

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NEW LONDON POLICE ASSOCIATION

and

CITY OF NEW LONDON

Case 20
No. 54446
MA-9687

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, appearing for the Association.
von Briesen, Purtell & Roper, Attorneys at Law, by Mr. James R. Korom, appearing for
the City.

ARBITRATION AWARD

The New London Police Association, herein the Association, requested the Wisconsin Employment Relations Commission to provide a panel of staff arbitrators to hear and to decide a dispute between the parties. The City of New London, herein the City, concurred with said request. The parties selected the undersigned as the arbitrator. Hearing was held in New London, Wisconsin, on January 15, 1997. There was no stenographic transcript made of the hearing. The parties completed the filing of post-hearing arguments on April 9, 1997.

ISSUES:

The parties stipulated to the following issue:

What shall be the disposition of the grievance contained in
Joint Exhibit 3?

BACKGROUND:

Approximately twenty-five years ago, the City implemented a policy of providing police officers with transportation to and from their houses when they were either completing or starting a shift. As the patrol officer on-duty was completing a shift, said officer would pick up the officer who was coming to work on the next shift. The officer who was completing a shift would then be taken to said officer's home. That practice allowed officers to relay information from one shift to the next while ensuring that one on-duty officer was on the streets at all times. The shift of the

officer coming on-duty commenced when the officer was picked up at home. The shift of the officer going off-duty ended when the officer arrived at his/her home. Although the length of the typical shift often exceeded eight hours under the practice, the officer was paid for only eight hours and did not receive any overtime pay.

On August 22, 1996, the City determined that it would discontinue its practice of providing transportation to and from the Department for each police officer on each shift. The change went into effect on August 24, 1996, beginning with the 6:00 a.m. to 2:00 p.m. shift. Commencing with that shift, all police officers have been required to transport themselves both to the police station where they participate in roll call and collect assignments at the start of each shift and to their homes at the end of their shifts. The Association notified the City on August 29, 1996, that it was filing a grievance based on the change of a past practice affecting working conditions.

When the practice started, the City had only one officer in one squad car on patrol at any given time. Now there are two officers on each shift and another officer works from 9:00 a.m. to 5:00 p.m. In addition, a supervisor is on duty during the time period of 9:45 a.m. to 2:45 a.m. There is no supervisor on-duty when the early shift, i.e., 6:00 a.m., commences.

Since the Police Department moved to its new building, there is ample parking space for all officers on a shift. Previously, the chief and the dispatcher were the only Police Department employees with access to City parking areas.

There are on-line computers in the Police Department offices which allow the officers to retrieve information from state and national databases. The computers cannot be accessed from outside the station.

POSITION OF THE ASSOCIATION:

The contract directly incorporates existing practices of the City regarding shifts. The change of practice, at issue herein, directly affects employee shifts. Therefore, substantive arbitrability of the grievance exists.

Article 4, Section A, of the contract requires the City to continue its existing practices regarding employees' shifts. Because the change in practice effectively changed the employees' shifts, the City violated the contract by terminating the practice. The City cannot rely on the contractual management rights clause to make a change which violates another clause of the contract. Rather, Article 14 of the contract requires the mutual agreement of the parties to amend or alter the contract.

The grievance should be sustained. The City should be required to pay the officers both for the additional time required to transport themselves to work and for the mileage for doing so.

POSITION OF THE CITY:

The Association has failed to relate this grievance to any existing clause of the contract.

The contract explicitly sets forth the benefits received by the employees. The parties would have included the benefit of transportation to and from work, if there had been a mutual agreement to continue the benefit forever.

The testimony at the hearing established that the issue of transportation to and from work was never discussed nor negotiated at the bargaining table because the parties never intended it to constitute a binding contractual term. The transportation was not the officers' right, but rather, it was provided for a period of time because it was in management's best interest to do so. Circumstances have changed and management, pursuant to the contractual management rights clause, has retained the right to change its transportation policy, even if the practice had constituted a binding agreement between the parties. The most significant change is that, over the past thirty years, the Department has become a much busier station, handling more complex cases. The City has experienced an increased need for officer availability at very short notice. Unlike thirty years ago, now it is not uncommon for the two officers on the street to be called to an emergency situation just as those officers are en route to pick up the officers on the next shift. When that occurs, the two on-duty officers would be paid overtime to respond to the situation, while the two officers coming on-duty would be paid to sit at home waiting for their transport. Officers are now spending more time in court than was the case thirty years ago. On days when an officer was required to appear in court, an officer was called off the street to pick up the other officer at home. The officer appearing in court would then be driven to the station to pick up a squad car, which the officer drove to court. After the court appearance, the officer would drive back to the station, park the squad car, and call an officer off the street to be taken home. Intermediate supervisors can more easily delegate assignments to officers coming on duty if the officers return to the station at the beginning and the end of each shift. Data from the state crime computers is much more accessible to officers when they stop at the station at the start and end of their shifts. There is ample parking for all on-duty officers at the new station, which was not the case at the old station.

The Association is asking the arbitrator to add to the contract, since the transportation of officers to and from work is not specifically provided for in the contract. The terms of the contract explicitly bar such an addition, particularly as stated in Articles 14 and 18.

Even if it is found that the City's past practice has risen to the level of a binding contract term, the changes in circumstances, since the policy was established, allow the City to modify the practice. Arbitrators have held that when established benefits conflict with legitimate management interest, management may change the binding past practice.

The grievance should be denied.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 2 - VESTED RIGHT OF MANAGEMENT

- A. Except as herein otherwise provided, the right to employ, to promote, to transfer, discipline and discharge employees and the management of the property and equipment of the City of New London is reserved by and shall be vested exclusively in the Common Council of the City of New London through its duly appointed Police and Fire Commission and through the duly appointed Chief of Police through authority vested in him by the Common Council and the Police and Fire Commission shall have the right to determine how many men there will be employed or retained, together with the right to exercise full control and discipline in the proper conduct of the Police and Fire Commission Operations.

- B. The Common Council, through its Police and Fire Commission and Police Chief, shall have the sole right to contract for any work it chooses and direct its employees to perform such work wherever located in its jurisdiction. This will be subject only to the restrictions imposed by this agreement, Chapter 111 of the Wisconsin Statutes, and the Common Council.

- C. The Police and Fire Commission shall have the exclusive right to determine the hours of employment to make changes in details of employment of the various employees from time to time as it deems necessary for the efficient operation of the Police Department, subject again to the restrictions imposed by this agreement, and the Association and the members agree to cooperate with the Board and/or its representatives in all respects to promote the efficient operation of the Police Department.

. . .

ARTICLE 4 - HOURS AND SHIFTS

- A. The current City's practice concerning employee's shifts are herein incorporated. The hours of employment shall be based upon a work week of six days on duty, two -- days

off duty, six days on duty, three days off duty, six days on duty and three days - off duty. Shifts will begin and end on the hour.

. . .

ARTICLE 6 - OVERTIME

A. Officers will be compensated for overtime as follows:

. . .

All time worked in excess of the eight hours on the department schedule	Time and one half
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. . .

ARTICLE 14 - AMENDMENT TO THIS AGREEMENT

A. This agreement is subject to amendment to alteration or addition only by subsequent mutual agreement between and executed by the City and the Association.

. . .

ARTICLE 18 - GRIEVANCE PROCEDURE

A. . . . A grievance is defined as any dispute or misunderstanding relating to employment between the employee and the employer that are contract related. . . .

. . .

C. If the grievance isn't settled at the first step, the grievance shall be presented in writing to the Police Chief. The written grievance shall include a statement of facts of the dispute, the alleged articles claimed violated, the issue and the remedy sought. . . .

. . .

- E. . . . The decision of the arbitrator, or arbitrators, shall be final and binding on the parties, and the arbitrator or arbitrators shall request to issue a decision in writing within thirty (30) days after the conclusion of the testimony and argument. However, the arbitrator(s) shall not modify, delete, subtract, add to, or alter the agreement.

. . .

DISCUSSION:

The instant dispute arose when the City, effective on August 24, 1996, changed its transportation policy so that police officers would no longer be transported to and from their homes in City vehicles at the start and end of their work shifts and for court appearances.

The undersigned does not agree with the City's assertion that, since the practice is not specified in the contract, then he would be adding to the contract by finding the practice to be binding on the City. The parties were fully aware of the practice and allowed the practice to continue over a number of years, during which period of time they negotiated several contracts. There is nothing to show that the practice was ever discussed during any of the negotiations which culminated in the contracts between the parties. The practice was implemented either by the City or with the City's consent and has continued with the City's knowledge under successive contracts. The City does not point to any contractual language with which the practice was in conflict. In the case relied on by the City in its brief, in support of its right to unilaterally terminate the practice, there was a conflict between the practice and other provisions of the relevant contract. Judsen Rubber Works v. Local 24, 149 LRRM 2641 (N.D. Ill. 1995). Consequently, the instant matter can be distinguished from said case.

