

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
CITY OF MAUSTON	: Case 32
	: No. 49769
and	: MA-8053
	:
MAUSTON PROFESSIONAL	:
POLICE ASSOCIATION	:
	:

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 So. Godfrey and Kahn, S.C., by Mr. Peter L. Albrecht, 131 West Wilson Street, P.O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of the City.

ARBITRATION AWARD

The Mauston Professional Police Association, hereinafter referred to as the Union, and the City of Mauston, hereinafter referred to as the City, are parties to a collective bargaining which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the change of schedule of an employee. Hearing on the matter was held in Mauston, Wisconsin on April 12, 1994. Post-hearing written arguments were received by the undersigned by June 13, 1994. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following Issue:

"Did the City violate the collective bargaining agreement when it changed the day shift schedule in May 1992?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II - MANAGEMENT RIGHTS

Section 1: Except as expressly and precisely provided in this Agreement, the management of the Police Department and the direction of the working forces shall remain vested exclusively in the Employer. Such management and direction shall include all rights inherent in the authority of the Employer, including among others, rights to hire, recall, transfer, promote and to relieve employees from duty because of lack of work or for any other reason. The Employer shall have the right to discipline or discharge for just cause. Further, the Employer shall have exclusive prerogatives with respect to promulgation of reasonable work rules, classification of occupations and employees, assignments of work including temporary assignments.

Section 2: The Association and the employees,

individually and collectively by their approval and consent to this Agreement, do thereby accept, acknowledge and affirm the rights of the Employer as reserved and expressed in this Article and elsewhere in this Agreement, and they thereby do assent thereto, and agree not to interfere with, abridge, nor attempt to interfere with, any of the prerogatives of the Employer with respect to the operation, management and direction of the Police Department. Nothing herein contained shall divest the Association of any of its rights under Wisconsin Statutes 111.70, as amended.

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ARTICLE IV - GRIEVANCE PROCEDURE

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Section 7 - Arbitration

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2. **Selection of Arbitrator:** If the grievance is not settled in Step 2 above, the grievance may be submitted to arbitration by requesting, in writing, with notice to the Chief of Police and the Police and Fire Commission within fifteen (15) calendar days after the conclusion of Step 2, the Wisconsin Employment Relations Commission (WERC) to appoint a particular member of its staff as sole arbitrator. To determine the particular arbitrator to be requested in a given case, there shall exist a panel of five (5) such staff members, previously agreed upon by the parties, from which the parties shall select. The parties shall alternately strike names from said panel until one name remains. The party to strike first shall be determined by the toss of a coin. The name remaining after the exercise of strikes shall be the selected arbitrator and the WERC shall be so notified as indicated above.

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ARTICLE X - HOURS

Section 1 - Work Day and Work Week Defined: The normal work day shall consist of eight (8) hours. The normal work week shall consist of forty (40) hours.

Section 2 - Schedule: The work schedule for all bargaining unit members shall consist of five (5) days on duty followed by two (2) days off duty. In any change in shift assignments, the employees shall be given fourteen (14) calendar days notice prior to the change except in the case of emergency.

Shift Hours: 7 a.m. to 3 p.m.
3 p.m. to 11 p.m.
11 p.m. to 7 a.m.
8 p.m. to 4 a.m.

Swing Shift: Work Monday, Tuesday,
Wednesday, Saturday
& Sunday. Thursday &
Friday off.

Every three months, all officers, except the sergeant, will rotate shifts. **Effective April 1st**, the 7 a.m. - 3 p.m. shift goes to the 3 p.m. - 11 p.m. shift, the 3 p.m. to 11 p.m. shift becomes the 11 p.m. - 7 a.m. shift, which in turn becomes the swing man, and the swing man assumes the 7 a.m. - 3 p.m. shift. This shift change will be automatic in the manner described above without seniority.

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BACKGROUND

At the commencement of the hearing in the instant matter the parties agreed upon the following facts:

1. Prior to May 19, 1993 the day shift cycle had consistently been Wednesday through Sunday, with Monday and Tuesday designated as off-days.
2. On May 19, 1993 the day shift cycle was changed to Friday through Tuesday, with Wednesday and Thursday designated as off-days.
3. The day shift hours remained as 7:00 A.M. through 3:00 P.M..
4. All bargaining unit officers became aware of the memo on May 4, 1994 when the memo was posted.
5. The City and the Union reached a voluntary agreement for a successor collective bargaining agreement for 1993, 1994 and 1995 in October, 1993.
6. The grievance has been processed through the grievance procedure set forth in the collective bargaining agreement and is properly before the Arbitrator.

The City operates a seven (7) day, twenty-four (24) hour police force. There are five different shifts and all employees represented by the Union rotate through the shift every three (3) months. During the early part of 1993 the Assistant Chief of Police position became vacant and the City determined not to fill the position. This resulted in a coverage problem on Mondays as only Chief of Police O.J. Foster was on duty and he often had duties in Municipal Court. Initially the Chief attempted to deal with the coverage problem by himself and then through the use of overtime, however the City determined this generated too much overtime. On May 4, 1993 the Chief issued a Memo changing

the day shift schedule to Wednesday and Thursday as designated days off. The Chief was informed verbally the Union would grieve the matter and it was processed to arbitration. During negotiations which culminated in the current collective bargaining agreement neither party raised the issue.

UNION'S POSITION

The Union contends the City violated the collective bargaining agreement when it unilaterally changed the day shift schedule in May 1993. The Union stresses that the undersigned's authority is restricted to the interpretation and application of the collective bargaining agreement. Further, that an arbitrator cannot ignore clear-cut contractual language. The Union asserts that Article X, Section 2, is clear and unambiguous as to intent and therefore the plain meaning should be given full force and effect. The Union acknowledges the City has the right to change schedules of work but that the intent of the parties was not to allow the City to abuse this right by changing a workshift in order to avoid the payment of legitimate overtime. The Union points out that since at least 1988 the normal rotation of workshifts had been Monday and Tuesday off for the day and afternoon shift, Saturday and Sunday for the night shift, and Thursday and Friday for the swing shift. The Union contends that when the City unilaterally changed the off days for the day shift the change modified the clear language of Article X, Section 2.

The Union also contends that changes in an employees days off is a mandatory subject of bargaining. The Union argues the City unilaterally changed a mandatory subject of bargaining, as well as a long standing condition of employment, when it modified the day shift's days off. The Union asserts the City had a burden to bargain any such changes. The Union further asserts it had no need to raise the matter in negotiations as it had filed a grievance and the existing language is clear and unambiguous. The Union points out the City offered no examples of where it had changed off duty rotation in the past. The Union argues there is a past practice which has been well established, clearly enunciated and acted upon, and unequivocal that the off day rotation for the day shift is Monday and Tuesday.

The Union also asserts that to find in favor of the City would be to grant it thought grievance arbitration that which it did not obtain in collective bargaining. The Union contends that if the City desires to change an existing condition of employment, as set forth in the agreement, it must do so through the collective bargaining agreement. The Union points out the City did not seek to change the language of Article X, Section 2, during negotiations. Further, that the City made the change only to save overtime costs. The Union concludes the City by it's unilateral actions is attempting to gain through grievance arbitration that which it has not even attempted to bargain.

The Union would have the undersigned sustain the grievance.

CITY'S POSITION

The City contends it had the authority to unilaterally change the day shift work schedule. The City points out the collective bargaining agreement mandates that a work schedule be five (5) days on duty followed by two (2) days off duty. Further, that the Union had argued there be fourteen (14) days notice prior to any change, the record supports such a notice was given. However, the City argues that while the hours provision defines a normal work week it does not restrict the City's right to change which days are on duty and which days are off duty. The City contends the agreement does not specify which days of the week the City may schedule employees to meet the forty (40) hours in a work week requirement. The City also argues that there is no

evidence which would demonstrate that when the parties reached agreement on the current language the work week for day shift officers would remain as it was prior to May 19, 1993. The City stresses that had the parties intended to limit the day shift schedule to Wednesday through Sunday this intent should have been embodied in the collective bargaining agreement. The City points out the collective bargaining agreement does specify a specific work week for swing shift officers. The City argues the fact the parties have specified the swing shift work week and have not done so for the remaining shifts demonstrates there was no intention to limit the work schedule.

The City also contends no past practice exists that would restrict the City's right to change the work schedule. The City argues a past practice can not modify clear contract language. The City asserts Article X, Section 2, is clear and unambiguous and that there is no evidence the City assented to modify the language. The City further asserts that just because an item has been performed the same way for a number of years does not clothe it with the sanctity of a practice or custom.

The City also asserts if there was a duty to bargain the matter it was waived when the Union did not act on the matter in negotiations. The City also points out the Union failed to demonstrate any employe was aggrieved by the change in the work schedule.

The City would have the undersigned deny the grievance.

DISCUSSION

Both the Union and the City have pointed out the undersigned does not have the authority to add to or delete from the express terms of the collective bargaining agreement. Article II of the collective bargaining agreement clearly gives the City the right to assign work except as "...expressly and precisely provided in this Agreement...". Article X, clearly defines the work week has normally consisting of forty (40) hours and further that the work schedule shall consist of five (5) days followed by two (2) days off. The collective bargaining agreement is silent concerning which days of the week will be "off days" except for the swing shift, which has a mandate that Thursday and Friday are "off days". The undersigned finds that to conclude as the Union argues, that the day shift (7:00 A.M. to 3:00 P.M.) has a mandate that the "off days" for this shift be Monday and Tuesday would be adding to the express terms of the collective bargaining agreement. The undersigned concludes the agreement is silent concerning which days are "off days" for the day shift. As noted above Article II allows the City the right to assign work except as expressly and precisely provided for in the collective bargaining agreement. The record demonstrates that the City has assigned the day shift officer to a forty (40) hour work week with five (5) days on duty followed by two (2) days off duty. The undersigned finds nothing in the City's actions that have violated a provision of the collective bargaining agreement.

The Union has also argued that the parties have a binding past practice which has Monday and Tuesday being the off duty days for the day shift officer.

The record does demonstrate that since 1988 and until May 19, 1993, Monday and Tuesday had been the off duty days for the day shift officer. However, the Union presented no evidence that the City has clearly abrogated its rights under Article II to assign work. At most the Union has shown that the City has not been very active in this area or when it has made shift changes it has given fourteen (14) days notice to employes. The fact that the City has never used its right to assign work in the manner objected to by the Union does not demonstrate the City had clearly modified its right to assign work.

The undersigned also notes that the Union arguments that the City's

actions directly related to hours, is a mandatory subject of bargaining and therefore the City violated its duty to bargain under the Wisconsin statues have no bearing on the merits in the instant matter. The question before the undersigned is limited to whether the City violated the parties' collective bargaining agreement.

Therefore, based upon the above and foregoing and the evidence, testimony and arguments presented the undersigned concludes the City did not violate the collective bargaining agreement when it changed the day shift schedule on May 19, 1993. The grievance is denied.

AWARD

The City did not violate the collective bargaining agreement when the City changed the day shift schedule in May, 1993.

Dated at Madison, Wisconsin this 9th day of September, 1994.

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