policy. The Union notes that there was only one other time when a call-in employee was allowed to work in the shift schedule for a full-time officer and that was done with the agreement of the Union.

It is also contended that as to Grievance 87-3, the retirement of Weber created a need for a patrolman. The City failed to post and fill such a position and has acknowledged the violation in its response from the Personnel Committee. The City's assertion that the delay was due to the unfortunate personal problems of the Chairman of the Personnel Committee does not excuse the City from having to comply with the Agreement. The Agreement requires that all vacancies be filled within thirty days. The 1st Sergeant position should have been filled within thirty days of Weber's retirement and the 2nd Sergeant position should have been filled within an additional thirty days, i.e., no later than August 1, 1987. Therefore, the patrolman position created by the movement of 2nd Sergeant Schmidt to 1st Sergeant and Patrolman Ostrander to 2nd Sergeant created a vacant patrolman position that should have been filled no later than September 1, 1987. The debate that took place regarding the creation of an Assistant Chief position also did not waive the City's obligation to fill the positions in a timely fashion. The Union also contends that the City used Lessard as a full-time patrolman from July 4, 1987 to December 31, 1987, yet failed to properly compensate him for his work. Since he was used as a full-time officer he was entitled to the contractual compensation for same. As to relief, the Union requests that there be separate remedies awarded. It is requested that all unit employees be made whole for the work opportunities lost due to Lessard's employment in Weber's slot in the rotation and also that Lessard be made whole for the difference in wages he earned during the period July 4, 1987 to December 31, 1987 and the proper wages and benefits he should have earned as a full-time officer during that period.

City:

The City concedes that it violated Section 9.04 of the Agreement, but contends that from a practical standpoint it could do very little under the circumstances to do anything differently. It asserts that while it took an unreasonable amount of time to decide to hire a patrolman, municipalities governed by common councils do not move as quickly as management in the private sector. The City asserts that this grievance is more appropriately addressed as to the proper remedy. It is contended that the Union's suggested remedy of awarding all of Lessard's hours from August 4, 1987 to December 31, 1987 to the unit at overtime rates would be "unjust enrichment" and would be "punitive" to the City. The Chief's un rebutted testimony was that if Lessard had not been available, the shift he filled would not have been filled at overtime rates with any unit members except on Fridays, Saturdays and special events, as is consistent with the practice of the City since 1981. Thus, the requested

remedy would not even "remotely resemble" what would have happened had there been no violation of the Agreement and would be punitive rather than make whole. The City argues that if make whole is the standard to be followed, one of the following approaches would be more appropriate; either calculate the overtime that would have been available to unit members on Fridays, Saturdays and special events from August 4 to December 31, 1987 or, as a better remedy, consider Lessard's employment from those dates as a de facto hiring as a full-time officer and make Lessard whole for the wages and benefits he did not receive.

GRIEVANCE 88-2

Union:

The Union takes the position that the City violated the Agreement when the Chief filled Officer Fulcher's shift on February 9, 1988. According to the Union, it is undisputed that the Chief filled a portion of the open shift and that this is the first time that the Chief has done so. The Chief's action was contrary to the procedure for filling open shifts and violated the Agreement and improperly denied a unit employee an opportunity to work the overtime. Since the City was obligated to fill the entire shift left open by Fulcher's absence, the Union requests that the City be ordered to make the appropriate employee whole for all lost wages. In reply to the City's assertion that the Chief first attempted to contact two off-duty full-time officers to offer them the work, the Union asserts that the officers that the Chief attempted to contact were scheduled to work later shifts that day and not "off-duty" officers. The Chief was attempting to arrange a "shift up" and not attempting to follow the proper contractual procedure for offering overtime.

City:

The City takes the position that the Chief acted within his rights under the Agreement in this case. Section 11.02 specifically states that it is within management's discretion to decide whether or not to fill a shift. The decision then whether or not to fill a shift is not in issue here, nor is how the shift will be filled if the City elects to fill it, the latter being clearly set forth in Section 11.02(A)(1) of the Agreement. It is asserted that the City has, and will, follow that procedure when it elects to fill a shift; however, this situation did not fall within the purview of Section 11.02(A)(1), as the facts indicate that the shift was not "filled" within the meaning of the contract. After Officer Fulcher notified the Chief of his illness, the Chief attempted to fill the shift per the terms of the Agreement. After attempting to call one of the two off-duty officers, however, the Chief determined, as was his right under the Agreement, not to fill that particular shift. Thus, while the Chief may have been working part of that shift, the facts indicate that the Chief did not fill the shift.

DISCUSSION

GRIEVANCE 87-4

The Union contends that the City's practice of not filling the shifts of officers who are off work due to illness, being on vacation, etc., Sunday through Thursday, or of having officers on day shift voluntarily "shift down" to fill a later open shift, violates the parties' Agreement and the Department's policy regarding the assignment of overtime. Specifically, the Union asserts that the practice of having open shifts, which leaves an officer alone for part of his/her shift, is unsafe and violates that part of Section 11.02 that states:

. . . The policy of the Employer is to retain sufficient personnel to maintain full coverage of shifts, including vacation and other leave periods, however, the chief shall have discretion in this matter.

Although both parties make assertions to the contrary, the above-cited language is not clear and unambiguous. There is, at the least, a tension between maintaining a policy of "retaining sufficient personnel to maintain full coverage of shifts" and the Chief having "discretion in this matter." 9/ In that case, how the parties have applied that provision in the past is relevant to determining how the parties intended the language to be interpreted and applied. It is undisputed that the practice of not filling open shifts that occur between Sunday and Thursday, unless there is a special event, has been consistent and has existed since 1981. The Union correctly points out that for a past practice to be binding there must be a mutual acceptance of the practice; however, such acceptance may be tacit. 10/ In this case the practice

9/ The Arbitrator does not deem it relevant that the discretion is exercised per the Council's direction to the Chief, as that is a matter of the chain of command within management and is not here regulated by the Agreement.

10/ Elkouri and Elkouri, How Arbitration Works, (3rd ed.) at 391-392.

has been open and well known to the Union. While the Union never expressly agreed to the practice and at times complained about it, the practice has existed over the lives of a number of the parties' labor agreements and there was no evidence that the matter was an issue in dispute in negotiations for successor agreements, despite the fact that the language in question has been in the parties' Agreements since at least 1979. Also, the testimony of the Union's witnesses was that this is the first time the matter has been grieved.

Given the length and consistency of the practice, the Union's knowledge of the practice and its failure to dispute the practice prior to the instant grievance, the Union is deemed to have tacitly accepted the practice.

Regarding the safety factor cited by the Union, the material presented did not state a conclusion that having only one patrolman on duty was unsafe, rather, it indicated that the average staffing level was 2.1 full-time officers for every 1,000 inhabitants, with an average for the midwest being 2.5 per 1,000 inhabitants. While there are situations where having two officers on at the same time would be safer, that does not necessarily lead to the conclusion that having only one officer on at times is unsafe. The evidence presented demonstrated that there appears to be disagreement within the law enforcement community as to whether one-man patrols are safe or even safer. Thus, there is not a sufficient basis for concluding the practice is unsafe.

On the basis of the above, it is concluded that the practice of not filling open shifts that occur Sunday through Thursday, unless there is a special event, does not violate the parties' Agreement.

The second part to Grievance 87-4 is whether the practice of "shift downs" violates the Agreement. While the practice the City relies on in its defense is as longstanding as that of not filling open shifts Sunday through Thursday, Section 11.02(A) of the Agreement expressly provides:

A) In the event a work scheduling change is required due to vacations, sick leave, or other reasons, the following procedure of call-up is required.

1. Off duty full-time patrolmen will first be offered the work hours as fill-in for employees who are on vacation, sick leave or off for other reasons. The off duty person has the option of accepting the work time or passing up the offered time. If he/she accepts, he/she will receive time and one-half pay for time worked or compensatory time at time and one-half. The same shall apply to all other full-time employees.
2. The next priority falls to regular part-time patrolmen according to seniority.

That language provides a specific procedure for determining how to fill an open shift once it is decided the shift will be filled. That procedure, as well as a written overtime equalization policy agreed upon by the City and the officers in 1986, specifies who will be offered the open shift and in what order it will be offered. There is no provision for first offering the shift to another officer scheduled to be on duty that day in the form of a voluntary "shift down," or for having an officer on the 7 a.m. - 3 p.m. voluntarily come in at 6 a.m. when the 11 p.m. - 7 a.m. shift is left open, as an alternative to the stated procedure for filling shifts left open due to officers being on vacations, sick leave, etc.

It is a long recognized principle of contract interpretation that even a well established practice will not be used to give meaning to clear contract language and will not countervail such clear language. 11/ Relatedly, many arbitrators have held that the failure to grieve violations of clear contract language in the past does not bar a party, upon notice to the violator, from insisting upon compliance with the contract in the future. 12/ In this case the contract is clear as to how shifts left open by vacation, sick leave, etc. are to be filled, if it is decided to fill the shift, and the practice will not be deemed to prevail over that clear contract language. The instant grievance was filed on August 6, 1987 (Union Ex. 12) and both parties' exhibits indicate that the practice of "shift downs" has subsequently continued, albeit to a lesser extent than in the past, twenty-two times in 1987 and seven times in 1988. (Union Ex. 27 and Employer Ex. 31). The opportunity to work the overtime has been lost and cannot be recaptured in this situation. The same is true of the instances where the officer on 7 a.m. - 3 p.m. started at 6 a.m. when the 11 p.m. - 7 a.m. shift was open. Given the difficulty, if not the impossibility, of determining who ultimately would have received the overtime if the contract had not been violated, and the parties' expressed policy of trying to divide overtime as equally as possible, it is concluded that the appropriate remedy is to compute the hours of overtime that were lost by "shift

11/ Ibid., at 303-304 and 408-410.

12/ Ibid., at 409.

downs" 13/ and having the 7 a.m. -3 p.m. officer voluntarily work 6 a.m. - 2 p.m. when the preceeding 11 a.m. -7 a.m. shift was open, and the pay that would generate, and divide that pay equally among the employees in the bargaining unit.

GRIEVANCES 87-6 and 87-3

Grievance 87-6 relates to the City's use of part-time officer Tom Lessard to fill 1st Sergeant Weber's slot in the shift rotation after Weber retired. Grievance 87-3 relates to the City's failure to post and fill a patrolman position after 1st Sergeant Weber retired. The City concedes that it violated the Agreement by using Lessard on a full-time basis while taking till the end of December of 1987 to hire a regular full-time officer (Lessard) to fill the vacancy ultimately left by Weber's retirement. The dispute is as to what is the appropriate remedy for the violation(s). The Union asserts that the City violated the overtime procedures by using a part-time officer to deny the regular full-time officers overtime and also violated the Agreement by using Lessard as a full-time officer while paying him as a part-time officer. According to the Union, there were two separate violations and there should be two separate remedies.

The evidence establishes that Lessard was initially hired to temporarily work Weber's slot in the rotation and that the Chief was directed to extend his employment for another thirty days each time the subsequent thirty day periods expired and that this continued until the end of 1987. It is concluded from the evidence that by continuing to employ Lessard on a full-time basis in a regular full-time position after the first thirty day period expired, the City de facto hired Lessard as a regular full-time Patrolman. To that extent, Grievance 87-3, the City's failure to timely post and fill a Patrolman position, is moot. Albeit unintentional, whatever obligation it had under the parties' Agreement to fill a Patrolman position, the City satisfied by its de facto hiring of Lessard as a full-time Patrolman as of August 4, 1987. 14/

As to Grievance 87-6, having concluded that the City de facto hired Lessard as a full-time officer, it follows that the violation was not the use of Lessard to fill a slot in the rotation, rather, the violation was the City's continued treatment of Lessard as a part-time officer with regard to wages and benefits after effectively hiring him to fill a full-time position. In other words, the violation was with regard to the City's treatment of Lessard and not the failure to use other full-time officers to fill the slot as overtime.

In determining the appropriate remedy it is necessary to construe Section 9.04 which allows the City to temporarily fill a vacancy, but requires that a vacancy be filled within thirty calendar days. The City suggests as an appropriate remedy that Lessard be considered a full-time officer as of August 4, 1987 and that he be made whole as to wages and benefits from that point on till he was officially hired and paid as a full-time Patrolman. That inferentially asserts a position that Section 9.04 permitted the City to use Lessard for the first thirty days and pay him as it did. The Union argues that Section 9.04 does not permit the temporary assignment of non-unit personnel to a unit position. Under the Union's interpretation the City could not discount Lessard's first thirty days in the position as a permissible temporary assignment. The problem with the Union's position is that the restriction for which it contends is not expressed in Section 9.04. More importantly, the position Lessard filled is Patrolman, and Patrolman is the entry-level position in the unit and in the Department, as far as regular full-time positions. Under the Union's interpretation that only unit employees may be used to temporarily fill a vacancy, Section 9.04 seemingly would not have any application as to temporarily filling a vacancy in an entry-level position, since there would not be any unit employee to temporarily place in such a vacancy. For those reasons the Union's interpretation of Section 9.04, as applied to the facts in this case, is rejected. It is concluded, however, that since Lessard was working on a full-time basis in a unit position he was entitled to the contractual rate of pay for that position, i.e., the Probationary Patrolman rate for the period July 4, 1987 to August 4, 1987. It is also concluded that he began serving his probationary period effective upon his continued regular full-time employment beyond the initial thirty day period, i.e., as of August 4, 1987.

GRIEVANCE 88-2

This grievance concerns the allegation that the Chief improperly covered part of Officer Fulcher's 2 p.m. - 10 p.m. shift on February 9, 1988, after Fulcher called in sick, instead of offering it as overtime to an off-duty full-time officer. The City concedes that Section 11.02(A)(1) of the Agreement sets

13/ No evidence was presented as to the occurrence of "shift ups" by night shift officers.

14/ The Union concedes that if the City took the full thirty days to fill each of the positions as they were vacated, the City had until September 1, 1987 to fill the Patrolman position.

forth the procedure for filling a shift when an officer calls in sick, if the City elects to fill the shift. The City contends, however, that the Chief has the right under Section 11.02 to elect not to fill an open shift and exercised that discretion in this case.

The evidence indicates that the Chief normally works 8 a.m. - 4 p.m. It is not clear exactly when the Chief started on February 9th; however, the Chief testified that he left work early on that date and returned around 3 p.m. and worked till approximately 7 p.m. because he had someone coming in to see him that evening and thought he would leave the shift open and would cover it himself. The Chief also testified that he unsuccessfully tried to contact the officer scheduled for the 10 p.m. - 6 a.m. shift to see if he wanted to "shift up" and that he did not try to call off-duty full-time officers.

As previously concluded and discussed with regard to Grievance 87-4, the Chief has discretion under Section 11.02 not fill an open shift. Section 11.02(A) of the Agreement sets forth when the call-up procedure is to be used:

A) In the event a work scheduling change is required due to vacations, sick leave, or other reasons, the following procedure of call-up is required.

In this case the only "work scheduling change" was the Chief's and his hours and work schedule are not covered by the Agreement. Since no employee was called in, i.e., no employee had his/her work schedule changed due to Fulcher's absence, Section 11.02(A) and the call-in procedure did not apply. It is also noted that although it is clear that the Chief worked from 3 p.m. to 7 p.m., it has not been shown that he performed the same duties that a patrolman would perform on that shift. Further, there has been no provision of the Agreement cited as restricting the Chief's right to perform such work.

Therefore, it is concluded that the City (Chief) did not violate the parties' Agreement when he worked 3 p.m. to 7 p.m. and did not call anyone in to fill Fulcher's shift on February 9, 1988.

On the basis of the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARDS

1. Grievance 87-4 is denied as to the allegation that the City's practice of not filling open shifts Sunday through Thursday, unless there is a special event, violates the parties' Agreement; however, the grievance is sustained as to the allegations that the City's practice regarding "shift downs" and having the officer on the 7 a.m. - 3 p.m. shift voluntarily work 6 a.m. - 2 p.m. when the 11 p.m. - 7 a.m. shift is open violates Section 11.02(A)(1), of the Agreement. The City is therefore to compute the total amount of overtime hours and wages lost by the "shift downs" and by having the officer on the 7 a.m. - 3 p.m. shift voluntarily work 6 a.m. - 2 p.m. when the preceding 11 p.m. - 7 a.m. shift was open (the latter situation being limited to one (1) hour each time) since August 6, 1987, i.e., the overtime wages that would have been paid had an off-duty full-time officer been called in for each instance, and divide that amount equally among the regular full-time employees.

2. Grievance 87-3 is dismissed as moot on the basis that the City de facto hired Officer Lessard as a regular full-time Patrolman as of August 4, 1987.

3. Grievance 87-6 is sustained. The City violated the wages and benefits provisions of the parties' Agreement by treating Officer Lessard as a part-time officer for pay purposes while employing him as a regular full-time Patrolman. The City is therefore to make Officer Lessard whole as to wages and benefits he would have received, but for the violation (wages only for the period July 4 -August 3, 1987). Lessard's probationary period as a regular full-time Patrolman is deemed to have begun as of August 4, 1987, and, therefore, the City is to also make Lessard whole for the difference in wages he received due to his having to serve a probation period commencing January 1, 1988.

4. Grievance 88-2 is denied.

Dated at Madison, Wisconsin this 26th day of June, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Arbitrator