Further, Article 6 of the contract specifies that overtime will be paid, inter alia, for "all time worked in excess of the eight hours on the department schedule." Notwithstanding said language, there is no evidence that any officers have either requested or received overtime pay on a daily basis when their on-duty time exceeded eight hours as a result of a delay in being transported to and from their homes for their work shifts. In fact, it was the uncontradicted testimony of the Police Chief that no such overtime payments had been made. Clearly, the City has relied on the practice to exclude time spent in transit from payment under Article 6. Thus, the practice can be seen as an interpretation of Article 6 in relation to transit time.

In addition, Article 4, Section A of the contract specifies that "Shifts will begin and end on the hour." The Police Chief testified that, under the old practice, an officer was considered to be on-duty as soon as the officer was picked up at home and remained on-duty until the officer arrived back at the officer's residence at the end of the officer's shift. Clearly, such a practice was a clarification or modification of said contractual language.

Herein, the City asserts that it has the ability to unilaterally eliminate the practice because the underlying basis for the practice has changed. There is support for the City's assertion, in light of the increased number of police officers, the increased amount of parking spaces available to the on-duty officers, the increase in the number of court appearances by the officers, and an increased need for officers to be available on short notice due to more emergency situations. However, the evidence does not show that such changes relied on by the City all occurred during the 1995-96 contract between the parties. Instead, the changes apparently have occurred on a gradual basis during a period of time spanning more than one contract, rather than during the 1995-96 contract. Consequently, it can be assumed that the parties anticipated that certain practices, such as the transportation practice at issue herein, would be continued during said contract.

The City did not establish that its ability to effectively administer the Police Department would have been hampered by delaying the termination of the practice until the end of the 1995-96 contract, rather than terminating the practice in late August of 1996, slightly more than four months prior to the end of said contract. The City cited two incidents, both of which occurred after August of 1996, to illustrate why it believed the practice needed to be changed immediately. However, inasmuch as the officers from the relief shift were already at the station in the cited examples, then it is quite possible that those officers would already have been picked up by the officers from the ending shift if the former practice had still been in effect. Thus, those examples did not conclusively demonstrate that less officers would have responded under the former practice, than responded in the examples. Neither did the cited examples discuss the role of the on-duty supervisor under either situation.

The City submitted a post-hearing reply brief wherein it requested the arbitrator to consider a recent decision by the Wisconsin Employment Relations Commission, i.e., City of River Falls, Dec. No. 29009 (WERC, 2/97). In said case, the Union had proposed to include in the contract a provision containing a description of an existing transportation policy, which policy was very similar to the practice at issue in the instant case. The Commission found such a proposal to constitute a permissive subject of bargaining. Said decision did not deal with the status of the transportation practice during the life of the contract. Thus, while that decision may be relevant to the status of the practice upon the expiration of a contract, said decision does not control the instant dispute.

The undersigned concludes that the City did not have the right to terminate the transportation practice in August of 1996, and, therefore, the grievance is sustained. As a remedy the Union requested that the officers receive both pay for the additional time they expended in transporting themselves to and from work and mileage for such transportation. As stated earlier, there is no evidence to show that the officers have ever received overtime pay for those instances where their shifts exceeded eight hours as a result of a delay either in being picked up at the start of their shifts and/or in being transported to their residences at the end of their shifts. Accordingly, the undersigned does not find it appropriate to grant the request for additional wages. However, it is appropriate to grant the request for mileage to the officers for transporting themselves between the Police Department and their residences for the period of time beginning

with the shift starting at 6:00 a.m. on August 24, 1996, and ending with the expiration of the contract. The rate for such reimbursement shall be at the prevailing mileage rate of the City for said period of time.

Based on the foregoing, the undersigned enters the following

AWARD

That the City did not have the right to discontinue, during the term of the 1995-96 contract, the practice of transporting police officers to and from the Police Department; that, while the City is not obligated to pay the officers for any additional time they spent in commuting between their residences and the Police Department, the City shall reimburse the officers for such travel at the prevailing mileage rate of the City for the period of time commencing with the 6:00 a.m. shift on August 24, 1996, and ending with the expiration of said contract; and, that the undersigned will retain jurisdiction of this case for a period of thirty (30) calendar days, which period of time will commence on the day following the day on which this Award is issued, for the sole purpose of resolving any disputes over the remedy directed herein.

Dated at Madison, Wisconsin, this 30th day of June, 1997.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator