

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 WINNEBAGO COUNTY :
 (SHERIFF'S DEPARTMENT) : Case 171
 : No. 41730
 and : MA-5453
 :
 WINNEBAGO COUNTY SHERIFF'S :
 PROFESSIONAL POLICE ASSOCIATION, :
 LAW, INC. :
 :

Appearances:

Mr. Patrick J. Coraggio, Labor Association of Wisconsin, Inc., for the Association.
Mr. John A. Bodner, Assistant Corporation Counsel, for the County.

ARBITRATION AWARD

Pursuant to a request by Winnebago County Sheriff's Professional Police Association, Law, Inc., hereinafter referred to as the Association, and concurred in by Winnebago County (Sheriff's Department), hereinafter the County, the Wisconsin Employment Relations Commission on February 22, 1989, appointed Robert M. McCormick as an impartial arbitrator to determine a dispute existing between said parties involving the County Sheriff's change of the work week schedule for the Detectives. This procedure was conducted in accordance with the binding arbitration provisions of the collective bargaining agreement between the parties which was in effect at all times material herein. A hearing was conducted on March 14, 1989 at Oshkosh, Wisconsin and a stenographic transcript was made of said hearing. The final post-hearing briefs were received by June 8, 1989.

At outset of hearing the parties stipulated to the following

ISSUE

Did the County's change in the work week assignment of detectives as of January 2, 1989, to a 6 - 3 work week schedule violate the provisions of the collective bargaining agreement?

PERTINENT CONTRACT LANGUAGE

In addition to the grievance-arbitration provision of Article 6, with which the parties have procedurally complied and which provides for the final and binding decision of the arbitrator, the parties are in dispute over the interpretation of the work week provision, set forth in material part as follows:

ARTICLE 7
WORK WEEK

The regular workweek for all employees represented by the Association shall consist of an average of 38.2 hours.

Employees serving in the capacities listed below shall work on a duty schedule consisting of five (5) consecutive workdays of seven hours and forty minutes each, Monday through Friday, broken by an unpaid lunch period.

Sergeant - Huber/Classification Officer
Sergeant - Detective Division
Juvenile Officer
Welfare Fraud Investigator
Police Officer - Court Officer
Police Officer - Transportation Officer
Police Officer - Process Server
Police Officer - Warrant Officer
Police Officer - Matron Specialist

The number of personnel assigned in these capacities may vary from time to time depending upon the needs of the Department. Such employees who are required to work without a lunch break may be allowed to adjust their ending time at the discretion of their supervisor.

All other employees of the Department shall work a schedule consisting of six (6) consecutive duty days of eight hours and ten minutes each followed by three (3) consecutive days off. Such employees shall be provided a paid lunch period within the duty shift as has been provided in the past.

Variation of the regular work schedules of employees, shall only be made by agreement between the Department and the Association Board of Directors and only as long as the regularly scheduled hours do not exceed an average of 38.2 hours per week.

. . .

ARTICLE 9
EXTRA TIME

Time worked by employees represented by the bargaining unit in excess of the regularly scheduled workday or workweek shall be paid at the rate of time and one-half, or the employee shall have the option to choose time off at the same rate in lieu of pay, subject, however, to the Department's scheduling requirements as determined by the County.

. . .

BACKGROUND

At least from the period of the 1986 labor agreement between the parties, the Detectives were scheduled for a 6 - 3 work week (6 consecutive days on and 3 consecutive days off) for an average 38.2 hours per week. In early 1987, after the parties had completed negotiations for a successor 1987 collective agreement, the then current Sheriff, Terry Footit, and his subordinate supervisor, initiated a request to the Association to change the work week schedule for detectives from a 6 - 3 schedule to a Monday - Friday schedule of five (5) consecutive days which is reflected in a letter dated January 29, 1987 from a supervisor to the detective which reads as follows:

TO: DETECTIVE CHUCK PENZENSTADLER
FROM: LT. MICHAEL BROOKS
IN RE: DETECTIVES WORK SCHEDULE

Effective February 1, 1987, the Detective Division will go to a 5-2 5-2 4-3 work week. The 5-2 work week being Monday through Friday and the 4-3 work week being Monday through Thursday. First shift will be 7:50AM to 4:00PM. Second shift will be 2:20PM to 10:30PM. You will note that this is an eight hour shift and you will be given a half hour paid lunch break.

If you are scheduled to work on a holiday you will have the option of taking that holiday or working in patrol on that day, (i.e., if you are scheduled to work first shift you work first shift on the road, 6:20AM to 2:30PM. If you are scheduled to work second shift you would work 2:20PM to 10:30PM.)

This is a temporary change in hours and after a three month period the schedule will be reviewed to determine its productivity to the Winnebago County Sheriff's Department Detective Division. At that time a decision will be made as to continuation of the 5-2 5-2 4-3, or reverting back to the 6-3 work schedule.

Attached you will find a copy of your work schedule for the next three months.

LT. MICHAEL BROOKS
DETECTIVE DIVISION

The Detectives and the Sheriff's administrative personnel worked out the details of 5-2 5-2 4-3 schedule and the Association's Board of Directors voted to approve said schedule change sometime in mid or late January 1987. On January 29, 1987, the Association's Law, Inc. Representative, Mr. Pat Coraggio sent Sheriff Footit a cover letter with an attachment described as "agreed upon contract change for the 1986 labor agreement . . ." which (Exhibit 7 - page 2) attachment reads as follows:

CHANGES TO 1986 LABOR CONTRACT BETWEEN THE COUNTY OF WINNEBAGO AND THE WINNEBAGO COUNTY SHERIFF'S PROFESSIONAL POLICE ASSOCIATION

PAGE 5 - ADD PARAGRAPH:

"All employees assigned to the Detective Division shall work a schedule of two (2) periods each consisting of five (5) consecutive days of eight (8) hours and ten (10) minutes each (Monday through Friday) followed by two (2) consecutive days off (Saturday and Sunday); followed by one (1) period of four (4) consecutive duty days of eight (8) hours and ten (10) minutes each (Monday through Thursday), followed by three (3) consecutive days off (Friday-Saturday-Sunday) equalling an average of 38.2 hours per week.

The seven (7) employees assigned to the Detective Division will be "On-Call" for the weekends (Saturday-Sunday) on a rotation basis with each being 7.4 times per year. Call-in provisions under Article 11 will apply.

Such employees shall be provided with a paid lunch period within the duty shifts consisting of 7:50 A.M. to 4:00 P.M. and 2:20 P.M. to 10:30 P.M.

Holiday will remain as indicated by Article 15."

Footit sent the following letter dated January 30, to Coraggio:

Dear Pat:

I am in receipt of your letter, dated January 29, 1987, wherein you agreed upon contract changes between the County and the Winnebago County Sheriff's Professional Police Association in reference to the change of hours for the Detective Division.

At this time it is our intention, before implementing the change, to temporarily try out the new work schedule of 5-2, 5-2, 4-3, for the detectives in the bargaining unit for a three month period. This was agreeable with every member of the Detective Division and myself.

Hopefully, at the end of the three months we will be able to make an evaluation on the benefits for the Detective Division. If we find it an effective schedule to work with, we will then ask for the change in the contract.

Sincerely,

WINNEBAGO COUNTY SHERIFF'S DEPARTMENT

Terry L. Footit /s/

Terry L. Footit
Sheriff

Though the letters of January 29 and 30 indicate the writers having copied William Wagner, County Personnel Director, the record evidence indicates that the Association's proposed language was not formally accepted by the County and was not reproduced in either the 1987 or 1988 agreement. However, the record is clear that the 5-2, 5-2, 4-3 schedule for detectives, as set forth in the Sheriff's administration memo of January 29, 1987 (Joint Exhibit 2 - page 4) remained intact for twenty-three (23) months.

Sheriff Footit testified that if the 5-2, 5-2, 4-3 work schedule for detectives survived the three-month trial period, it would become a permanent work schedule for detectives. The record evidence is uncontroverted that Footit talked to Wagner sometime after the end of ninety days and that Wagner told Sheriff Footit that if the 5-2, 5-2, 4-3 schedule was the one Footit believed the detectives should be working and given the Association's accord with the changed schedule, then the Department "should go ahead and keep it going".

The record further discloses that after April 1987, Sheriff Footit's administration made no changes to the 5-2, 5-2, 4-3 schedule over the twenty-three months, except for a directive of May 17, 1987 to clarify and make certain the Department had sufficient coverage of detective personnel for holiday weekends, with an on-call procedure for each of the summer holidays.

In November of 1989 Sergeant of Patrol Lee Burton was elected Sheriff, at a time coincident with ongoing labor negotiations between the Association and the County for a 1989 agreement. The Association's detective personnel learned from Sheriff-Elect Burton's statements that he was contemplating a change back to a 6-3 schedule for detectives upon taking office. The Association proposed a work week change to Article 7 - sometime in late 1988 to County bargainers, which provided, "Incorporate side letter for detectives (meaning the Brooks' memo of January 29, 1987) into the contract, identifying the 5-2, 5-2, 4-3 work week".

Wagner testified that in the early stages of the December 1988 bargaining for 1989 contract, the County had no objections to the Association's request to codify the 5-2, 5-2, 4-3 side letter in the 1989 contract covering detectives' schedules. Wagner, in testimony, confirmed that the then incumbent Footit was favorably disposed to adopt the 5-2, 5-2, 4-3 language in the contract. Wagner further confirmed in testimony that the County changed its position about adopting the Association's proposed language, because of the strong opposition of Sheriff-Elect Burton, and in addition, Wagner testified that the parties had never formally adopted in writing, the exception to a 6-3 schedule, so that the twenty-three month 5-2, 5-2, 4-3 schedule for detectives was a transitory exception, which could be rescinded at the sufferance of the new Sheriff.

The record further discloses that the Union withdrew its proposal before the conclusion of negotiations for a 1989 agreement and that the proposed codification of the side letter was never adopted in Article 7, Work Week of the 1989 labor agreement.

The significance of said withdrawal shall be discussed in Positions and Conclusions to follow. On January 2, 1989, the County, by Sheriff Burton, implemented a changed 6-3 schedule for detectives, thereby abolishing the 5-2, 5-2, 4-3 schedule on the basis that there existed no formal contractual language by way of an amendment to the otherwise controlling 6-3 language of Article 7. The Association filed a grievance which triggered the instant litigation.

POSITIONS OF PARTIES AND CONCLUSIONS

The Union contends that the County initiated a schedule change for detectives in early 1987, secured the approval of the Association's local Board of Directors, and thereafter, by its conduct, made no review at the end of the three month trial period. On the contrary, Sheriff Footit and his department's supervision exchanged correspondence with the Association and apprised the County's Personnel Director that management was satisfied with the 5-2, 5-2, 4-3 schedule as a permanent schedule. Though the Sheriff and County had an opportunity to rescind the 5-2, 5-2, 4-3 schedule, it merely confirmed its ongoing permanency in May of 1987 by clearing up the clinkers of minor on-call problems to secure detective coverage for summer holiday weekends.

The Union urges that the twenty-three month retention by management of the 5-2, 5-2, 4-3 schedule after the parties mutually-agreed change to the old 6-3 schedule, rises to the quality of an implied term of the labor agreement. The Union avers that such a lengthy practice was unequivocal, clearly enunciated and acted upon by the parties and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The Union urges that the record evidence clearly shows that the County implemented the change after securing the contractually required approval of the Association's Board of Directors. The Sheriff exchanged correspondence with the Association which reflected continued County approval for a permanent 5-2, 5-2, 4-3 schedule and that the labor negotiator for the County was aware of the Department's continued satisfaction with codifying the 5-2, 5-2, 4-3 schedule.

In the alternative the Union urges that the parties conduct, given the verbal understandings between both sides, fortified by the County's living with the twenty-three month schedule change and the written understanding between the Association and the County's agent all reflect the parties amending Article 7, Work Week to accomplish a 5-2, 5-2, 4-3 schedule for detectives.

The Union argues that overtime language of Article 9 justifies the Arbitrator imposing a time and one-half make whole remedy because of the County and Sheriff-Elect Burton's unilateral and arbitrary rescission of a permanent schedule change without securing the approval of the Board of Directors for the Association.

The County argues that the first two paragraphs of Article 7 are exceptions to the otherwise controlling 6-3 schedule for the remaining department personnel. Without a formal signed writing between the parties, the County may properly rescind the temporary practice of a 5-2, 5-2, 4-3 schedule when its new sheriff did conclude that the exception was no longer appropriate to the needs of the Department. The County contends that the language of Article 7 is clear and unambiguous so that once the Association is placed on notice that the Sheriff no longer agrees to the previous mutually acceptable exception, which was never adopted by express contract language, than the Association should have secured codification of the 5-2, 5-2, 4-3 side letter into the 1989 agreement. To the contrary, the Association withdrew its 1989 contract proposal to accomplish same. The County urges that the grievance be denied, and in the alternative argues that there is no contractual language to support the Association's "time and one-half" remedy since the detective lost no hours but merely drew weekends on a cyclical basis more frequently.

The undersigned finds the County's arguments set forth in its brief, where it avers that the 5-2, 5-2, 4-3 are "exceptions" to the normal 6-3 operative schedule to be of a "bootstrap variety". The language of Article 7 does not use the word "exception". It provides for two tiers of scheduling groups. The record evidence is uncontroverted from Sheriff Footit's testimony (see Tr. page 42-44) that the County secured the Association's approval for changing from 6-3 to a 5-2, 5-2, 4-3 for various personnel over the years. Footit testified that Don Sleiks, Lieutenant of Communications Center, was such a change that was never codified formally in Article 7, but nonetheless the Department retained his 5-2, 5-2, 4-3 schedule change as a permanent one.

From the testimony of County's witness Wagner, and from the County's written argument, the County views the labor agreement as an instrument between the Sheriff and the Department personnel, rather than a bilateral agreement between the County and the Association. The record evidence clearly indicates, through the correspondence between the Association and Footit, that the County considered the 1987 5-2, 5-2, 4-3 schedule changes as permanent after 1987. It reinforced that condition by its clarifying memo of May 1987 covering Detectives on-call responsibility for summer holiday weekend. Wagner in his testimony never denied receiving copies of the Coraggio-Footit letters and he further confirmed that Footit and the Department, given agreement from the Association, should implement 5-2, 5-2, 4-3 schedules if Footit believed it benefited the Department. However, the County cannot substitute the whim and caprice of a successor sheriff regarding the planned rescission of an agreement over permanent schedule changes. Article 7 Work Week speaks to "agreement" and to "variations of the regular work schedules" only secured by agreement (with) the Association's Board of Directors. The undersigned agrees with the

Association's first argument, that the twenty-three month practice, given the written exchanges between Footit and the Association indicates that the parties' conduct was clear and unequivocal. The new 5-2, 5-2, 4-3 schedule was permanent with no overt County effort to rescind it during the trial period. The work schedule change was clearly annunciated and acted upon. The correspondence (Exhibit 7 and 8) and the testimony of Footit and Wagner which reveals that the County voiced no objection to codifying the practice in contract language. Finally, a protracted twenty-three months of the County's application of the 5-2, 5-2, 4-3 schedule for detectives is certainly ascertainable over a reasonable period of time.

The undersigned concludes that a custom and practice existed here, where the County has done a certain thing for twenty-three months (applied a 5-2, 5-2, 4-3 schedule after securing agreement from the Association Board of Directors), and the matter is so well understood and taken for granted that it may be said that the contracts (i.e. 1988 and 1989) were entered into upon the assumption that such customary action would continue to be taken. I find such customary action constitutes an implied term of the parties' Article 7 Work Week language of the labor agreement.

The undersigned rejects the County's contention that the Association's drop of it's 5-2, 5-2, 4-3 side letter codification in 1988 for a 1989 contract, proves that it failed to secure by contract an exception to the 6-3 schedule. The record evidence equally supports a plausible inference that the parties essentially adopted the same language of Article 7 and agreed not to hold up interest negotiations for a 1989 contract, but were willing to take their chances on a grievance-arbitrator's construction of their 1987 and 1988 agreements.

CONCLUSION REMEDY

The undersigned rejects the Association's contention that Article 9 Extra Time (Overtime) supports a make-whole money award based on time and one-half earnings for working outside of a 5-2, 5-2, 4-3 regular schedule since January 2, 1989. There is no express clear language to support such a remedy.

On the contrary the parties took special pains to describe the time off in lieu of pay for the time worked in excess of schedule. That very phrase "in excess of the regularly scheduled work-day etc." contemplates working more hours than the regular 5-2, 5-2, 4-3 schedule would have produced. In addition the Association failed to produce evidence of bargaining conduct or of "contract administration that otherwise might evince a different intent of the parties' by their usage in Article 9.

For the foregoing findings and conclusions set forth above, the arbitrator makes the following

AWARD

That Winnebago County did violate Article 7, Work Week of the labor agreement by its assignment of detectives on January 2, 1989 to a 6-3 work week schedule without securing approval of the Association's Board of Directors to a variation of the then existing regular work schedule.

The County is directed to rescind the violative 6-3 schedule implemented by Sheriff Burton, and reinstate the 5-2, 5-2, 4-3 schedule for detectives, as described in the Brooks' January 29, 1987 side letter no later than thirty (30) days from the date of this Award.

Dated at Madison, Wisconsin this 27th day of February, 1990.

By _____
Robert M. McCormick, Arbitrator