

2. Whether the City violated the contractual agreement between the City and the City

of Prairie du Chien Police Unit by prohibiting police officers from working more than two consecutive days during their three days off period?

Having reviewed the entire record, the Arbitrator finds the issues as framed by the City are appropriate to decide the instant case. In addition, if the answer to any of the above issues is in the affirmative, a question remains as to the appropriate remedy.

FACTUAL BACKGROUND:

The City of Prairie du Chien is a city of the fourth class and a municipal employer within the meaning of the Municipal Employment Relations Act. The City maintains a police force. Non-supervisory police officers including Patrolmen, Sergeants and an Investigator are represented in matters concerning their wages, hours and conditions of employment by the Prairie du Chien Police Department Employees Union Local 1972, AFSCME, AFL-CIO. The Union and the City have been parties to a series of collective bargaining agreements.

Over the years the parties have negotiated specific scheduling procedures. These procedures are initially contained in the parties' agreement particularly in Article XI - Work Day and Work Week - Overtime.

Effective August 1, 1986, the parties entered into a written agreement regarding overtime and overtime shifts in an attempt to divide up overtime as equally as possible. This agreement provided, in material part, that overtime shifts be divided up as equally as possible on a rotating basis between off duty full-time officers and that equal opportunity to work on an overtime shift be given to each officer. The agreement also provided for the right of employes to work on more than one (1) shift during a twenty-four (24) hour period ("double back") and the right of employes to work on all scheduled days off.

Also in effect during this time was a written policy (revised July 1987) of the Department "not to allow employees to work sixteen (16) consecutive hours on the same work classification. There shall be a minimum of four (4) hours of rest between shifts." The only exception to this policy included instances where an investigation had to continue or in cases of extreme emergency where all personnel were needed on duty.

The above policies and practice on overtime remained in effect until on or about May 15, 1991 when the City unilaterally revised the scheduling policy. The unilateral change resulted in the denial of voluntary overtime work opportunities that had been provided to employes in the past. This included the opportunity to work on more than one shift during a twenty-four (24) hour period (under the scheduling routines in effect this requirement principally affects the ability of the first shift Sergeant to

"double back") and the opportunity to work on more than two (2) days during employees' three (3) day off cycle.

The City took this action based on its interpretation of 1987-88 State Stats., Sections 62.13(7m)(a) and 62.13(7n) and over concern about potential liability for not having sufficiently rested police officers.

PERTINENT CONTRACTUAL PROVISIONS:

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 (1/2) 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.

. . .

ARTICLE XXIII - LEGAL AGREEMENT

23.01 If any article or part of this Agreement shall be held invalid or illegal, the same shall not affect the rest of this Agreement which shall continue in force, and the parties shall immediately meet to negotiate legal settlement or the clause in question.

RELEVANT STATUTORY PROVISIONS:

62.13 CITIES 87-88 Wis. Stats.

(7n) HOURS OF LABOR. The council of every city of the second, third or fourth class, shall provide for a working day of not more than eight hours in each twenty-four except in cases of positive necessity by some sudden and serious emergency, which, in the judgment of the chief of police, demands that such workday shall be extended beyond the eight-hour period at such time; and when such emergency ceases to exist, all overtime given during such emergency, shall be placed to the credit of such police officer, and additional days of rest given therefor.

62.13 CITIES 89-90 Wis. Stats.

(7m) REST DAY. (a) The council of every city of the fourth class shall provide for, and the chief of the police department shall assign to, each police officer in the service of such city one full rest day of 24 consecutive hours during each 192 hours, except in cases of positive necessity by some sudden and serious emergency, which, in the judgment of the chief of police, demands that such day of rest not be given at such time. Arrangements shall be made so that each full rest day may be had at such time or times as will not impair the efficiency of the department.

(7n) HOURS OF LABOR. Except where a labor agreement under subch. IV of ch. 111 that governs hours of employment exists, the council of every 2nd, 3rd or 4th class city shall provide for a working day of not more than 8 hours in each 24 except in cases of positive necessity by some sudden and serious emergency, which, in the judgment of the chief of police, demands that such workday shall be extended beyond the 8-hour period at such time; and, when such emergency ceases to exist, all overtime given during such emergency shall be placed to the credit of such police officer, and additional days of rest given therefor.

PARTIES' CONTENTIONS:

The Union basically argues that the City unilaterally changed longstanding procedures allowing employes to work on more than one (1) shift during a twenty-four (24) hour period ("Double Backs") and allowing employes to work on scheduled days off ("Third Day Off Rule") in violation of the parties' agreement. The Union maintains that the City's contention that Sec. 62.13(7n) necessitates that the City's policy allowing "Double Back" be eliminated is without merit because said statute "clearly exempts 4th class cities from any restrictions about scheduling employes to work only eight (8) hours during a twenty-four (24) hour period and permits "Double Backs". Likewise, the Union maintains that the City's current practice of restricting employes' work opportunities to two (2) of the three (3) days off during each nine (9) day cycle is not required by Sec. 62.13 (7m) since said provision does not prohibit employes "from voluntarily working on their scheduled days off." (Emphasis supplied). In any event, the Union contends that the City's current practice violates the parties' collective bargaining agreement, policies and past practice and suggests, pursuant to Article XXIII, the "Savings" provision, that "If the City believes that State Statutes prohibits them from allowing employes to voluntarily working (sic) on their days off, then they should have the appropriate provisions of the contract nullified by a court of law. It is not for the arbitrator to interpret the law as it applies to the parties' contract."

For a remedy, the Union requests that the Arbitrator order that the scheduling procedures be restored and that all employes affected by the City's action be made whole.

The City argues, contrary to the above, that its change in policy eliminating the former practice of "Double Back," and establishing a rule whereby no officer was allowed to work more than two of his three scheduled days off was required by State Statute and was necessary to avoid potential liability. More specifically, the City maintains that Sec. 62.13 (7n) even though

it specifically exempts employes covered under a collective bargaining agreement "Clearly . . . dictates and necessitates that the City's policy allowing 'Double Back Shifts' be eliminated." The City opines that said statutory provision is a safety measure designed to ensure an officer is rested and able to perform his job because it provides that cities of the fourth class, like Prairie du Chien, "shall provide for a work day that is not more than 8 hours in each consecutive 24 hours except in cases of emergency." The City concedes that said statute states "a labor agreement reached by management and the workers can dictate a work day for police officers in excess of 8 hours in each consecutive 24 hours," but argues that this exception does not extend to contractual overtime situations.

The City also argues that Sec. 62.13 (7m) requires the City to give its officers one full rest day of 24 consecutive hours during each 8 days work, and that the City's prior practice of allowing officers to work all or some part of each of his three days off violates said Statute. The City adds that the Statute states that the day off shall be arranged so as not to impair the department's efficiency. The City feels the new policy is necessary in order to address problems of officer fatigue.

Based on all of the above, the City requests that the grievance be denied and the matter dismissed.

DISCUSSION:

Double Back Shift

The City's own witness, Assistant Chief Terrence J. Zinkle, admitted at hearing that the City made its decision to eliminate "double backs" based on an earlier version of Sec. 62.13(7n), Stats., which provided that a city of the fourth class "shall provide for a working day of not more than eight hours in each twenty-four except in cases of positive necessity. . . ." However, the provision in effect at the time of the City's decision provided, contrary to the above, "Except where a labor agreement under subch. IV of ch. 111 that governs hours of employment exists, the council of . . . 4th class city shall provide for a working day of not more than 8 hours in each 24 except in cases of positive necessity. . . ."

It is undisputed that the parties had such an agreement in effect at the time which governed overtime distribution and which provided for the right of employes to "double back." It is also undisputed that this agreement was in effect since August, 1986, and reflected a practice primarily affecting the first shift Sergeant, which continued until May, 1991, at which time the City unilaterally eliminated the opportunity of bargaining unit employes to "double back." The City argues that it eliminated the prior practice in order to ensure police officers were adequately rested, but offered no persuasive evidence or testimony regarding

same. The City also concedes that the aforesaid statute provides that "a labor agreement reached by management and the workers can dictate a work day for police officers in excess of 8 hours in each consecutive 24 hours," but argues said provision does not extend to overtime situations. However, the Statute creates no such exception.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the first issue noted above is YES, the City violated the contractual agreement between the City and Union by not allowing the prior practice of "Double Back."

Third Day Off Rule

Again, it is undisputed that the parties had an agreement which allowed bargaining unit employes to work all three (3) days during their three (3) days off cycle, and that this practice was eliminated by the City's unilateral action in May, 1991. The City argues that it was required to take this action based on Sec. 62.13(7m)(a), Stats. However, said statute does not address the issue of overtime. It simply requires the City "to provide for, and the chief of the police department shall assign to, each police officer . . . one full rest day of 24 consecutive hours during each 192 hours. . . ." The City has generally met this requirement by contractually agreeing to a six (6) days on and three (3) days off work schedule with the Union. The Statute says nothing about employes voluntarily agreeing to work on their scheduled day off, nor does it specifically prohibit same. Such a conclusion, as argued by the Union, harmonizes the provisions of the parties' agreement and prior practice with the aforesaid statutory language. Finally, the Arbitrator points out, contrary to the City's argument, that there is no persuasive evidence in the record that allowing an officer to work overtime on his third (3rd) scheduled day off would cause potential liability for the City. In particular, the Arbitrator notes that this did not occur in the past nor is there any evidence liability would increase in the future if the disputed practice is continued.

Based on all of the above, and absent any persuasive evidence to the contrary, the Arbitrator finds that the answer to the second issue is YES, the City violated the contractual agreement between it and the Union by prohibiting police officers from working more than two consecutive days during their three (3) days off period.

REMEDY

The Union requests that the aforesaid scheduling procedures allowing bargaining unit employes to "double back," and to work on their third (3rd) day off be restored. The Arbitrator finds this request appropriate and will grant same. However, the Union also requests unspecific make whole remedies. The Arbitrator will

grant a make whole remedy, but orders the Union to provide a specific written request for same to the City within thirty (30) days of the date of this Award. The Arbitrator will retain jurisdiction over the remedy portion of this Award to address any issues over same that the parties are unable to resolve.

In view of all of the foregoing, it is my

AWARD

1. The grievance is sustained.

2. The City is ordered to restore the parties' prior practice allowing for bargaining unit employes to "double back," and to work on their third (3rd) day off during their three days off period.

3. The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin this 3rd day of August, 1993.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator