BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LABOR ASSOCIATION OF WISCONSIN, INC., LOCAL 216	Case 4 No. 45700 MA-6712
and	
CITY OF NEW RICHMOND (POLICE DEPARTMENT)	

Appearances:
Mr. Dennis A. Pedersen, Business Agent, Labor Association of Wisconsin, Inc., on behalf of the Association.
Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld, on behalf of the City of New Richmond.

ARBITRATION AWARD

Labor Association of Wisconsin, Inc., hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the City of New Richmond, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and Stuart Levitan was designated to arbitrate in the dispute. Due to Mr. Levitan's unavailability, David E. Shaw was subsequently designated in his place. A hearing was held before the undersigned on September 18, 1991 in New Richmond, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 23, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that the matter is properly before the Arbitrator and also stipulated to the following statement of the issue:

> Did the City violate Article 18, Section 6, of the Collective Bargaining Agreement when it did not assign two July shift vacancies to the Grievant? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1989-1991 Agreement are cited:

ARTICLE 10 - MANAGEMENT RIGHTS

The City of New Richmond possesses the sole right to operate City government and all management rights repose in it, subject to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

1. To direct all operations of City government.

2. To establish reasonable work rules, providing that the same are distributed to each member of the bargaining unit at least thirty (30) days prior to implementation.

3. To hire, promote, schedule and assign employees in positions within the bargaining unit.

. . .

ARTICLE 18 - OVERTIME - COMPENSABLE TIME OFF COURT TIME

Section 6: Whenever there exists a full or partial regular patrol shift vacancy which is to be filled, the Employer shall, during the months of January through August, fill said vacancy as follows:

(a) The Employer may fill the vacancy with supervisory personnel.

(b) If the Employer does not fill the vacancy with supervisory personnel, then it must offer the work to available bargaining unit employees. (An employee is not considered available where working the hours would result in less than an eight (8) hour period between shifts.) If a bargaining unit employee accepts the offer, he/she shall be compensated in either pay or compensatory time at a straight time rate. It is understood that any offer under this subsection is voluntary in nature and the employee may decline the same. Nothing herein prohibits the assignment, where necessary, of work outside of regularly scheduled hours; however, where this occurs as an assignment, and is not subject to refusal at the employee's discretion, the overtime provisions of this Article shall apply.

(c) Where attempts to fill a vacancy under (b)

above fail, the Employer may then fill said vacancy with part-time employees, if desired.

(d) During the months of September through December, the vacancies contemplated above may be filled with supervisory employees, reserves, or bargaining unit employees at the discretion of the Chief of Police.

. . .

BACKGROUND

The City maintains and operates the New Richmond Police Department and the Association represents all full-time police officers in the Department. The Grievant, Tony Milliron, is a full-time police officer in the Department and normally works the "C" shift (7:00 p.m. - 3:00 a.m.).

The scheduling in the Department is done by Sgt. Cody and during the week of June 17, 1990 Cody was attempting to finalize the schedule for July of 1990. On June 21, 1990, Cody determined that he would have two vacant shifts in July - July 4 and July 15, as well as others. In reviewing the schedule he determined that Officers Lundell and the Grievant were scheduled to be off on July 4 and July 15. Lundell being the senior of the two officers, Cody called him first and offered him the vacant shifts on those dates, and Lundell rejected the offer. At approximately noon hour on June 21, Cody attempted to call the Grievant at his residence. The Grievant's scheduled days off were June 21 and 22, a Thursday and Friday, and the Grievant was not at home when Cody called. Cody left a message on the Grievant's answering machine that he had a couple of vacant shifts in early July and that the Grievant should call him in that regard.

In the afternoon of Friday, June 22nd, Cody contacted two reserve officers, i.e., part-time officers, and assigned them to the vacant shifts on July 4 and 15, having not heard from the Grievant regarding whether he wanted to take those shifts. The July schedule was distributed on June 22.

Both Cody and the Grievant were scheduled to work on Saturday and Sunday, June 23 and 24, Cody on the "A" shift (6:00 a.m. - 2:00 p.m.) and the Grievant on the "C" shift. Cody was scheduled to be off the week starting Monday, June 25. On Monday morning Cody had to come into the office for reasons unrelated to this case before leaving on vacation and again called the Grievant's residence to advise the Grievant that a request for a vacation day was being denied for lack of available coverage. The Grievant was not home when Cody called and Cody left a message on the answering machine to have the Grievant call him. The Grievant called Cody approximately one hour later whereupon Cody advised him that his request for a vacation day had been denied and during that conversation Milliron advised Cody that he was available to work the vacant shifts. There is some dispute as to whether Cody first told the Grievant that the shifts were filled and then the Grievant said he wanted to work them or vice versa. Cody informed the Grievant that he had already filled the shifts with reserve officers and they were therefore no longer available. The Grievant then advised Cody that he would grieve the matter. A grievance was filed and the dispute proceeded to arbitration before the undersigned.

The parties stipulated that they had previously attempted to negotiate what they would both consider to be a "reasonable" time for officers to respond as to whether or not they would be willing to work vacant shifts that were

offered, but were unable to reach agreement in that regard.

ASSOCIATION

The Association takes the position that the language of the parties' Agreement at Article 18, Section 6, clearly provides that the City is contractually required to "offer the work to available bargaining unit employees" before the vacant shift may be filled with part-time employes. Being the least senior full-time officer among those available to work the vacant shifts, the Grievant had to be offered the work before it could be assigned to part-time personnel. According to the Association, the Grievant attempted to accept the offered vacancies on June 25th but was denied the opportunity.

With regard to the City's argument that the Grievant failed to notify Cody that he desired to work the vacant shifts within a reasonable time, the Association contends that the City's argument fails for several reasons. First, it notes that the Grievant notified Cody of his desire to work the vacant shifts 9 and 20 days before the respective vacancies. Hence, there was no "sense of emergency" in filling the shifts. Secondly, Cody testified that the period of time allowed to respond varies depending upon "the immediacy" of the vacancy involved. The bargaining unit personnel, thus know there is no fixed time frame to respond. Further, Cody testified that when he left a message for the Grievant on June 21, he said nothing about any need for any immediate response and gave no time frame for responding. Under the circumstances, the City cannot reasonably argue that the Grievant should have known to address the matter sooner than he did. Third, although Cody testified that one of the reasons he wanted a quick response was to allow him to distribute the July schedule on June 22, he did not so indicate in the message he left for the Grievant on June 21. Fourth, Cody testified that it was common knowledge that the posted schedule is subject to change along the way. That being the case, it cannot be asserted that because the work had been assigned to the reserves, Cody could not make a change. Fifth, the Association disputes that there is any provision in the relevant contractual language that requires that the offer of such work to bargaining unit employes must be addressed within a "reasonable" period of time. Rather, the contract requires that such employes be given preference in filling the shifts before the shifts may be offered to non-unit personnel. Sixth, the Association notes that the parties stipulated that they attempted in prior negotiations to establish a "narrow and specific timeframe" for handling these matters, but that they have not been able to agree on such a clear timeframe. To allow the City's action in this case to stand, would be to permit it to gain through arbitration that which it has been unable to obtain at the bargaining table.

The Association concludes that the relevant language of the Agreement is clear that the Grievant should have been allowed to fill the vacant shifts. There has been no mention of an emergency and no evidence that there was one involved. The Grievant's notice to Cody that he desired to work the vacant shifts occurred well in advance of the shifts and Cody did not advise the Grievant that there was a pressing urgency for him to respond. Further, the work was assigned to the reserves only one day after leaving the message for the Grievant. Pursuant to established arbitral principles, the contract terms being clear on their face, should be given no meaning other than that expressly stated. Further, the Arbitrator is without authority to expand upon the terms negotiated by the parties.

CITY

The City takes the position that the grievance must be denied because its assignment of the two vacant July shifts to reserve officers (part-time

officers) did not violate the parties' Agreement. The City cites Article 10, Management Rights, of the Agreement as providing it with certain management rights regarding the scheduling of work and direction of all City operations. It cites Article 18, Section 6 of the Agreement as more specifically applying to the issue before the Arbitrator. The City asserts that it followed that provision. It first checked regarding supervisory personnel and determined they were either unavailable or unwilling to fill the vacant shifts. Cody then contacted the full-time patrol officers who were available, Lundell and the Grievant. Lundell refused both shifts and Cody then contacted the Grievant. As the Grievant was not home, Cody left the message on his answering machine indicating that he was offering the Grievant some vacant shifts in early July and that he should return Cody's call. That call was on Thursday morning of June 21, and as of Friday afternoon, June 22, the Grievant had not yet responded in any manner. It was then that Cody assigned the vacant shifts to part-time officers who had volunteered as provided under subsection (c) of Article 18, Section 6. The City disputes that the Grievant's waiting until June 25 (4 days after the shifts were offered) was a reasonable time in which to respond. The City disputes as well the Grievant's reasons for not responding before that time.

The City asserts that the Grievant gave three reasons for not responding sooner than he did. The first of those reasons was that Sgt. Cody was off-duty during the intervening weekend and therefore the Grievant was unable to contact him. Cody was in fact scheduled to work both Saturday and Sunday, June 23 and 24, and it was a common practice for officers to leave messages for each other in the Department. Further, the June schedule showed Cody to be scheduled off beginning Monday, June 25, and the City questions when the Grievant did intend to respond to the offer. In fact, the Grievant admitted he never attempted to contact Sgt. Cody, rather it was Cody who called the Grievant on Monday, June 25 regarding a denial of a requested vacation day. Had it not been for Cody's phone call to the Grievant on June 25, it is probable that the Grievant would have continued to delay his response to the offer of the open shifts.

The City asserts that the Grievant also indicated that he could not accept or reject the vacant shifts because he did not know which shifts were being offered and without that information could not determine whether he was available to work. In that regard, the Grievant's written statement of the grievance indicates that Cody left a message on his telephone answering machine that indicated there were two vacant patrol shifts which would "occur early in July, 1990". Hence, the Grievant knew the shifts were to occur early in July. Further, if the Grievant was truly interested, he could have contacted Cody to find out the dates.

It is also asserted that the Grievant used as an excuse that the message left by Cody on his machine did not indicate that he should return the call as soon as possible. Even assuming that Cody did not indicate a need for immediate response, the Grievant was aware through prior negotiations and communications with the Chief that shift vacancy offerings required immediate response. That very issue had surfaced 5 months earlier when the Grievant had another "misunderstanding" regarding vacant February shifts. Chief Levi's response to the Grievant at that time stated:

> During negotiations this was an area that was talked about with your union representative. They both agreed that when a phone call was made to the officer about working a voluntary shift, the officer is to tell the calling person right away if he will work the shift or not. It was my understanding and theirs that the officer could make a phone call, but that we were to be given an answer within a reasonable time. . .

Thus, even without explicit indication in the telephone message, the Grievant knew that a quick response was expected.

The City asserts that it waited a reasonable time to allow the Grievant to respond. Although a "reasonable period" was never defined by the parties in bargaining, they had considerable discussion about the matter and all had agreed that management should wait a "reasonable period". Further, the Grievant knew that distributing the work schedule was a sensitive issue with the patrol officers in that they wanted to know their schedule as far in advance as possible. In that regard, Cody testified he generally tried to get the monthly work schedules out early in the last week of the prior month. The City notes that the Grievant's memo to Chief Levi in the February incident indicates that the Grievant himself suggested that work schedules get distributed even earlier. The Grievant's argument that since he was low man on the seniority pole with respect to the vacancies on both the 4th and the 15th, his response to whether he wanted the vacant shifts did not affect the rest of the bargaining unit, is entirely without merit. The whole July schedule could not be distributed until the shifts were filled. Thus, any delay in filling the shifts would affect the whole bargaining unit adversely.

The City notes that the parties attempted to negotiate an understanding as to what constitutes a reasonable time for responding to shift vacancies, but were unable to agree. In the absence of such an agreement, the City asserts it has the right to determine what constitutes "reasonable". Chief Levi's memo of February, 1990 notes that the parties agree that the officers need to tell the City "right away" whether or not they can fill the shift. In that same memo, Chief Levi set a one-hour time limit for responding so as to permit an officer to check his personal availability. In this case, the Grievant knew that as the month of June was ending the management needed a response so that it could complete the July schedule for distribution. He also knew of the Chief's one-hour time limit. The City contends that in the absence of a written agreement to the contrary, it is the City's standard which governs. Citing, Willamette Industries, Inc., 78 LA 1137 (1982). Thus, the City concludes that it had the right to expect the Grievant to respond within the City's stated deadline, as long as it is reasonable.

In determining what is "reasonable", it asserts that it was reasonable in waiting an entire day before filling the shifts with part-time employes, as opposed to the Grievant's accepting the shifts four days after the offer was made. The City notes its practice of filling vacant shifts "right away", also noting that "right away" can vary depending on the specific situation. Generally speaking, the officers called by Cody indicate immediately during that telephone conversation whether they will accept or reject the shifts. Under no circumstances has it been the practice for officers to wait one day, let alone four days, before responding. Also, an unreasonable delay in responding to a shift vacancy makes it more difficult for the City to find other employes interested in filling the shift, especially as to July 4th, since both the patrol officers and the reserves were making personal plans for the holiday. Thus, the longer the Grievant delayed in responding, the less likely it was that others would be available for the work in question. Under the Association's standard of reasonableness, i.e., four plus days, the City would face a scheduling nightmare, leaving critical shifts unstaffed. Four days is not a reasonable response time, and neither past practice nor the City's prior communications with the Grievant indicate that four days was ever an acceptable response time.

The City concludes that it met its responsibility to notify the Grievant of the vacant shifts, but the Grievant failed to respond to the offer in a timely fashion. Since Sgt. Cody knew at the time the shifts were offered to

the Grievant that the latter was in the process of working on his home, he also had circumstantial reasons to believe that the Grievant did not want the work. It was the Grievant's responsibility to notify management of his intentions within a reasonable period, and in this case he did not fulfill that responsibility. Thus, the City cannot be faulted for assigning the shifts to part-time employes after waiting more than a day for a response from the Grievant.

DISCUSSION

It is first noted that Article 18, Section 6, of the Agreement is silent as to when officers in the bargaining unit must respond to offers of vacancies on the schedule. Section 6, (b), provides only that the vacancy must be offered to bargaining unit personnel if it is not filled by supervisory personnel, and Section 6, (c), provides that the vacancy may be filled by part-time employes where attempts to fill under 6 (b) fail.

Despite the Association's assertion that there is no requirement set forth in the Agreement that the offer and acceptance of a vacancy must be completed in a "reasonable" period of time, both parties have in essence offered arguments as to whether the City waited a reasonable period of time for a response from the Grievant before offering the vacancies to part-time officers. The parties have thus recognized by the arguments they make that some standard must be applied in assessing the actions of the City and the Grievant in this case in determining whether the City violated Article 18, Section 6, of the Agreement. The parties in fact had attempted, albeit unsuccessfully, to reach agreement on what would constitute a "reasonable" amount of time an officer had to respond to an offered vacancy before the offer was considered rejected. Contrary to the City's assertion, however, that does not mean that the City's requirement of a response within an hour necessarily then becomes the rule. What constitutes a reasonable time for management to wait for a response, and for an officer to respond, to an offer of a vacancy could well vary with the circumstances in each instance.

In this case, management waited until Friday afternoon, i.e, slightly more than a day, for the Grievant's response before offering the vacancies to part-time officers. It is not, however, necessary to determine whether that period was reasonable in order to decide the issue in this case. The "offer" was made around noon on Thursday, June 21st, regarding vacancies in early July. The evidence indicates the practice in the Department is to post and distribute the monthly work schedules approximately a week prior to the start of the month. The Grievant testified that he received Sgt. Cody's message on his answering machine either Friday evening or Saturday morning. Both the Grievant and Cody worked on Saturday and Sunday, albeit different shifts. The testimony of the Grievant indicated that it was common practice for officers to leave messages for officers on other shifts, yet he did not attempt to contact Cody in that manner or any other on Saturday and Sunday. It was not until Monday morning that the Grievant responded to the offered vacancies. Even then, it was only in the course of a conversation initiated by Sgt. Cody with regard to a vacation request of the Grievant's that the topic was broached. Further, Cody was scheduled to be off that Monday through the rest of June. Hence, it took the Grievant approximately four days to respond and then it was only happenstance that the Grievant and Cody talked about the matter on that Monday. Under the circumstances in this case, that is deemed to exceed a reasonable time for responding to the offered vacancies and amounts to a tacit rejection of the offer. Whether, as the Association argues, it was possible for the schedule to be changed so as to give the Grievant the vacant shifts is irrelevant, since he waited too long to accept the offer. Moreover, the mere fact it is possible does not mean the City is contractually required to change

the schedule. Presumably the plans of the other officers, both in and out of the unit, are also affected by such changes. For these reasons, it is concluded that the City did not violate Article 18, Section 6, of the parties' Agreement when it did not assign the Grievant to the two July shift vacancies.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 26th day of February, 1992.

By David E. Shaw /s/
David E. Shaw, Arbitrator