BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DISTRICT COUNCIL 48, AFSCME,
AFL-CIO, and LOCAL #883

and

THE CITY OF SOUTH MILWAUKEE

PSO Right to Claim Hours
Case 83, 85 and 86
No. 50670, 51162 and 51163
MA-8341, 8514 and 8515

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, 207 East Michigan Avenue, Suite 315, Milwaukee WI 53202 by Mr. Alvin R. Ugent, appealing on behalf of District Council 48 and Local Union 883.

South Milwaukee City Attorney's Office, Post Office Box 308, South Milwaukee, WI 53172, by Mr. Joseph Murphy, City Attorney, appearing on behalf of the City of South Milwaukee.

ARBITRATION AWARD

The City of South Milwaukee (hereinafter referred to as the City) and District Council 48, AFSCME, AFL-CIO and its affiliated Local No. 883 (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the claim of Thomas Margetta that Public Safety Officers should have the right to claim open dispatching shifts at the Police Department. A hearing was held on June 2, 1994 at the City Hall in South Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits. other evidence and arguments as were relevant to the dispute. One of the City's arguments was that the Grievance was untimely. The parties submitted the case on oral arguments. On June 3Oth, the arbitrator wrote to the parties, inquiring whether it would be appropriate to consolidate two subsequently filed cases dealing with the same issue with the original case for a decision on the merits, treating the City's timeliness objections as remedial questions related to the original grievance. On September 2nd, the parties approved this procedure and die record was closed for all three cases.

Now, having considered the record evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUES

The parties stipulated that the substantive issue in this case is:

"Was the failure to assign overtime to the grievant on January 1, 1994 violated the collective bargaining agreement? If so, what is the appropriate remedy?"

In addition, the City raises a question of procedural arbitrability, asserting that the grievance was not filed and processed in a timely manner.

PERTINENT CONTRACT LANGUAGE

ARTICLE I

Section I - Purpose

It is the intent and the purpose of this Agreement to define the rights and obligations of the parties hereto and to promote and improve employer-employee and economic relationships between the Municipality, its employees and their bargaining representatives, and to set forth herein agreements as to rates of pay, hours of work, and other terms and conditions of employment, to be observed by the parties hereto for the term of this Agreement.

. . .

Section 4 - Recognition

(a) The Municipality hereby recognizes the Union as the exclusive collective bargaining agent for the appropriate certified bargaining units, and as the certified representative for those employees in these bargaining units occupying the classifications as defined in the appropriate "Certifications of Representatives" promulgated by the Wisconsin Employment Relations Commission.

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ARTICLE I

Agreement

The Municipality and Union agree to faithfully and diligently abide and be bound to all of the provisions of this Agreement.

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ARTICLE IV

Section I - Management Functions

Except as expressly limited in this Agreement, all management functions are reserved to the Municipality. Disputes over the application of this provision shall be submitted under Article VII - Section 4 (Step III of Grievance Procedure) of this Agreement.

Section 2 - Contracting and Subcontracting

The Union recognizes that the Municipality has statutory and charter rights and obligations in contracting for matters relating, to municipal operations. The right to contract or subcontract is vested in the Municipality. However, the right or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members.

. . .

ARTICLE VII

Section 1 - Grievance and Arbitration Procedure

Only matters involving interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. Should differences arise between the Municipality and the Union or any employee, an earnest effort shall be made to settle such differences promptly at the lowest step. Matters pertaining to discharge, disciplinary action imposing, loss of time or wades, or any other emergency matters that cannot be delayed, shall be presented as soon as possible to the appropriate Board, Commission or governing body without adherence to the provisions set forth below. All time requirements set forth in this Article may be waived or extended upon mutual agreement of the parties.

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Section 2 - Step I of Grievance Procedure

The employee who has an individual complaint shall discuss it with the (Foreman) … (Department Head) as appropriate, within twenty (20) calendar days after the event giving rise to the complaint occurred, or the employee could reasonably have been expected to have knowledge of it. The departmental steward shall be given the Opportunity to be present during the discussion on the complaint. The (Foreman) … (Department Head) as appropriate. shall attempt to make a mutually

satisfactory adjustment and, in any event, shall be required to give an answer within seventy-two (72) hours, not including Saturdays, Sundays and Holidays.

