

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
	:
GERMANTOWN PROFESSIONAL POLICEMEN'S ASSOCIATION	:
	:Case 29
	:No. 48479
and	:MA-7618
	:
VILLAGE OF GERMANTOWN	:
	:

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Appearances:

- Mr. Patrick J. Corragio, Labor Consultants Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, WI 53222, appearing on behalf of the Association.
- Mr. James R. Korom, von Briesen & Purtell, S.C., Attorneys at Law, Suite 700, 411 East Wisconsin Avenue, Milwaukee, WI 53202-4470, appearing on behalf of the Village.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' applicable collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments at a January 18, 1994 hearing conducted at the Village Police Department Conference Room, Germantown, Wisconsin. The hearing was not transcribed, but the parties agreed to permit the Arbitrator to maintain an audio tape recording of the evidence and arguments for his exclusive use in award preparation. The conclusion of the parties' oral summations at the January 18, 1994 hearing marked the close of the record.

ISSUES

The parties authorized the Arbitrator to formulate the issues. After hearing the parties' respective proposed formulations, the Arbitrator advised the parties at the outset of the hearing that the issues for determination in this matter are as follows:

1. Did the Employer violate the Agreement by not permitting the Grievant to switch his November 7, 1992 work day with his November 9, 1992 off day?
2. If so, what is the appropriate remedy?

The Arbitrator also informed the parties at that time that he did not consider the ISSUES so framed to bar the Association from pursuing its theory that the Village, by past practice or otherwise, has established an implied term of the Agreement supportive of its request for relief in this case.

FACTUAL BACKGROUND

The Association represents the Village's Police Department employes in the classifications of Patrolman, Patrolwoman and Detective. Grievant is junior of the two Detectives. There are approximately 15 employes in the Patrol classifications. Pursuant to various Agreement provisions, the Village schedules Detective Piotrowski (referred to in the Agreement as "the Detective II position") to work day shift (morning and afternoon) on a 5-days-on, two-days-off (5-2) schedule with weekends off, and the Village schedules Grievant on a 4-2 schedule, which frequently involves regularly scheduled work on weekend days. The Grievant is ordinarily scheduled to work on the early shift (afternoon and evening) on days when both detectives are working and on the day shift on days when the other Detective is off.

During approximately eight years before Captain Craig Evans took over scheduling in June of 1990, Grievant enjoyed considerable flexibility regarding changes in his shift schedule and off day schedule, so long as they were operationally manageable for the two Detectives. Grievant would let Lt. Walter Berg (retired), the supervisory officer then in charge of scheduling, know when he intended to change his scheduled off day, but that was sometimes after the fact rather than in advance. On some occasions Grievant changed his off day schedule to accommodate the needs of the Department, and on other occasions he did so to meet his own personal needs. Grievant estimated that he traded off days with himself for personal reasons once a month on average during Berg's tenure. Berg, who was called as a witness by the Association, characterized such instances as a "rarity."

Since Evans took over scheduling, Grievant has been permitted to trade with himself (i.e., reschedule his off day to another day) where it is in the Department's interests to permit him to do so, but not when he has sought to do so solely for personal reasons. However, Grievant is allowed to take vacation and compensatory time off virtually whenever he requests it.

Evans permits employes in the Patrol classifications to trade off days with another Patrol employe whenever they wish, whether for Department reasons or personal. While some Patrol personnel are not willing to trade, many are; so as a practical matter Patrol personnel enjoy many opportunities to trade off days to meet their personal needs. However, because those employes (unlike the Detectives) are subject to a minimum manning requirement, their ability to schedule vacation and compensatory time off is comparatively limited.

Grievant would theoretically be permitted to trade with the other Detective (Det. Piotrowski) with the same sort of freedom as Patrol personnel enjoy, but Piotrowski has been entirely unwilling to alter his weekday schedule. As a practical consequence, Grievant has had no one to trade off days with but himself since he sought and was awarded promotion to Detective in May of 1983.

Following a number of disputes with Department management regarding his right to trade off days with himself, Grievant filed the instant grievance alleging violation of "Art. III - Management Rights, Section 3.01 and 3.02, Article VI - Workweek, Appendix B And any other appropriate section." The grievance asserts that the Village's refusal to permit Grievant to trade with himself violated a binding past practice that constituted an implied term of the Agreement and violated Art. III of the Agreement by committing a unilateral change prohibited practice contrary to Sec. 111.70(3)(a), Wis. Stats., and by exercising its management rights in an unreasonable manner.

The grievance remained unresolved through the pre-arbitral steps and was ultimately submitted to arbitration as noted above.

PORTIONS OF THE AGREEMENT

ARTICLE III MANAGEMENT RIGHTS

Section 3.01: The Village possesses the sole right to operate the Police Department and all management rights repose in it. These rights include, but are not limited to, the following:

. . .

C. To hire, promote, transfer, schedule and assign employees in positions within the Police Department;

. . .

Section 3.02: These rights shall be exercised consistently with Chapter 111 of the Wisconsin Statutes and the express terms of this Agreement. Nothing herein contained shall divest the Association of any of its rights under Wisconsin Statutes.

. . .

ARTICLE V
OVERTIME

Section 5.01 - Overtime: . . . Employees who are called in prior to their regularly scheduled shift shall be allowed to complete their full regular shift unless mutually agreed otherwise.

. . .

Section 5.05 - Training Overtime: . . . The employer has the authority to change the employee's shift so as to accommodate training and thereby avoid the payment of overtime by mutual agreement.

Section 5.06: - Trade Days: Employees shall be allowed to trade days or shifts under mutual agreement subject to the approval of management. Trade days shall not be subject to overtime until such time as an employee would be required to work in excess of the normal hours of the shift for which he has traded. It shall be the normal procedure to assign the employee to his or her next regular shift under such circumstances, unless mutually agreed otherwise.

. . .

ARTICLE VI
WORK DAY AND WORK WEEK

. . .

Section 6.02 - Work Week: The normal work week for the patrol division shall be a 4-2 work week, eight and one-half (8-1/2) hours a day, the normal work cycle for the policewoman shall be a 5-2 work week, eight (8) hour day with 115 off days per calendar year, and the Detective II position normal work week shall be 5-2 with an eight and one-half (8-1/2) hour day with 122 off days per calendar year.

. . .

ARTICLE XII
INSURANCE

Section 12.01 - Hospitalization and Surgical Care Coverage:. . . The employer may from time to time after due notice in writing to the Association, change the insurance carrier and/or self fund its health care program, if it elects to do so.

. . .

ARTICLE XVII
GRIEVANCE PROCEDURE

. . .

Section 17.05: The arbitrator shall neither add to, detract from nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for final and binding arbitration. The arbitrator shall have no authority to grant wage increases or wage decreases. The arbitrator shall expressly confine himself to the precise issue(s) submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination. In any arbitration award, no right of management shall in any manner be taken away from the Employer, nor shall such right be limited or modified in any respect excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right. The decision of the arbitrator within the limits of his authority shall be final and binding on the parties.

. . .

ARTICLE XXIII
OFF DUTY WEAPONS

Section 23.01: The carrying of an off-duty weapon and badge shall be at the option of the officer unless the Chief deems it necessary for officers to carry their guns while off duty to assure the safety of the citizens of the community.

. . .

ARTICLE XXVIII
AMENDMENTS AND SAVINGS CLAUSE

Section 28.01: This Agreement may not be amended except by the mutual consent of the parties in writing.

. . .

Section 29.01: This Agreement constitutes an entire Agreement between the parties and no verbal statement shall superseded any of its provisions.

Section 29.02: The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. The Employer and the Association for the life of this Agreement each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.

. . .

APPENDIX B

. . . Detective Culver will work a 4-2 work schedule . . . and will have the holiday benefits of an employe working a 4-2 schedule.

. . .

POSITION OF THE UNION

For at least eight years, now retired Lt. Berg allowed

Grievant to reschedule his own off days to meet Department needs and Grievant's personal needs, subject only to Grievant keeping Berg informed, in advance if possible, and otherwise after the fact. That practice was longstanding, unequivocal, clearly enunciated and mutually acted upon by Grievant and Berg. It also was inherently fair and reasonable because it was well known that Grievant's only other potential trade partner (besides himself) would never trade with Grievant because he likes his weekends off. The practice therefore constituted an established and binding condition of Grievant's employment implied by the Agreement.

Without notice to or consent of the Association, the Village abruptly changed that practice when Capt. Evans took over scheduling. Under Evans, Grievant has been permitted to change his schedule only to meet departmental needs, but not to meet Grievant's personal needs.

The "Trade Days" language in Agreement Sec. 5.06 does not make Grievant's historically-permitted trades with himself "subject to the approval of management." That Section, with its references to "Employees" and "mutual agreement", is clearly applicable only to trades involving more than one employe.

By unilaterally changing an existing condition of employment on which the Agreement is silent, the Village violated its duty to bargain under Chapter 111 of the Wisconsin Statutes. The Arbitrator should rule that the change violated the Agreement including the implied term of the Agreement created by the practice. The Arbitrator should remedy that violation by ordering the Village to reinstate and honor the practice in all respects until it is dissolved through the collective bargaining process.

POSITION OF THE EMPLOYER

Agreement Sec. 5.06 expressly makes off-day trades "subject to management approval." Under that language, the Village has discretion whether to grant or withhold approval of each trade. The granting or withholding of such approval regarding prior trades does not bind the Village as regards the next request to trade, just as one approval or mutual agreement would not require another in a subsequent instance under provisions such as Secs. 5.01, 5.05, 12.01 and 23.01.

Here, Evans withheld Village approval of Grievant's request to reschedule his off day where that request was for personal reasons. The Village has been willing to approve rescheduling of Grievant's off days to meet the Department's needs, however. The Village has never denied any of Grievant's requests for vacation or compensatory time off. The Grievant has therefore not been unfairly treated in the circumstances.

If Sec. 5.06 does not apply to Grievant's request to trade off days with himself, then the Village's express reservation in

Sec. 3.01.C. of "the sole right . . . to schedule and assign employees" would permit the Village to decide whether to permit Grievant to deviate from his 4-on 2-off work schedule established in APPENDIX B of the Agreement. Even if the Village were shown to have routinely permitted Grievant to trade off days with himself for personal reasons -- doubtful as that may be in light of Berg's testimony that that was a "rarity" -- Agreement Sec. 17.05 expressly precludes the Arbitrator from limiting or modifying that or any other "right of management" in any respect "excepting only to the extent that this Agreement clearly and explicitly expresses an intent and agreement to divest the Employer of such right." Since the alleged past practice in this case cannot by its very nature "explicitly express" an intent to divest the Employer of such right, the Arbitrator must conclude that the Village retains the right to grant or deny Grievant's request to change his schedule. Agreement Secs. 28.01 and 29.01 further emphasize that unwritten practices cannot alter or supersede the express provision of the Agreement.

For those reasons, the Arbitrator must deny the grievance.

DISCUSSION

The Arbitrator finds the Village's arguments generally persuasive.

Appendix B of the Agreement expressly provides that Grievant is to have a 4-2 schedule. He was requesting to alter his schedule to something other than a 4-2 when he sought the change of off day at issue in this case. Agreement Sec. 3.01.C. gives the Village, not the Grievant, the general right to schedule and hence to reschedule employees consistent with the other terms of the Agreement such as the APPENDIX B proviso that Grievant "will work a 4-2 work schedule." Agreement Sec. 17.05 clearly and unequivocally prohibits the Arbitrator from adding limitations that are not expressed in the Agreement onto the Village's expressly reserved right to schedule employees. The Sec. 17.05 language is unusually tight and specific on that point. In light of that provision, the practice relied upon by the Association and Grievant cannot be permitted to limit the expressed right of the Village to schedule employees.

