

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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CITY OF ASHLAND (POLICE DEPARTMENT) : Case 56  
 : No. 44796  
and : MA-6417  
 :  
WISCONSIN PROFESSIONAL POLICE :  
ASSOCIATION/LAW ENFORCEMENT :  
EMPLOYEE RELATIONS DIVISION :  
 :  
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Appearances:

Mr. Scott W. Clark, City Attorney, City of Ashland, 214 Second Street, Ashland, Wis  
Cullen, Weston, Pines, & Bach, Attorneys at Law, by Mr. Richard Thal,  
20 North Carroll Street, Madison, Wisconsin 53703, appearing on  
behalf of the Union.

ARBITRATION AWARD

The City of Ashland (Police Department), hereinafter referred to as the City, and Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Commission to arbitrate a dispute over payment of overtime for employees enrolled in a training course. Hearing on the matter was held in Ashland, Wisconsin on March 12, 1991. Post hearing arguments and reply briefs were received by the undersigned by June 14, 1991. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE:

At the onset of the hearing the parties agreed upon the following issue:

"Did the City violate Section 13.04 of the collective bargaining agreement when it denied overtime payment for the time the grievants spent attending state mandated recertification training?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

. . . .

ARTICLE 13 - WORK DAY & WORK WEEK, OVERTIME

. . .

13.04 Overtime payments will be made for all time worked outside of the work schedule. All such time shall be compensated at the employee's option either in pay at the rate of 1-1/2 times the normal rate of pay or as compensatory time at the rate of 1-1/2 hours off for each hour worked. Employees shall be entitled to receive said overtime payments in any combination of pay or compensatory time of their choosing. If compensatory time is chosen, it shall be scheduled upon mutual agreement between the Chief of Police and the employee involved.

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BACKGROUND:

Amongst its various governmental operations the City operates a police department. Members of the police force have been encouraged by the City's Chief of Police, Gordon G. Gilbertson, to attend training schools to maintain/improve their skills and abilities. At the Chief's approval employees can attend the schools either on or off duty. Employees on duty receive their regular pay. Off duty employees receive compensatory time. Some employees never attended training programs while other employees received over forty (40) hours of training.

Effective July 1, 1990, Wisconsin Statutes mandated law enforcement employees to receive twenty-four (24) hours of training each year to maintain their certification as law enforcement officers. The State of Wisconsin pays each municipality one hundred dollars (\$100.00) per law enforcement officer to offset the costs of training.

On July 13, 1990, Chief Gilbertson sent the following memo to all officers of the Police Department:

MEMO

TO: All Officers

FROM: Gordon G. Gilbertson, Chief of Police

SUBJECT: Training Schedule

DATE: July 13, 1990

John Dinkle of WITC Law Enforcement North has presented this department with a calendar containing all of the scheduled training sessions that will be held in this area. Besides the training calendar, he has also put together a training booklet that describes all of the classes being offered and their locations as well as the dates.

Please look over the posted training calendar and if you find training that you are interested in attending, please put your initials in that dated area and I will then make up a registration form for you.

There are basically two Patrol Officer in-services that will take place at WITC in Ashland and those are October 2, 3 & 4, 1990 and February 26, 27 & 28, 1991.

There is one Investigators in-service that will take place on February 12, 13 & 14, 1991 in Ashland.

Please remember that the State of Wisconsin training and standards board has required that every sworn officer obtain a minimum of 24 hours of in-service training before July 1st of 1991 to remain certified as a law enforcement officer.

The training calendar and training book will be kept in the squad room. Should you have any questions regarding this, please feel free to contact me.

Prior to the issuance of this memo when similar memos had been posted employees merely initialed the memo to indicate their intent to attend the training. If the employee attended the training during off duty hours the employee was compensated at time and one-half rates of pay. During October, 1990, four employees, Greg DeBeau, Gene Brinker, Dan Crawford and Dan Mainguth attended the training session identified in Chief Gilbertson's July 13, 1990, memo. After attending the training sessions the employees requested overtime payments. These payments were denied by Chief Gilbertson on the basis that the hours spent by the employees on recertification training outside their work schedules were not properly counted as time worked. Chief Gilbertson sent the following memo to the grievants on October 8, 1990:

MEMO

TO: Officers Brinker, Mainguth, Crawford and BeBeau

FROM: Gordon G. Gilbertson, Chief of Police

SUBJECT: Grievance

DATE: October 8, 1990

I have received the above referenced grievance. The grievance is denied. There is and has been no violation of the contract or past practice. No overtime pay or compensatory time will be given for the officers to satisfy the newly mandated 24 hour training requirement by the State of Wisconsin.

The matter of the State required 24 hour training became effective July 1, 1990. It is an entirely new matter that should be addressed in the context of collective bargaining and not through the grievance procedure.

Thereafter the instant grievance was filed and processed to arbitration in accordance with the collective bargaining agreement's grievance procedure.

At the commencement of the hearing in the instant matter the parties stipulated to the following:

#### BEFORE THE ARBITRATOR

In the Matter of the  
Arbitration Between:

ASHLAND CITY POLICE DEPARTMENT  
EMPLOYEES UNION

Union, Case 56 No. 44796 MA-6417  
Overtime Pay Grievance

and

THE CITY OF ASHLAND,  
Employer.

#### STIPULATION

##### I. STIPULATED STATEMENT OF FACTS.

1. Wisconsin Statutes, sec. 165.85(4)(bn) was adopted effective July 1, 1990. By adopting the statute, the State of Wisconsin required all law enforcement officers in the state to complete 24 hours of recertification training annually beginning in fiscal year 1990-91.

2. The state mandated training referred to in paragraph 1 above is met when an officer completes in any combination at least 24 hours of:

- a) state approved in-service training provided by their employer; and/or
- b) instruction from schools which offer state approved recertification training.

The Department of Justice, Training and Standards Bureau provides information on recertification training. Attached as Exhibit 1 to this Stipulation is a copy of the January, 1991 "Attorney General's Law Enforcement and Jail Officers Training Bulletin." This Bulletin is one example of the information law enforcement agencies receive concerning mandated recertification training.

3. The Wisconsin Department of Justice funds annual recertification (in-service) training by reimbursing a department at least \$100.00 (less tuition costs) for each officer each fiscal year.

4. Ashland City Police Department received a roster of its personnel from the Department of Justice, Division of Law Enforcement Services, Training and Standards Bureau. This roster is the form for claiming reimbursements for the mandatory 24 hour recertification training.

5. All Ashland City Police Department law enforcement officers are required by the state to complete at least 24 hours of recertification training. After June 30, 1991, the Department of Justice will reimburse the City \$100.00 (less tuition costs) for each officer identified on the roster as having completed this mandated training. Upon receipt of the Department of Justice reimbursement, the City intends to pay all amounts reimbursed directly to the City officers. The City intends to retain none of the Department reimbursements.

6. Grievants Gene Brinker, Dan Mainguth, Dan Crawford and Greg BeBeau, attended recertification training at Ashland WITC on October 2-4, 1990 outside of their work schedules. The grievants signed up for overtime payments in the form of compensatory time after they completed this training.

7. Sec. 13.04 of the parties' collective bargaining agreement states: "overtime payments will be made for all time worked outside of the work schedule." In calculating the time worked by an employee, all time spent in training outside the work schedule is compensable as sec. 13.04 overtime pay if that time would be counted as working time under the Fair Labor Standards Act (FLSA).

8. The City denied overtime pay for the time the grievants spent attending recertification training on October 2-4, 1990. The City maintains that each grievant will be paid the reimbursement which the City receives from the Wisconsin Department of Justice due

to that officer's completion of the training requirement.

9. It is the City's position that the hours the grievants spent attending recertification training outside their work schedules were properly not counted as time worked for the purposes of computing overtime under both sec. 13.04 of the parties' collective bargaining agreement and under the FLSA.

10. It is the Union's position that the hours the grievants spent attending recertification training on October 2-4, 1990 must be counted as time worked for the purposes of computing overtime under both sec. 13.04 of the parties' collective bargaining agreement and under the FLSA.

## **II. STIPULATED ISSUE.**

Did the City violate sec. 13.04 of the collective bargaining agreement when it denied overtime payment for

the time the grievants spent attending state mandated recertification training on October 2-4, 1990. If so, what is the appropriate remedy?

Dated at Madison, Wisconsin this 6th day of March, 1991.

ASHLAND CITY POLICE DEPARTMENT  
EMPLOYEES UNION

By: Richard Thal /s/ 3/6/91  
Date

CITY OF ASHLAND

By: Scott W. Clark /s/ 3/6/91  
Date

UNION'S POSITION:

The Union contends the hours spent by Brinker, BeBeau, Crawford, and Mainguth, hereinafter referred to as the grievants, attending recertification training at the Ashland WITC on October 2-4, 1990, must be counted as time worked for the purposes of computing overtime under both Section 13.04 of the collective bargaining agreement and under the Fair Labor Standards Act. The Union points out it has been the custom and past practice of the parties to make overtime payments to all off duty officers who have spent time in training that has been approved by the Chief of Police. The Union asserts it was undisputed by the City that all hours spent in approved training were counted as hours worked and therefore overtime (or comp time) payments were made for hours spent in training. The Union does acknowledge that the collective bargaining agreement does not refer to training time. However, the Union argues that custom and past practice is enforceable when the past practice is in essence a part of the parties' whole agreement. Particularly when the practice is unequivocal, clearly enunciated and acted upon, and when it is readily ascertainable over a reasonable period of time. The Union claims that the City does not dispute that the parties' practice met this test.

The Union also acknowledges that effective July 1, 1990 the State of Wisconsin required all law enforcement officers to complete twenty-four (24) hours of recertification training. The Union submits that during the life of a contract the City should not be allowed to repudiate the parties' past practice on overtime for approved training because of a new state mandate. The training attended by the grievants was no different then training they had attended in previous years. The training had not only been approved but had been recommended by the Chief. It has long been department policy to encourage officers to attend training and Chief Gilbertson had advocated that officers attend training and had encouraged officers to attend forty (40) to sixty (60) hours of training. The Union asserts the state mandate does not change the parties' collective bargaining agreement or the parties' binding past practices. The Union concludes that during the life of the collective bargaining agreement the City may not unilaterally change terms embodied in the agreement.

The Union also contends its interpretation of the collective bargaining agreement is reasonable. The Union argues the City, by not following the past practice has treated the grievants unreasonably and unfairly. The Union points

out the City will receive one hundred dollars (\$100.00) less the course tuition fee for each of the grievants. This results in a payment of fifty-five dollars (\$55.00) to each grievant. Yet the Chief of Police acknowledged in his testimony that the state does not mandate that employees receive the reimbursement in lieu of overtime compensation. Thus the City has unilaterally determined to pass on the reimbursement as the only compensation to the grievants for the entire twenty-two (22) to twenty-four (24) hours of training they attended. The Union concludes it does not make sense that in the past the City encouraged officers to receive more than twenty-four (24) hours of training with no reimbursement from the state that now, when it is receiving reimbursements it desires to pay officers less than two dollars and fifty cents (\$2.50) per hour for time spent in approved training. The Union concludes the City should continue to count attendance at in-service training as hours worked.

The Union further points out that when officers receive recertification training during normal work hours they receive their regular compensation. Also, employees have been allowed, even after the instant matter arose, to change work shifts in order to receive training.

The Union argues the City's defense is that its actions were a cost saving measure. The Union asserts the City's ability or inability to make contractual overtime payments is not relevant. Cost factors do not permit the City to violate a binding contractual overtime provision.

The Union also argues that under the Fair Labor Standards Act (FLSA) time spent attending training which is directly related to employee's job must be counted as compensable hours of work. Thus, the FLSA supports the grievants' contractual claim in the instant matter. The Union points out there is no dispute that the training the grievants attended was directly related to their jobs. The Union also points out the Chief of Police's testimony confirmed that the patrol in-service the grievants received was directly related to the duties and responsibilities performed by the four (4) grievants. While the Union recognizes that the arbitration is not the place for interpreting the FLSA regulations, if, as in the instant matter, the FLSA regulations clearly support the Union's interpretation of the collective bargaining agreement, the Union need not prove that the grievants are entitled to overtime pay by virtue of a binding past practice. The Union concludes that while the FLSA may set minimum standards with which a contractual provision must be consistent, the FLSA minimum standards cannot be used to take away contractual rights such as the contractual overtime rights at issue in the instant matter.

In its reply brief the Union asserts the past practice was to compensate officers for all approved training. The Union argues the City's claim that the Chief of Police had in advance specifically approved overtime compensation for all training received is inconsistent with the record in the instant matter. The Union argues that approval or disapproval of compensation for approved training had never been an issue. Thus there has never been a need for the Chief of Police to specifically approve overtime compensation. The Union also claims the instant matter is not a dispute about management's right to determine training needs. The Union points out the record demonstrates the Chief of Police encouraged officers to attend the training on October 2, through October 4, 1990. The Union concludes the training was therefore consistent with the Police Department's needs. The Union contends the issue is not whether the training was approved but rather the issue is whether the City can discontinue a practice because of recent legislation requiring law enforcement officials to complete twenty-four (24) hours of recertification training each year. The City's reasoning that it should not be required to absorb the cost of this mandate must therefore fail. The Union also asserts the FLSA regulations and arbitral precedent support its position.



The Union concludes that the undersigned should uphold the grievance and direct the City to make the grievants whole for all overtime lost as a result of the City's denial of the grievants request for compensatory time.

CITY'S POSITION:

The City contends that the hours the grievants spent attending recertification training outside their work schedules were properly not counted as time worked for the purposes of computing overtime under both Section 13.04 of the parties' collective bargaining agreement and under the FLSA. The City points out that the facts in this matter are not in dispute. However, the City contends the instant matter is one of first impression by virtue of the fact that the grievance arises out of a new State of Wisconsin mandate requiring law enforcement officers to attend recertification training. The City also points out that the parties have agreed that the only applicable collective bargaining agreement provision is Section 13.04 which states: "...overtime payments will be made for all time worked outside of the work schedule.". The City further points out the parties have agreed that in calculating the time worked by an employee all time spent in training outside the work schedule is compensable as Section 13.04 overtime if that time would be counted as working time under the Fair Labor Standards Act. The City asserts that 29 CFR, Chapter V, Section 553.226 is therefore dispositive of the entire grievance. 1/ The City concludes the State of Wisconsin's mandated recertification training is not considered as working time under the FLSA.

The City argues any payment to City officers for training time for state mandated recertification training is a permissive subject of bargaining. The City points out the Chief of Police's October 8, 1990, memo denying the grievance clearly advised the Union that issues related to overtime pay or compensatory time for attending state mandated recertification training should be addressed at the bargaining table and not through the grievance procedure.

In its reply brief the City acknowledges that a past practice can be binding under certain circumstances. However, the City argues that the practice supported by the evidence in the instant matter, contrary to the Union's claims, demonstrates that no compensation would be paid to any officer for training received outside of regular working hours unless the training and compensation for overtime was specifically approved, in advance, by the Chief of Police. The City reasserts it is not mandated by the collective bargaining agreement or the FLSA to pay overtime for any officer for receiving training outside of regular working hours.

The City also argues it has a need to stay within budgetary constraints. This need requires Chief Gilbertson to examine and specifically accept or reject requests for training and overtime compensation. The City claims that under the law and past practice it is not obligated to pay overtime for any training outside regular hours. The City concludes it has the discretion to allow overtime compensation if the Chief feels the area of training would benefit the Department, the Chief believes his budget would allow such an expenditure, and the Chief has specifically approved in advance the training

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1/ 29 CFR, Chapter V, Section 553.226 - Training Time: "Attendance outside of regular working hours at specialized or follow-up training, which is required for certification of employees of a governmental jurisdiction by law of a higher level of government (e.g., where a State or county law imposes a training obligation on city employees), does not constitute compensable hours of work."

and the overtime. The City argues that in the instant matter the grievants failed to seek advance approval from the Chief for either the type of training they pursued or for payment of overtime. The City argues this failure on the part of the grievants is fatal to their grievance. The City points out that when the Chief first became aware of the grievants request for overtime on October 2, 1990, he immediately made it clear that no overtime would be paid for the training.

The City also argues that the Union's contention that the City is obligated to pay overtime for attendance at "approved training courses" is erroneous. The City asserts this contention is neither supported by the law, any provision of the agreement, past practice and flies in the face of logic. The City asserts that it has the management right to determine what training will benefit the Police Department and whether the City can afford to have that training administered to its law enforcement officers. The City asserts the Union's argument results in a situation whereby the City has no control over or ability to limit overtime compensation claimed by officers receiving training outside of their regular hours of work.

The City also stresses that 29 CFR Section 553.226 controls the instant matter and argues this section affirms that recertification training is not compensable under the FLSA. The City concludes that the State mandate of recertification training is an issue between law enforcement officers and the state which licenses the officers. The City argues it should not be forced to absorb the law enforcement officers' expenses in retaining their license as there is no law, past practice or collective bargaining agreement provision requiring the City to do so.

The City would have the undersigned deny the grievance.

## DISCUSSION:

The record herein demonstrates that prior to July 1, 1990, when the City's Chief of Police saw a training program he felt would benefit the City's Police Department he would post a notice of the training and interested employees would sign up for the training. The Chief of Police testified at the hearing that he was always aware of which officers were going to training programs. The record also demonstrates the Chief has encouraged officers to attend training programs and that the City has allowed on duty officers to attend training programs with no loss of compensation. The Chief has also allowed employees to attend in-service schools in the past and the employees who volunteered to attend them received compensation. The record also demonstrates the City's Police Department averages about twenty-four (24) hours of paid training time per year with some employees receiving as high as forty (40) hours of training and some receiving no hours of training.

The instant matter arose after the Chief of Police had posted a notice of training. This notice pointed out to employees they had to receive twenty-four (24) hours of training to maintain their law enforcement officer certification. It did not inform employees that the City would not compensate them for attending the training program.

The parties have stipulated that in calculating the time worked by an employee, all time spent in training outside the work schedule is compensable if that time would be counted as working time under the FLSA. Both parties have pointed to the FLSA in support of their positions. As pointed out by the City the act specifically excludes as compensable hours spent outside of regular hours at training which is required for certification. However, as the Union has pointed out, when the training is not required by law and is directly related to an employee's job an employer must include the training time as hours worked. The undersigned notes that Section 555.226 (c) 2/ implies law enforcement officers at a training facility are on compensable time when they are in class or at a training session. In effect, the WITC may qualify as a training facility. If the WITC qualifies as a training facility, then paragraph Section 555.226 (c) dictates that personal time is not compensable while attendance in classes is compensable. Thus the undersigned finds that the FLSA is ambiguous as to whether the City should compensate the grievants for the time spent at training on October 2 through 4, 1990.

The City has raised questions concerning budget problems and it's right to determine what training employees should be compensated for. However, neither defense is dispositive in the instant matter. There is no evidence that when the Chief denied the grievants' request for compensation that he did so because his budget for training had been depleted. There is evidence that in-service training programs had in previous years been approved by the Chief and had been compensated for by the City. The record also demonstrates that when an employee wanted to go to a school of his own choosing, the employee would seek the Chief's approval first prior to attending the school. Thus, the grievants are not challenging the City's ability to determine what training employees should be compensated for, for clearly the City has already made this determination in past years. However, once the City, by the Chief's actions,

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2/ Section 553.226 (c): Police officers or firefighters, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable.

has identified a training program, the grievants are seeking compensation for attending the program.

The record clearly demonstrates that the parties have a practice that contains the following aspects. One, the Chief of Police determines training programs he is interested in having employees attend. Two, the training programs are posted by the Chief and interested employees sign the posting. Three, employees who attend the training program either do so during their regular duty time or during off duty hours. Four, employees who attend the training during their regular duty hours receive their regular pay. Lastly, five, employees who attend the training during their off duty hours receive overtime compensation. There is no evidence that the Chief has in the past denied an employee's request to attend a posted training program. The undersigned does conclude that the practice is binding on the City. While the undersigned is aware that the State of Wisconsin has initiated a minimum training requirement on all law enforcement officers, which may result in an increased desire by employees to attend training programs, the practice is still binding on the City. The fact that employees may utilize attendance at training programs approved by the Chief of Police to satisfy their recertification requirements is irrelevant. The parties' practice is clear and, as noted above, this practice is based upon the initial determination by the Chief of Police that certain training programs are beneficial to the Police Department.

The undersigned notes here that this decision does not limit the City's right to police its past practice. The parties' practice does not require the City to post every training program it becomes aware of. Clearly, the Chief has the discretion in determining training needs of the department; not only what training programs the City shall offer, but also, how many employees should be trained in a given area. Clearly, he has already done this in the area of intoxilyzer use and radar operation. This decision does not limit the Chief's ability to continue to exercise such decision-making.

Based upon the above and foregoing and the testimony, evidence and arguments presented by the parties the undersigned finds the City violated Section 13.04 of the parties' collective bargaining agreement when it failed to compensate the grievants at overtime rates for time spent at state mandated recertification training. The City is directed to make the grievants whole. The grievance is sustained.

AWARD

The City violated Section 13.04 of the collective bargaining agreement when it denied overtime payment for the time the grievants spent attending state mandated recertification training on October 2-4, 1990. The City is directed to make the grievants whole.

Dated at Madison, Wisconsin this 30th day of September, 1991.

By Edmond J. Bielarczyk, Jr. /s/  
Edmond J. Bielarczyk, Jr., Arbitrator