Section 3 - Step II of Grievance Procedure

The grievance shall be considered settled in Step I, unless within five (5) days, not including Saturdays, Sundays and Holidays, the grievance is reduced to writing on an approved grievance form signed by the aggrieved employee, and countersigned by the department steward. It shall be delivered by the department steward to the (Department Head) … (Superintendent of Wastewater System) as appropriate, who shall make a decision within forty-eight (48) hours thereafter, not including Saturdays, Sundays and Holidays. He/she shall indicate his/her disposition of the grievance in writing on the grievance answer form and return one copy to the department steward who first presented it to him/her. If the grievance is not answered within forty-eight (48) hours, the grievance shall be considered as automatically presented in Step III.

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Section 6 - Final and Binding Arbitration

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The function and Jurisdiction of the arbitrator shall be limited to the interpretation, application and enforcement of the provisions of this Agreement. The arbitrator shall have no power to alter, add to or delete from the terms of this Agreement, or to change methods of operation or working rules of the Municipality which are not inconsistent with this Agreement. Any matter presented contrary to the function and jurisdiction of the arbitrator as herein defined shall be returned to the parties without decision or recommendation.

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ARTICLE XX

Equal Distribution of Overtime

Overtime shall be distributed as equally as practicable among employees in their respective job classifications, and the Municipality shall post overtime accumulation and distribution bi-weekly. The following rules of procedure shall be followed to distribute such overtime:

(a) Convert overtime hours worked which are compensated at a rate of one and one-half (1 1/2) times the regular rate to an equivalent number of hours worked at

regular rates by multiplying actual hours worked times one and one-half (1 1/2).

(b) Convert overtime hours worked which are compensated at a rate of two (2) times the regular rate to an equivalent number of hours worked at regular rates by multiplying actual hours worked times (2).

(c) Post the summary of overtime hours worked in terms of equivalent hours worked at regular pay on a biweekly basis in a location readily accessible to all bargaining unit employees.

(d) If an employee refuses overtime under the conditions set forth under Article XX of this Agreement, he/she should be charged the same number of equivalent hours worked by the fellow employee who actually did work, provided he/she was not engaged in official union business.

(e) Overtime Call-in Procedures

(1) It is recognized by the Union that the Municipality has overtime work that must be accomplished; therefore, the following procedure shall be used:

(a) Employees shall be called in, in accordance with the proper overtime list used for such purposes according to job classification.

(b) Departmental Supervisors shall make every effort to notify the employee(s) to be called in with the least amount of overtime in the job classification for the work to be performed.

(c) Departmental Supervisors shall, after step (a) above, make every effort to notify the employee(s) to be called in with the least amount of overtime in the next lower job classification who qualifies for such overtime work.

. . .

(5) If the Municipality still needs more employees for work and has not been able to secure such employees per provisions 1, 2, 3, and 4 above, then the Municipality may go to other departments in the order in which the Municipality decides it can get the most qualified employees.

(f) Library Overtime. Additional hours (beyond the normal part-time workday and/or workweek) may be offered to the part-time employee before offering such hours to full-time employees up to eight (8) hours in a day or forty (40) hours in a week. All hours which exceed eight (8) hours in a day or forty

(40) hours in a week shall be offered to employees in accordance with Article XX of this Agreement.

. . .

(l) Equal distribution of overtime. If there are any administrative errors in assignment of overtime, to maintain equal distribution of overtime, the City shall adjust the future assignment of overtime hours of the individual that was bypassed when the next overtime assignment is available.

ARTICLE XXI

Hours of Work

Section I - Normal Work Day and Normal Work Week

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CITY HALL

(a) Normal work day shall commence at 8:00 A.M. and end at 5:00 P.M. with one (1) hour for lunch, except as set forth under Paragraphs (c) and (d).

(b) Normal work week shall be Monday through Friday except for Part-Time Public Safety Officers who shall work in accordance with a schedule set forth under Paragraph (d). 1/

(c) Pair-Time Building Service Helpers shall work a minimum average of three (3) hours per day during defined work periods. Part-Time Building Service Helpers hours shall be variable and subject to scheduling by the City Clerk.

. . .

FACTUAL BACKGROUND

The City is a municipal corporation providing general governmental services to the people of South Milwaukee in southeastern Wisconsin. In providing these services, the City operates a Police Department employing, among others, Public Safety Officers (PSO), part-time civilian employees who have been used since l984 to provide dispatching services. Public Safety

1/ Although the contract makes reference to defining the PSO's normal work schedule under Paragraph (d), the contract introduced into the record as Joint Exhibit #1 contains no such paragraph.

Officers are members of the Union's bargaining unit. At the time of this grievance, there were 9 PSO's employed by the City. The grievant, Thomas Margetta, has been a PSO for two years.

Prior to 1990, PSO's were limited to less than 600 hours per year to avoid the payment of retirement benefits to the Wisconsin Retirement System. The PSO's were used to provide dispatching services on an overload basis when police officers were not able to cover those duties. Beginning in 1990, the Police Department started trying to schedule 24 hour coverage with PSO'S. PSO's sign-up for open shifts based upon seniority. The Department attempts to limit PSO's to 16 hours per week, although given the staffing level of nine PSO'S, this leaves three shifts open. PSO's are limited to a maximum of 39.5 hours per week, as 40 hours is the threshold for fringe benefits.

The Department had, from time to time, used Police Officers to fill open PSO shifts. This was a source of concern for PSO's and the issue was raised at a meeting of the PSO's and Talaska on July 18, 1992. Minutes of the meeting were distributed on July 30th, and summarized the discussion of scheduling issues as follows:

> 2. Scheduling Issues - PSOs were reminded to schedule work hours according to the procedure. That procedure is to allow two days per employee to schedule their work days in order of PSO seniority.
>
> 2b. PSOs raised the issue that officers are frequently called in when a PSO calls in sick. Captain Talaska stated it was the department's policy to call PSOs to staff the communications center. If no PSO was available, police officers should then be called in. (Captain Talaska issued a memo with these directions on 07/27/92.)

The body of Talaska's memo on scheduling read:

> The department currently has 10 permanent part-time public safety officers. Their function is to staff the Communications Center. The department's goal is to staff the center with public safety officers whenever possible rather than police officers.
>
> Whenever the need arises to call a department member to staff the communications center, the shift commander, supervisor, or acting supervisor should first attempt to call in a public safety officer. If no PSO is available to work, a police officer should then be called to staff the communications center.
>
> All PSOs have been directed to monitor their accumulated hours. Due to a guideline established by the City of South Milwaukee, PSO's are not allowed to work more than 39 hours per week. In the event a PSO would exceed the 39 hour limit, they should advise the person calling them of the situation. In the event of a true emergency, such as fire, flood, earthquake, etc., a PSO can be used regardless of exceeding 39 hours per week. However, for most instances a PSO should not be brought in who would exceed 39 hours per week.

Notwithstanding the memo, the City continued to occasionally use police officers to cover open shifts when it considered PSO's unnecessary.

The grievant was scheduled to work the 4 p.m. - Midnight shift on January 1, 1994. On December 29th, he noted that there was no PSO scheduled for the New Years Eve third shift (Midnight - 8 a.m. on January 1st). As he was the next in line for overtime under the overtime equalization provision of the contract, lie asked Captain Talaska for the open shift. He was accompanied by his Union Steward when he made this request. Talaska refused to give him the hours, explaining that he would use a police officer to cover the dispatching duties. The grievant told Talaska that he viewed this as a violation of the contract, and Talaska indicated, in essence, that he did not care if the grievant believed it to be a violation.

On January 11th, the grievant submitted a written grievance on an approved grievance form, listing the contract provisions violated as being "Article IV Section 2 "Contracting and Subcontracting"; Article XX (e)(1)(a) "Equal Distribution of Overtime" & all applicable articles of the Agreement." The grievance form was dated January 8th. The body of the grievance read:

> A vacancy in the position of Public Safety Officer occurred New Year's Day, January 1, 1994, Midnight-8 am. This vacancy was known more than forty-eight (48) hours in advance of the commencement of the assignment.
>
> Wednesday, December 29, 1993, at approximately 2:00 pm, Capt. Timothy Talaska called me into his office to discuss this vacancy. I informed his the vacancy should be filled by asking for volunteers from the Scheduled Overtime list, established by departmental seniority, and that I would accept the assignment should it reach me. Capt. Talaska disagreed with this procedure and informed me and Public Safety Officer Catherine Kamiski, my AFSCME Union Steward, that the Police Department would not allow any Public Safety Officer to fill the vacancy. Rather, a Patrol Officer would assume the Public Safety Officer duties for the holiday shift. Patrol Officers are not members of AFSCME Local #883.

The relief requested was "Compensation of eight hours added to total hours worked at the Holidays Worked pay rate which was knowingly denied to me." Talaska denied the grievance on January 14th, basing the denial on Margetta's failure to submit a written grievance within the time limits of the contract:

> Article VII, Section 3, Step II of Grievance Procedure states that a grievance is considered settled in Step I, unless it is reduced to writing within 5 days. Mr. Margetta alleges he was aggrieved on 1/1/94. yet his grievance form was dated 1/8/94, and delivered on 1/11/94. Therefore, the written grievance was not executed within the five days, as required by this section.

After receiving Talaska's denial, the grievant drafted a memo stating that his original grievance was premature, because the actual violation took place on January 1st, while his Step I

discussion with Talaska at the first step took place on December 29th. He noted that Talaska's denial took place three days after the grievance was presented in writing, and that this violated the 48 hour limit of Step II responses. In recognition of these procedural defects, his memo announced that the grievance was actually presented at the first step on January 14th when he met with City and Union officials to discuss the original grievance. He concluded his memo by stating that "Grievance #4, dated January 8, 1994, which does not accurately comply with the mandated time limits, is hereby annulled without prejudice to the violation of the Agreement which occurred January 1, 1994." This memo was presented to the City on January 17th.

On January 21st, the grievant submitted an amended written Grievance, citing the same provisions of the contract noted on the previous grievance. The body of the amended grievance read:

> Wednesday, December 29, 1993, at approximately 2:00 pm, Capt. Timothy Talaska called me into his office to discuss a vacancy in the position of Public Safety Officer for the Late Shift (Midnight-8 a.m.) on January 1, 1994.. I informed him the vacancy should be filled by calling in a Public Safety Officer by asking for volunteers from the overtime list, established by departmental seniority, and that I would accept the assignment should it reach me.. Captain Timothy Talaska disagreed with this procedure and informed me and Public Safety Officer / Union Steward Catherine Kamiski that, contrary to the terms of the Agreement and departmental policy, the Police Department would not allow any Public Safety Officer to fill the vacancy. Rather, a Patrol Officer would assume the Public Safety Officer duties for the holiday shift.
>
> The vacancy in the position of Public Safety Officer did occur New Year's Day, January 1, 1994, Midnight-8 a.m., with 1-2 Patrol Officers at a time performing Public Safety Officer duties in lieu of a trained Public Safety Officer. Patrol Officers are not members of AFSCME Local #883.

Talaska denied the grievance, noting that it had already been responded to on January 14th.

The grievance was not resolved in the lower steps of the grievance procedure, and was referred to arbitration. A hearing, was held on June 2, 1994. The Union presented Margetta as its only witness, and the City presented the testimony of Captain Talaska. The grievant testified that Talaska had told him that he intended to "knowingly violate" the contract. On the issue of timeliness, the grievant indicated that his original grievance was based on a violation of call-in provisions, while his second grievance was premised on the overtime provisions of the contract. He conceded that the Police Department has made several unsuccessful attempts to persuade the City Council to make the PSO's full-time, and that the City Council had not budgeted any overtime for PSO's. He also agreed that the Department had used PSO's five to ten times over the preceding three years to perform dispatching duties. He testified that the procedure for filling shifts when a PSO called in sick was to call PSO'S, with all but the two who worked that day being eligible for the hours.

Talaska testified that nine PSOs were not enough to fill all shifts through the normal schedule sign-up, and that he assigned open shifts to police officers. PSO staffing levels have varied over time, and at one point the City had only seven PSOS, resulting in many open shifts. Talaska stated that Police Officers have always been used for some dispatching, and the work has never been exclusively reserved for PSOS. The call-in procedure is used if the vacancy is the result of someone calling in sick, or if the Department decides not to use an officer for an open slot. Talaska stated that the open shift on January 1st was not an overtime opportunity, since it would not have caused a PSO to work in excess of 40 hours in the week. Since it was a holiday, it would have been an opportunity for a PSO to earn double time, and Talaska agreed that the grievant was next on the call-in list.

Talaska said that when Margetta approached him about the open shift, he discussed the matter with Captain McArdle. They decided that the midnight shift on New Years Eve was not likely to be as busy as in past years, and that they could cover the shift with the Police Officers already scheduled to work. He said he did not recall telling the grievant that he would "knowingly violate" the contract, but agreed that he might have said something similar in a different context.

After the hearing, two other arbitration cases were filed on the same subject. The parties agreed that these cases would be consolidated with the Margetta grievance for decision, and that the timeliness issue would be treated as affecting the remedy, if a remedy is warranted. Additional facts as necessary are set out below.

POSITIONS OF THE PARTIES

Position of the Union

The Union takes the position that the grievance is plainly arbitrable. The grievant made a timely submission of his grievance within twenty days of the actual date on which the violation occurred. There is no question that the City was made aware of the dispute in a timely manner and the City should not be allowed to hide behind a purely technical argument to avoid the resolution of this ongoing dispute.

The contract language is clear. Overtime "shall be distributed as equally as practicable among employees in their respective job classifications." The distribution for call-in overtime is laid out in detail. This was overtime for the PSO classification, in the form of an extra shift beyond the normal schedule, performing the duties normally performed by that classification. The contract requires the use of the call-in list for such overtime, and the grievant was next in line for overtime work. The contract only allows for the assignment of overtime to a different classification if no employee in the classification is available. Even the City admits that this is the proper procedure, as reflected by Talaska's 1992 memo promising not to assign this work to Police Officers at the PSO's expense, and pledging to use the call-in list for open shifts. Talaska's belief that he can choose to either follow the contract or assign the work outside of the bargaining unit at his whim is plainly at odds with the entire notion of a binding contract. Given the

deliberate nature of this violation, the Union asks that the grievant be made whole, and that some form of punitive damages be awarded.

Position of the City

The City takes the position that the grievance is not within the jurisdiction of the arbitrator, since it was filed after the time limits specified in the contract had expired. The contract requires that a Step I meeting with the supervisor be held within 20 days. This took place on December 29th. Thereafter, a dissatisfied employee has five days to file a written grievance. The grievant waited for 13 days to file a written grievance, obviously missing the deadline. Thus Margetta's grievance should be denied.

On the merits, the City argues that determining staffing levels is a right reserved to management. The contract neither reserves dispatching work exclusively to PSO's nor guarantees overtime to them. Dispatching work has always been performed by Police Officers, and the PSO's are purely supplementary positions, performing the work when management decides not to use officers.

The work at issue here was not overtime, and is not governed by the equalization or call-in procedures of Article XX. Distribution of extra shifts is instead controlled by department policy, and Talaska followed the existing policy by not to distribute the shift. Only if he had decided to use a PSO would he have had occasion to refer to Article XX to decide which PSO would be called-in. Since Talaska decided that a PSO was not needed, he had the right to have the dispatching work absorbed by the already assigned officers.

DISCUSSION

Timeliness of the January 1994 Margetta Grievance

The grievance procedure is jurisdictional, and a claim that the grievance did not comply with the requirements of the procedure is a threshold issue which must be resolved before any discussion of the merits. The contract requires that a grievance be raised through discussion with the supervisor within twenty days, and be reduced to writing within five days after that meeting. In this case, the City claims that the grievance procedure was triggered on December 29th when the grievant told Talaska that he was contractually entitled to the open shift and Talaska refused to assign him the shift. The grievance was not reduced to writing and presented to the City until January 11th.

On the face of it, the January 11th grievance is untimely. The grievant, however, argues that his grievance meeting with Talaska was premature, since the actual loss did not occur until January 1st. Thus he sought in his January 17th memo to "annul" the initial grievance and have his second step meeting on January 14th treated as the initial presentation of the grievance.

The contract requires that a grievance be presented at the first step "within twenty (20)

calendar days after the event giving rise to the complaint occurred, or the employee could reasonably have been expected to have knowledge of it." There is considerable arbitral authority for the proposition that, in cases where a decision is announced in advance, the employee need not grieve immediately, and may wait for the actual loss without forfeiting, his or her right to challenge management's action. Whether this proposition is applicable in a given case depends upon the particular facts of the case, including the action involved, the amount of time between the decision and the action, whether decision is unequivocal, and the past practices of the parties. The use of the later date as the date of the grievable event is not universally accepted. 2/ There is little question, however, that the employee may choose to initiate a grievance at the time of unequivocal notice of a management decision, rather than waiting for the later date on which the decision is implemented.

In this case, Talaska made an unequivocal decision to cover the open shift 58 hours hence with a Police Officer, and carried through with the decision. At the time of the unequivocal decision, the grievant obviously felt he "had knowledge" of the grievable event, as indeed he did. The grievant had an option in this case, and could have waited until January 1st to raise his grievance without prejudicing his position. However, he did 'I the later date. He chose to grieve immediately, as was his right, and his subsequent argument that the initial grievance was ineffective because it was raised too early is not only contractually incorrect, but was rather obviously concocted for the sole purpose of circumventing the untimeliness of his written appeal.

The grievant stated his claim to the open shift, and his claim was denied. His written grievance cited the discussion on December 29th as being the event giving rise to the relevance. His subsequent memo admitted that it was intention to complete the first step of the grievance procedure when he met with Talaska on that da@'. Despite his contention at the hearing that the original grievance was premised upon a violation of the call-in provisions while his second grievance was aimed at the City's violation of the overtime provisions, there is virtually no difference between the wording, of the first and second grievances, no additional facts came to light between the submission of the first grievance and the second grievance necessitating another first step meeting, and the only intervening event of note was his realization that his initial grievance was time-barred. The City was fully aware of the grievance on December 29th and, more importantly, the grievant was fully aware of the City's response at the first step on December 29th. Having initiated the grievance, and then allowed it to lapse, the grievant cannot cite his own supposed procedural mistake to overcome his failure to pursue the grievance.

A plausible argument might be made that the appeal to the second step could have been timely if it was filed within five days of January 1st, despite the meeting with Talaska on the 29th. However, there is no calculation that makes a written grievance submitted on January 11th a timely submission for a decision announced and protested on December 29th and implemented on

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2/ Compare the analysis in Elkouri, How Arbitration Works (4th Ed.) BNA, 1985 at page 196, favoring the later filing date, with the discussion in Fairweather, Practice and Procedure in Arbitration (2nd Ed.) BNA, 1983, at page 103, suggesting that the earlier date is more appropriate.

January 1st. The grievant chose to submit the first step grievance at the earliest permissible moment, and then failed to follow up with a written grievance within the time limits specified in the contract. For that reason, his grievance is barred as untimely. Pursuant to the stipulation of the parties in this case, this does not preclude a decision on the merits, but does effectively eliminate any remedy for the grievant even if the Union prevails on the substance of the grievance.

The Merits

The Union's case mixes elements of overtime equalization, call-in procedures and bargaining unit work preservation. The City asserts that this is not overtime work, that call-in is not applicable when the City decides not to staff a shift with PSO's and that the work has customarily been performed both by workers in the PSO classification and by sworn officers.

The contract provides no direct definition of "overtime". The overtime equalization language of Article XX is premised on the assumption that overtime refers to hours paid at a premium rate. Thus the formula for converting overtime hours to straight-time hours for equalization purposes:

> (a) Convert overtime hours worked which are compensated at a rate of one and one-half (1 1/2) times the regular rate to an equivalent number of hours worked at regular rates by multiplying actual hours worked times one and one-half (1 1/2).
>
> (b) Convert overtime hours worked which are compensated at a rate of two (2) times the regular rate to an equivalent number of hours worked at regular rates by multiplying actual hours worked times (2).
>
> (c) Post the summary of overtime hours worked in terms of equivalent hours worked at regular pay on a biweekly basis in a location readily accessible to all bargaining unit employees.

While the work at issue here would have been paid at a premium rate of double-time, that is not because it was overtime work, but because it would have been performed on a holiday. There is no reading of the equalization provision that would bring additional straight-time hours for the PSO's within that section's definition of "overtime".

The call-in provision of Article XX is also cited as a basis for the grievance. The call-in provision immediately follows the equalization provision in the contract, and the term "overtime" is used in the same sense in both provisions:

> It is recognized by the Union that the Municipality has overtime work that must be accomplished; therefore, the following procedure shall be used:
>
> (a) Employees shall be called in, *in accordance with the proper overtime list used for such purposes* according to job classification.
>
> (b) Departmental Supervisors shall make every effort to notify the employee(s) to be called in with *the least amount of overtime* in the job classification for the work to be performed.
>
> (c) Departmental Supervisors shall, after step (a) above, make every effort to notify the employee(s) to be called in *with the least amount of overtime* in the next lower job classification who qualifies for such overtime work.

As with the overtime equalization language, the use of the term "overtime" in the call-iii section of the contract does not lend it to an interpretation that includes extra hours on open shifts for PSO's. 3/ Moreover, the fact that Talaska has had discussions with the PSO's in the past concerning the procedures governing call-in, and issued a memo in July of 1992 defining their rights to be called-in before any officer is called-in, is strong evidence that these hours have been controlled by policy rather than contract. 4/ If the PSO's have the contractual right to claim available straight-time hours under Article XX of the contract, the Talaska memo would have been both unnecessary and a violation of the collective bargaining agreement.

The overtime language of the contract does not require that a PSO be used to cover an open shift when the City has determined that there is no need for additional personnel from the ranks of either the PSO's or the sworn officers. The Union argues, however, that the use of

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3/ The City conceded at the hearing that the call-in provisions were followed for filling shifts in cases where a PSO called-in sick and had to be replaced, and nothing in this Award should be read as disturbing that arrangement.

4/ The pertinent provision of the memo reads: "Whenever the need arises to call a department member to staff the communications center, the shift commander, supervisor, or acting supervisor should first attempt to call in a public safety officer. If no PSO is available to work, a police officer should then be called to staff the communications center." Compliance with this specific policy is not in issue in this case, since the policy addresses situations where the choice is limited to which classification to call-in, while the officer used on January 1st was already scheduled for duty and was not called-in to perform dispatching duties.

sworn officers violates the prohibition on assigning bargaining unit work to non-unit personnel embodied in Article IV, §2:

> The Union recognizes that the Municipality has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right to contract or subcontract is vested in the Municipality. However, the right to contract or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members.

Assuming that this may be read as a restriction on the ability of the City to assign work to other City personnel outside of the bargaining unit, there is no evidence that the use of a police officer undermines the Union or discriminates against Union members. The grievant conceded in his testimony that dispatching work has not been exclusively the province of PSO'S, in that the City has historically used police officers for covering open shifts, albeit on an occasional basis. There is nothing to suggest that the decision to have an already assigned officer cover dispatching on New Years' Day represented an expansion of this policy that would undermine the Union. While counsel for the Union indicated in his opening statement that the decision may have been assigned specifically at the grievant because of a personal dislike for him by Talaska, this point was not developed in Margetta or Talaska's testimony, and Talaska offered a plausible, nondiscriminatory basis for the decision.

The desire of the public safety officers to expand their hours and establish an exclusive claim on dispatching work is legitimate and understandable. However, the contract as written does not guarantee those results. The definition of overtime in Article XX will not sustain an interpretation that includes straight-time hours, and the limitation on contract in and subcontracting is consistent with the occasional use of police officers to cover open shifts on the communication center schedule.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Margetta grievance over the use of a police officer to perform dispatching work on January 1, 1994 was not timely;

2. The failure to assign the grievant to work the open shift on January 1, 1994 was not a violation of the collective bargaining agreement.

3. The grievances are denied.

Signed this 21st day of September, 1994 at Racine, Wisconsin.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator