

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 69
 WISCONSIN PROFESSIONAL POLICE : No. 50578
 ASSOCIATION, LOCAL 38 : MA-8307
 :
 and :
 :
 CITY OF RHINELANDER :
 :

Appearances:

Mr. Philip T. Parkinson, City Attorney, on behalf of the City.
Mr. Gary Wisbrocker, Business Agent, on behalf of the Association.

ARBITRATION AWARD

The above-entitled parties, herein "Association" and "City", are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held in Rhinelander, Wisconsin, on June 14, 1994. The hearing was not transcribed and the parties there presented oral argument in lieu of briefs.

Based upon the entire record, I issue the following Award.

ISSUE

Has the City violated Article VIII of the contract by scheduling officers to work outside the shift schedule provided for therein and, if so, what is the appropriate remedy?

DISCUSSION

The City in 1992 decided to hire two new employes for so-called "power shifts" - i.e., times where additional manpower was needed because of increased police activity, but it held off doing so until after it had discussed the matter with Association representatives.

By memorandum dated December 11, 1992, City Police Chief Tony N. Paris informed Local 38 President David Allen:

. . . .

This letter is relative to the two new patrol positions that have been approved for 1993. Listed below is the proposed schedule:

Position 1 - Tuesday 11:00 P.M. to 7:00 A.M.
 Wednesday 3:00 P.M. to 11:00 P.M.
 Thursday 3:00 P.M. to 11:00 P.M.
 Friday 7:00 A.M. to 3:00 P.M.
 Saturday 7:00 A.M. to 3:00 P.M.
 Off Sunday and Monday

Position 2 - Will work Thursday through Monday
 7:00 P.M. - 3:00 A.M.
 Off Tuesday and Wednesday

These positions will be posted and would be open to any

current sworn officer. If no existing officer bids on one of these shifts, newly hired officers will be assigned to them.

No officer on a permanent shift could be moved to these shifts unless it is by the officer's request.

These shifts will be temporary and will be discontinued as soon as we get the other two men to place an extra officer on each shift. This was assured by the Protection of Persons & Property Committee to me, that this fall two additional officers will be approved.

Position 1 will cover days when patrol is short
Position 2 will cover night time hours and bar closing.

If further assistance on the part of the city is needed, please be advised that a compromise could be worked out that is agreeable to both parties and still provide protection to our citizens.

Professionally,

. . .

By letter dated December 29, 1992, Association Business Agent Gary Wisbrocker informed Chief Paris:

. . .

On December 11, 1992, you sent a letter to David Allen, President of the Rhinelander Police Association. Contained in this letter were proposed changes in the scheduled work week and hours for two new positions that have been approved by the City for 1993.

ARTICLE VIII - HOURS OF WORK contained within the current Working Agreement specify the scheduled work week and hour of work for members of the bargaining unit. Your proposed changes to the current work week and hours are not contained within ARTICLE VIII and therefore, the Association does not agree with the proposed changes. If you would like to discuss the impact of the new schedule, the Association would be willing to meet with the City to negotiate over the proposals.

Please feel free to contact me at your convenience if you should have any questions relating to the Association's position on this matter.

. . .

By letter dated December 30, 1992, City Attorney Philip I. Parkinson informed Wisbrocker:

. . .

I received your letter that you sent to Chief Paris regarding the proposed work schedule changes for the two new officers authorized by the City Council.

We, of course, are willing to meet and discuss the impact of this matter. The purpose of the original letter was to open discussion regarding the creation of new schedules not in the contract. Since you are out of town, I would request that you would let us know what a convenient date is for you; I am sure the Chief and I can meet most readily. My initial thought would be that you, the Chief and I, along with whatever representatives you wish from the union, would meet to try and work out an appropriate schedule. Once that is worked out, we would present the schedule to the Finance Committee for approval and inclusion into the working agreement.

Let me know if you have any problems with this procedure.

Wisbrocker testified that he attended a February 23, 1993, meeting with Chief Paris, Association President Allen, and several detectives and that "my understanding was that there would be a sunset clause" to the City's proposal to establish a new shift which would expire on December 31, 1993, or whenever two additional employes were hired -- whichever came first.

By letter dated March 8, 1993, Parkinson informed Wisbrocker:

. . .

The City of Rhinelander Finance Committee discussed the proposed settlement for scheduling the two budgeted, but not hired, police officers. Although the schedule arrangements for 1993 were satisfactory the termination of those arrangements effective January 1, 1994 was not. Although the Finance Committee will agree that upon the hiring of two additional police officers (this is above and beyond the two budgeted for 1993), the scheduling of those officers should be along the same lines as the existing schedules, the Committee did not want to have that happen automatically effective January 1, 1994. The Finance Committee is concerned that the two additional police officers (two over and above the two budgeted in 1993) may not be budgeted for the 1994 calendar year. With proposed State of Wisconsin restrictions on local government spending, and other restrictions, the Finance Committee is not sure that the City will be able to continue to add police officers to the force in the future. In short, it is quite possible that the two officers budgeted for 1993 may be the only additional officers hired for the force for several years. If that is the case, the Finance Committee wants to be able to keep the schedule proposed by the Chief indefinitely.

After you have had a chance to review this letter, please let me know the Association's thoughts about coming to an agreement on the scheduling of two new police officers. If we are able to agree upon a schedule, we can get these people hired and on our force.

If you have any questions, or need anything further, please do not hesitate to contact me.

. . .

By letter dated March 25, 1993, Wisbrocker informed Parkinson:

. . .

As we have not been able to make telephone contact, this letter is in response to your question of the Association's position on the above-referenced matter.

It is the position of the Association that the levels of manpower on the shifts currently listed in the WORKING AGREEMENT is the cause of the staffing problems within these shifts. Additional officers on the existing shifts will help to correct this problem and therefore, the Association believes that the new officers should be used on the currently listed shifts and not be used to create any additional or new shifts.

Also, it has been brought to my attention that the Chief of Police is, at times, scheduling an officer outside of the shifts listed in the WORKING AGREEMENT. The Chief has assigned officers to a 7:00pm-3:00am shift, a 11:30 pm-7:30am shift and a 9:00 am-5:00 pm shift. These shifts are clearly not allowed in accordance with the current agreement. Therefore, the undersigned, for and on behalf of the Rhinelander Police Association, hereby notifies the City that this practice must stop immediately and only the shifts listed in the WORKING AGREEMENT are to be scheduled for the members of the Association.

If you should have any questions relating to the above, please contact me.

. . .

By letter dated March 26, 1993, Parkinson informed Wisbrocker:

. . .

I have received your letter regarding the Association's position in the above-referenced matter. The City will take this to the next regular meeting of the Finance, Wage & Salary Committee, which is scheduled for Monday, April 5, 1993 at 7:00 p.m. The Finance Committee will determine whether or not the two new officers should be hired under the conditions mandated by the Association.

With respect to the second part of your letter, regarding your demand that the Chief terminate the assignment of officers to a 7:00 p.m. - 3:00 a.m. shift, a 11:30 p.m. - 7:00 a.m. shift, and a 9:00 a.m. - 5:00 p.m. shift, the Chief informs me that these shifts have been scheduled in the Department for numerous years. In addition to the past practice aspect of this procedure by the Department, I cite Section 8.04 of the Working Agreement, which states as follows:

"Shift differential will be paid as follows: 3:00 PM to 11:00 PM shift, \$1.00

per day additional; 11:00 PM to 7:00 AM shift, \$1.50 per day additional. When an employee who works regular shifts is required to work an irregular shift, he/she shall be paid the shift differential for the next shift." (Emphasis in original).

Note the reference in the contract of our ability to place an officer on an irregular shift. I am of the opinion that past practice and this contractual provision authorize the Chief of Police to schedule exactly as he has been in the past. I believe that an officer who is required to work an irregular shift is entitled to claim the shift differential for the next higher shift; i.e., a person working the 9:00 a.m. - 5:00 p.m. shift could claim the shift differential of 3:00 p.m. - 11:00 p.m. of \$1.00 per day additional.

Wisbrocker testified that on April 8, 1993, he met with City officials where this issue was discussed and that, "Although I do not specifically remember the sunset clause being discussed, I do know that the Association never agreed to carrying over the new shift after December 31, 1993."

City Attorney Parkinson also attended that meeting and testified, "I remember that we agreed not to sunset but to tie in the Kelly shift with two new employes".

Parkinson said that he then went back to the City's Finance Committee where he related this understanding and that the Committee's subsequent June 14, 1993 resolution "specifically recounted the understanding [with the Union] as I remember it." Parkinson added: "I did not know of the sunset problem until I received the Union's December 3, 1993 letter." He also said that because of funding levels, it is "extremely unlikely" that that City will hire any new employes for the remainder of 1994.

On June 14, 1993, the Rhinelander City Council adopted a resolution which provided in pertinent part:

. . .

NOW THEREFORE BE IT RESOLVED, that the 1992-1993 working agreement between the City of Rhinelander and the Wisconsin Professional Police Association is modified to include the following:

1. Two new patrol positions are created for 1993. A new schedule for one of the officers shall be created working varying shifts from Tuesday through Saturday to cover the scheduled vacancies known as Kelly Days. The other officer hired will be placed on a regular shift in the department. It is agreed between the city and the Union that the Tuesday through Saturday shift will be terminated upon the City of Rhinelander hiring two additional patrol officers. Bringing the total of new officers up to four and one officer will be placed on each of the regular shifts.

. . .

The City then posted for a new position which was scheduled to work as follows:

- Tuesday: 11:00 p.m. - 7:00 a.m.
- Wednesday: 3:00 p.m. - 11:00 p.m.
- Friday: 3:00 p.m. - 11:00 p.m.
- Saturday: 7:00 a.m. - 3:00 p.m.
- Sunday: OFF
- Monday: OFF

Officer Craig Strid bid for this position and worked that schedule until December 31, 1993. He then returned to his former position after informing the City that he no longer wanted to work the new shift.

By letter dated December 3, 1993, Wisbrocker informed Chief Paris:

. . .

I have been informed that you are intending to post the open shift created by Officer Craig Strid's request to be re-assigned on January 1, 1994, from the swing shift (Position 1 in your letter dated December 11, 1992 and addressed to Officer David Allen, President - Local 38) to a regular shift as listed in the current WORKING AGREEMENT. As you may remember, the approval of this "swing shift" by the Association was with the understanding that the "swing shift" was to be in effect only until December 31, 1993. Therefore, the Association is hereby notifying the City that, effective December 31, 1993, there will no longer be an agreement between the parties allowing the "swing shift" to occur outside of the current WORKING AGREEMENT language.

If you should have any questions relating to the above matter, please feel free to contact the undersigned.

. . .

On December 23, 1993, the City posted for a position which would be scheduled to work:

- Tuesday: 11:00 p.m. - 7:00 a.m.
- Wednesday: 3:00 p.m. - 11:00 p.m.
- Thursday: 3:00 p.m. - 11:00 p.m.
- Friday: 7:00 a.m. - 3:00 p.m.
- Saturday: 7:00 a.m. - 3:00 p.m.
- Sunday: OFF
- Monday: OFF

After no employees bid for this position, the City assigned it to Officer Thorp who had been hired in the summer of 1993.

At the hearing, Thorp testified that his existing schedule is grueling because he sometimes is not given enough time off between shifts and because it is difficult to work with 3 or 4 different crews during the week.

In support of the grievance, the Association primarily argues that the new schedule was to sunset on December 31, 1993; that it never agreed to an indefinite extension of the new shift; and that the City's actions violate Article VIII. As a remedy, it asks that the new shift be immediately

eliminated.

The City, in turn, contends that the parties expressly agreed at their April 8, 1993, meeting, that the new shift was not to sunset on December 31, 1993, as witnessed by the fact that Strid bid for it - which is something he would not have done if the schedule was going to be in existence for only a few months. The City similarly points to Strid's subsequent withdrawal letter as further proof that the shift was to last past December 31, 1993, since there otherwise was no reason for Strid to formally notify the City that he no longer wanted the position.

The exchange of letters between the parties described above shows what a contentious issue this became. In and of themselves, however, the letters do not contain any express reference as to what exactly was agreed to here.

Rather, the terms of the parties' bargain must be discerned by looking at the April 8, 1993, meeting. As to that, I credit Parkinson's detailed testimony that the parties then agreed not to sunset the new shift. Parkinson's testimony was undisputed since Wisbrocker was unable to say with certainty whether a sunset was discussed in that meeting.

But, I credit Wisbrocker's further testimony that the Association never meant to continue the new shift indefinitely.

In such circumstances, it is clear that the parties had a missing of the minds on this issue. I therefore find that while the new shift is to continue in effect until December 31, 1994, when the contract expires, it shall automatically terminate on January 1, 1995, since the Association never meant to agree to carry over the new shift past the contract's termination and since there is no express reference in any of the parties' correspondence showing a contrary intent. 1/

In light of the above, it is my

AWARD

1. That the City has not violated Article VIII of the contract by scheduling officers to work outside the shift schedule provided for therein.

2. That the new shift shall automatically terminate December 31, 1994 and the City after that point is precluded from establishing any shifts not provided for in the contract unless mutually agreed to by the parties.

Dated at Madison, Wisconsin this 19th day of July, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

1/ The new shift is to terminate that day even though the other provisions of the collective bargaining agreement continue past that point because the Union never expressly agreed to do otherwise and because it is unfair to Officer Thorp to be placed on such a difficult shift for any longer than is absolutely necessary.