The trades language in Sec. 5.06 is as applicable to Grievant as it is to the other employees in the bargaining unit as regards trading an off day with another employe. While Detective Piotrowski's clear-cut preference not to trade prevents Grievant from trading with him, it does not make that trades language inapplicable to him.

If Grievant's request in this case is viewed as a proposed

trade with himself (with the Sec. 5.06 requirement of mutual agreement deemed met by the fact that Grievant is on both ends of the trade), the Agreement expressly makes such a trade "subject to the approval of management." The right to grant or withhold approval of a trade request is a "right of management" which Sec. 17.05 protects from modification or limitation, just as was the Village's right to schedule discussed above. As

above, in light of Sec. 17.05, the practice relied upon by the Association and Grievant cannot be permitted in an arbitration award to limit the expressed right of the Village to approve or disapprove trade requests.

The grievance asserted that the change from prior practice at issue in this case constituted an unreasonable exercise of management's rights violative of Article III. There is no express provision in Art. III requiring that the Village exercise its rights reasonably. There is, however, a generally recognized principle of contract interpretation to the effect that a covenant of (or commitment to) good faith and fair dealing is ordinarily presumed to be implied in all agreements. That commitment is that rights reserved to a party will not be exercised arbitrarily, capriciously or in a bad faith effort to undercut the benefits the contract elsewhere provides to the other party.

It is unnecessary to decide in this case to what extent an implied covenant of good faith and fair dealing is applicable under the Agreement in the face of Secs. 17.05, 28.01 and 29.01 because, for the following reasons, the Association's has not persuasively established that the Village is exercising its rights in an arbitrary, capricious or bad faith manner.

Evans is effectively treating Grievant the same as he treats all other bargaining unit employes with regard to rescheduling off days. He would allow Grievant to freely trade with another employe in his classification for departmental or personal reasons, just as he allows Patrol personnel to do. He does not allow Grievant to trade with himself for personal reasons, just as he does not allow Patrol personnel to do so. It is the limited number of Detective positions, their respective work schedules, Piotrowski's superior seniority and Piotrowski's disinclination to trade that limits Grievant's ability to trade off days.

Berg's previous approach represented a "two-way street" in which Grievant flexed his schedule to save Village overtime dollars and the Village allowed Grievant to flex his schedule to meet his personal needs. Now Grievant may choose, as he has in at least some cases, not to flex his schedule to save the Village money because the Village is no longer allowing him to flex his schedule as he did previously to meet his own needs. While that may be viewed as an unfortunate "lose-lose" consequence of Village management's change in the manner of exercise of its rights with respect to Grievant's schedule, it is a consequence which the Village is entitled to expose itself to if it chooses to do so in pursuit of its preferred operational objectives, including uniformity of treatment of Patrol and Detective personnel as regards trading with oneself for personal reasons.

While as a practical matter patrol personnel enjoy trading opportunities that Grievant does not, that is a disadvantage associated with the Detective position which has far fewer potential trade partners. The effect of that disparity in trading opportunities on Grievant's personal life seems significantly balanced by the greater vacation and compensatory time off scheduling flexibility that Grievant's position gives him as compared with the Patrol personnel.

For all of those reasons, then, the Arbitrator finds that the Agreement reserved to the Village the right to unilaterally change its prior practice as it did to prohibit Grievant from trading off days with himself for personal reasons. The Agreement allowed the Village to make that change without notice to, bargaining with or agreement of the Association. Because the Agreement expressly reserves to the Village the right to act as it did, the Village's actions were not inconsistent with the statutory duty to bargain or with the express terms of the Agreement. The Sec. 3.02 limitations on the exercise of Village rights have not been violated.

After consideration of each of the Agreement provisions alleged violated in the grievance, and for the reasons noted above, the Arbitrator has denied the grievance.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The Employer did not violate the Agreement by not permitting the Grievant to switch his November 7, 1992 work day with his November 9, 1992 off day?
2. The subject grievance is denied, such that consideration of a remedy is neither necessary nor appropriate.

Dated at Shorewood, Wisconsin by Marshall L. Gratz /s/
this 18th day of February, 1994. Marshall L. Gratz, Arbitrator