BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY LAW ENFORCEMENT
EMPLOYEES ASSOCIATION

and

SHEBOYGAN COUNTY
(SHERIFF'S DEPARTMENT)

Case 305
No. 54582
MA-9730

Appearances:

Mr. Richard J. Daley, Business Agent, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, on behalf of Sheboygan County Law Enforcement Employees Association.

Ms. Louella Conway, Personnel Director, on behalf of Sheboygan County.

ARBITRATION AWARD

Sheboygan County Law Enforcement Employees Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Sheboygan County, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 9, 1997 in Sheboygan, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by February 18, 1997. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not stipulate to a statement of the issues and agreed that the Arbitrator will frame the issues to be decided.

The Association offers the following statement of the issues:

> Did the Employer violate provisions of the Collective Bargaining Agreement (Articles 13 and 14) and mutually agreed terms of clarification of said provisions (Memorandum of Understanding, 09-21-95 and letter of 09-19-95), when the

employer called-in the grievants to work outside their *regularly scheduled 8 hour shift* without paying the minimum call-in and overtime premium of Articles 13 and 14; changed their regularly scheduled 8 hour shifts and denied said grievants the opportunity to work their regularly scheduled 8 hour shift as previously agreed in said memorandum? If so, what is the appropriate remedy?

The Employer would state the issues as being:

> Did the employer violate the contract and past practice when the shifts of Deputies Smith, Benning and Cowen were adjusted for a special event, if so, what is the appropriate remedy?

The Arbitrator concludes that the issues to be decided may be stated as follows:

> Did the Employer violate the parties' Collective Bargaining Agreement when it unilaterally assigned the Grievants (Deputies Smith, Benning and Cowen) to work an eight-hour shift at the 1996 Cascade Picnic other than their regularly scheduled shift without paying overtime or call-in pay for the hours outside of their regular hours, and by not permitting them to work their regularly scheduled shift? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1995-1996 Agreement are cited:

ARTICLE 5

MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, the Employer shall have the right to:

1. Carry out the statutory mandate and goals assigned to the County utilizing personnel, methods and means in the most appropriate and efficient manner possible. It is understood and agreed, however, that should new classifications, reclassifications, reallocation or substantial changes in job duties occur, the parties agree to meet and negotiate wages, hours and working conditions for any such positions.

2. To hire, promote, transfer, demote, discipline, suspend or discharge for just cause its employees.

3. To determine the specific hours of employment, the length of the work week and make such changes in the various details of the employment it from time to time deems necessary for the effective and efficient operation of the Sheriff's Department. It is understood and agreed that shift rotation during the term of this Agreement shall remain the same as scheduled prior to the effective term of this Agreement.

4. To adopt reasonable rules and policies and amend the same from time to time.

. . .

ARTICLE 10

WAGES, WAGE ADMINISTRATION AND WORK WEEK

. . .

IV. WORK WEEK

The standard work week for full-time employees shall be as follows:

. . .

4. For Patrol Officers, the standard work week shall be a 6-3 schedule, eight (8) hours per day.

5. Temporary changes can be made in the schedule by the Sheriff or his/her designee, which shall be limited to Inspector and Deputy Inspector when in his/her judgment it would be in the best interest of the operation of the department.

. . .

ARTICLE 13

TIME AND ONE-HALF

Time and one-half (1-1/2) shall be paid for all hours worked in excess of the employee's regularly scheduled eight (8) hour shift and on the employee's days off.

. . .

ARTICLE 14

CALL-IN TIME AND STAND-BY

Employees who are called to work at times or on days on which they are not scheduled to work shall be entitled to a minimum of three (3) hours work (or pay). Any employee so called in may be required to work the full three (3) hours.

. . .

ARTICLE 23

SENIORITY

A. Sheboygan County, shall, during the life of the herein contract for the employees covered by the same, recognize seniority as herein provided.

. . .

3. In determining shift preference where the same classifications are involved the shift preference shall be given to the employee with the longer period of seniority in that classification.

. . .

ARTICLE 32

COMPLETE AGREEMENT

> The herein agreement shall constitute the entire Agreement in effect between the parties and items not specifically set forth in the herein Agreement shall not become a part hereof by reference unless otherwise specifically set forth in writing and added hereto by mutual agreement.

BACKGROUND

The County maintains and operates a Sheriff's Department, and in 1994 the Association became the bargaining representative of the Sheriff's Department law enforcement employes bargaining unit. Prior to that time, the bargaining unit had been represented by AFSCME. The Grievants, Deputies Smith, Benning and Cowen are employed in the Sheriff's Department and are members of the bargaining unit represented by the Association.

The Sheriff's Department provides security and police protection for a number of special events that occur in the Sheboygan area, and in early August of 1996 the Grievants were assigned to work at the Cascade Picnic. Deputy Smith normally works the third shift with hours of (9:00 p.m.-5:00 a.m.) and was given approximately three days prior notice that his hours were going to be changed for August 2 to work from 6:00 p.m. to 2:00 a.m. at the Cascade Picnic. Smith worked those hours on August 2 and was not permitted to work his regular shift hours and was not paid overtime. Deputy Benning normally works the third shift (11:00 p.m.-7:00 a.m.) and was given approximately 48 hours notice that he was to work 6:00 p.m. to 2:00 a.m. at the Cascade Picnic on August 3, 1996. Benning worked the amended hours on August 3 and was not permitted to work his regular shift hours and was not paid overtime. Deputy Cowen normally works the third shift hours (11:00 p.m. to 7:00 a.m.) and was given 3 to 4 days prior notice that his hours were to be changed for August 4, 1996 to work from 1:00 p.m. to 9:45 p.m. at the Cascade Picnic. Cowen worked the amended hours on August 4 and was not permitted to work his regular shift and was not paid overtime.

The Grievants filed a grievance challenging the Department's right to assign them to work hours other than their regular shift and at the same time not permit them to complete their regular shift hours and not be paid overtime for the hours outside their regular shift hours.

Previously, in late August of 1995, a grievance had been filed by Deputy Traas alleging that the County had violated the parties' Agreement by calling him in to court outside of his regular shift hours and requiring him to work an altered 8 hour shift, instead of permitting him to

work his regular shift, without paying him call-in pay or overtime. Said grievance stated the following:

> STATEMENT OF GRIEVANCE:
>
> On 8/24/95, Employee Traas whose regular shift is 11Pm-7Am, was called to work at 3:45Pm. Said court call-in was outside of his normal work shift. Traas was denied call-in pay and told to work 3:45Pm-11:45Pm that day. Traas was not allowed to work his regular shift. Traas was not paid call-in premium nor overtime for hours outside his normal work shift. And, he was not allowed to work his normal work shift.
>
> On 8/25/95, Employee Traas was called-in to court at 10Am. Traas was ordered to either work a split shift 10Am to 2Pm, then come in for 4 hours at 11Pm until 3Am OR, work 10Am to 6Pm (which he elected to do). Traas was not paid overtime for hours outside his normal work shift, was not paid call-in premium, and was not allowed to work his normal work shift.
>
> REMEDY SOUGHT:
>
> For 8/24/95 Traas to be made whole to include,
>
> > 3 hours at time and one half as per Article 14 for court call-in at 3:45Pm.
> > 7.25 hours at time and one half as per Article 13 for hours worked outside of regular work shift and receive regular 8 hours pay for regular work shift denied.
>
> For 8/25/95 Traas to be made whole to include,
>
> > 3 hours at time and one half for court call-in, at 10Am.
> > 8 hours at time and one half for time worked outside of normal work shift, 10Am-6Pm.
> > 8 additional regular hours for time on regular shift not allowed to work from 11Pm-7Am.
>
> Employer to cease the attempts to change work hours to avoid payment of overtime due employees by contract.

Traas' grievance was denied on September 2, 1995 and on September 7, 1995, the following memorandum was posted by management:

> MEMO TO ALL THIRD SHIFT PATROL OFFICERS AND SUPERVISORS
>
> FROM: CAPT. DENNIS RAKOW
>
> REFERENCE: CALL-IN ISSUSE (sic) AS IT RELATES TO COURT CASES AND OVERTIME
>
> ON WED. 09/06/95 OUR DEPARTMENT HELD A STAFF MEETING WITH ALL SUPERVISORS. AT THIS MEETING THE INSPECTOR OUTLINED PROCEDURES THAT WILL BE USED BY THIRD SHIFT OFFICERS AS IT RELATES TO OVERTIME AND COMING IN FOR COURT CASES. IN ALL CASES, WHEN AN OFFICER COMES IN FOR A COURT CASE AND THAT EVENING THE SHIFT IS RUNNING AT MINIMUM STAFFING OVERTIME WILL BE PAID FOR CALL IN AND THE OFFICER CAN LEAVE AFTER THE CASE AS WAS THE CASE IN THE PAST. WHEN AN OFFICER IS COMING IN AFTER HIS DAYS OFF THE FOLLOWING PROCEDURE WILL BE FOLLOWED. WHEN THE SHIFT IS ABOVE MINIMUM, THE OFFICER WILL BE GIVEN CREDIT FOR THREE HOURS WORKED REGARDLESS OF HOW LONG THE CASE LASTED LESS THE THREE HOURS AND WILL THEN GO OUT ON THE ROAD FOR FIVE REMAINING HOURS. IN THE CASE WHERE THE COURT CASE IS ON THE COURT SCHEDULE, THE SUPERVISOR WILL ASSIGN HIM THAT SHIFT AHEAD OF TIME. IF THE CASE IS CANCELLED WITHIN TWO DAYS OF THE CASE, THE OFFICER WILL WORK THE SHIFT HE IS SCHEDULED. IF THE OFFICER HAS WORKED THE NIGHT THE FOLLOWING GUIDELINES WILL BE IN EFFECT. IF THE CASE IS SCHEDULED BETWEEN THE HOURS OF 8AM AND 12PM. THE OFFICER WILL BE GIVEN THE CALL IN RATE OF OVERTIME AND WILL GO HOME. IF THE CASE IS SCHEDULED BETWEEN THE HOURS OF 1PM AND 5PM, IT WILL BE PART OF THE OFFICERS SHIFT. IF A CASE WHERE THREE OFFICERS COME IN FOR A COURT CASE AT THE SAME TIME, SENIORITY WILL DETERMINE WHO GETS PAID THE OVERTIME AND

> WHO WILL BE MADE TO WORK THE COURT TIME AS PART OF HIS OR HER SHIFT. IF THE SUPERVISOR IS SCHEDULING AN UP COMING COURT CASE HE WILL TAKE INTO ACCOUNT THE TIME THE CASES ARE SCHEDULED, WHEN DECIDING WHO WILL WORK THE COURT CASE AS PART OF HIS OR HER SHIFT.
>
> THERE ARE SOME ISSUES THAT NEED TO BE RESOLVED AND I AM EXPECTING A MEMO FROM OUR DIVISION COMMANDER REFERENCE THIS PROCEDURE IN A FEW DAYS. THIS IS THE INFORMATION I CAME AWAY WITH AT THE MEETING. IT IS NOT SET IN STONE BUT I AM PUTTING THIS OUT IN AN EFFORT TO KEEP YOU AS MUCH INFORMED AS I AM IN REGARDS TO THE ABOVE SITUATION. IF YOU HAVE ANY QUESTION PLEASE COME AND TALK TO ME AND I WILL SHARE WHAT INFORMATION I HAVE WITH YOU.
>
> ALSO MAY I ADD THAT THIS IS THE PROCEDURE AND IS NOT NECESSARY (sic) THAT OF THE FIRST OR SECOND SHIFT. THEY MAY HAVE DIFFERENT GUIDELINES THAN OUR SHIFT HAS. I HOPE THIS CLEARS UP SOME OF THE QUESTIONS THAT YOU HAVE.
>
> THANK YOU,
>
> CAPT. D. RAKOW

In response to the September 7, 1995 memorandum, the Association added a "class" grievance to the Traas grievance, which class grievance stated in relevant part:

> **STATEMENT OF GRIEVANCE:** On September 7, 1995, a departmental memorandum of rules and regulations was issued by CAPT. RAKOW outlining the approval of overtime, and hours change procedures for employees called-in for court and various other call in requirements. The Employer has embarked on a systematic process of changing employees regular work hours and shifts to avoid payment of overtime as per the provisions of Article 13 which calls for overtime for all hours in excess of the employees regularly scheduled 8 hour shift and on employees days off.
>
> **RELIEF SOUGHT:** Make all effected employees whole for

overtime work performed in excess of regularly scheduled 8 hour shift, and make them whole for the regular work shifts denied, and pay appropriate call-in and court cancellation premiums for all applicable occurrences. Rescind all memoranda conflicting with the written provisions of Articles 13 and 14 of the labor agreement.

Along with the above grievance, the Association sent the following letter to the County's Personnel Director and Sheriff:

> Dear Ms. Conway and Mr. Spelshaus:
>
> After leaving the personnel committee grievance hearing that we participated in on September 7, where we presented the Bergman, and Norlander grievances, and where we discussed the Traas grievance, (which we submitted to the third step), I had the opportunity to meet with the association as a whole at a special association meeting. I have now learned that the issues that are at the heart of the Traas grievance and related to the Bergman and Norlander grievances are even more wide spread than we at first realized. There are wholesale, and multiple occurrences of the employer changing hours to avoid paying overtime, and denial of overtime pay for hours in excess of the regular scheduled 8 hour work shifts for a variety of reasons. Those circumstances related primarily to the Traas grievance are directives as per the recent memo written by Capt. Rakow that indicate the intentions of the employer to change employee hours when employees are called-in or require training outside their normal work shifts. And, the expressed intention to not allow the employees to work their normal work shift on days that they had been required to be trained or when called-in for court or other circumstances.
>
> The association has formed a committee to keep track of all instances of these occurrences as they unfold. Our members are being directed to submit overtime slips for all overtime hours to which they are entitled by contract and to inform the employer that they do not wish to give up their contractual right to work their regular scheduled 8 hour work shift that they have picked by seniority provisions.
>
> <u>The WPPA/LEER hereby resubmits the Traas grievance to include these wholesale occurrences as a class or association grievance</u>. It is our express intent to seek appropriate compensation for all similarly

> effected employees, and that they be made whole for all occurrences from 30 days of the Traas filing.
>
> I am particularly interested to meet with you both in order to reach an understanding as to what are fair and reasonable procedures concerning the applications of Articles 13 and 14 in all their implications as written.
>
> Finally, I must remind you that as a special accommodation to the employer's expressed budget problems of 1994, a moratorium of certain rights under Articles 13 and 14 was implemented for the specific and certain period of time to end December 31, 1994. I will remind you that no agreement was ever renewed to carry said modifications of the understanding or moratorium beyond December 31, 1994. In fact, contract negotiations during the fall of 1994 prove that no further agreement was reached. Therefore, all rights and compensation provisions of Articles 13 and 14 are in effect as has existed prior to the specific moratorium period that ended December 31, 1994. That includes any payout of the unlimited accumulation of overtime hours compensatory time bank that was allowed to be paid out at the end of 1993 and 1994.

. . .

Representatives of the parties met on September 18, 1995 to discuss the pending grievances, and as a result of said meeting, the Association's representative, Richard Daley, sent Conway the letter of September 19, 1995, which read, in relevant part, as follows:

> Dear Ms. Conway:
>
> This is to confirm details of our meeting in Sheriff Spelshaus' office on September 18, 1995.

. . .

> The Traas/Association-Class grievance is to be settled as follows:
>
> 1. Traas and all similarly effected employees who had been called in for court or other reasons outside of their regularly scheduled work shift shall be paid the minimum call-in of 3 hours at time and one-half for all such occurrences. The association will submit a list of the employees effected.

2. All of the above effected employees shall also receive their regular 8 hours shift pay for the days they had their hours changed when called-in.

3. The employer will not change the employees work hours to avoid payment of overtime. Employees called-in for court or other reasons will have the opportunity to work their regular shift. The parties mutually recognize the routine practice of filling the overlap on the regular shifts.

4. A memorandum of understanding will be developed through cooperation between the local association committee and management to govern adjustment of work hours by mutual agreement of the effected employee and employer for purposes of accomplishing training and other mutually necessary departmental operations and for the good of the employee and department. Said memorandum will serve as a guideline to implement these occasional adjustments of work hours during the period of the current labor contract which is to end December 31, 1996. At that time the parties may propose and negotiate specific language to be incorporated in the successor agreement.

This concludes our understanding of the agreement reached in the three grievances at issue. Please advise if there is any conflict as to your understanding.

Sincerely,

Richard J. Daley /s/
Richard J. Daley, Business Agent
WPPA/LEER

cc: Corey Roeseler, Local President

The last sentence of enumerated paragraph 3 was added to the letter at the request of the Employer after receiving a copy of the letter. The parties ultimately reached a mutual understanding resolving the Traas and class grievances, which was commemorated in the following Memorandum of Understanding:

MEMORANDUM OF UNDERSTANDING

September 21, 1995

The following document is a memorandum of understanding between the Sheriff of Sheboygan County (for the Employer) and the Wisconsin Professional Police Association/Law Enforcement Employee Relations division (for the Deputy Sheriff Association) as the result of the parties settlement of the Traas/Association-Class grievance. The memorandum is to provide guidelines as to application of Articles 13 and 14 of the labor agreement pertaining to adjustment of work hours and call-in circumstances. The memorandum is to be in effect for the interim period of the current labor agreement until December 31, 1996 when the parties may negotiate specific language into a successor agreement.

1. The employer shall not generally adjust work hours or shifts for the purpose of avoidance of overtime payment called for in Articles 13 and 14 of the labor agreement. Employees shall not be generally denied the opportunity to work their regular work shifts.

2. The Association recognizes the need for training to remain current on the many procedures and techniques required by law enforcement professionals. To that end, the association agrees that employees may waive by mutual agreement of the employee and employer certain overtime payment rights expressed in the labor agreement for adjustment of work hours and shifts in instances where training is required or desired. If mutual agreement between the employee and employer to adjust hours in lieu of overtime payment can not be achieved, the training may not be provided, and the employee may default their participation on special teams and activities such as SWAT, Dive Team, Field Training Officers, etc.

3. The Association also recognizes that there may be isolated instances when an employee has been required to be awake and working on special call-ins to court or emergency call-out activity for excessive durations of time. In such circumstances where it is evident that for the good of the employee and the department, a specific change of a regular work shift is needed to have the employee properly rested, the employer may adjust that work shift without payment of the overtime provisions of the labor agreement.

4. The Association recognizes that the State requires mandatory

minimum amounts of training to maintain law enforcement certification. The current requirement is 24 hours per year. The employer may adjust the employee's work hours for the purpose of providing the minimum training for certification.

5. The Parties agree that the above guidelines do not in any way waive their contractual rights as expressed in the labor agreement beyond the date of December 31, 1996. Any desired specific changes to the labor agreement may be proposed and negotiated through the collective bargaining process at that time.

for the Employer	for the Association
William D. Spelshaus /s/	Richard J. Daley /s/
William D. Spelshaus, Sheriff	Richard J. Daley, WPPA/LEER
Louella Conway /s/	________________________
Louella Conway, Personnel Director	Corey Roeseler, Local Association President

dated this 22 day of September, 1995.

The parties have been unable to resolve the instant grievance and proceeded to arbitration of their dispute before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association first argues that the settlement of the Traas/class action grievances provide guidance in this case. It asserts that the Sheriff admitted in his testimony that the primary motivation of the Employer to implement these "new" procedures regarding overtime payment and change of hours was the Department's annual budget, and that payment of overtime was the primary concern. Inherent in the Sheriff's testimony is the acknowledgement that the practice had been changed, that this was not a "long-standing past practice" and that those changes had been made to avoid the payment of overtime. Further, the September 19, 1995 letter to Conway reporting the terms of the settlement of the grievances stated that all similarly effected employees who had been called in for court or other reasons outside of their regularly scheduled work shift shall be paid the minimum call-in pay. It also stated that all would receive their regular 8 hours shift pay for all of the days they had their hours changed, and that in the future, the Employer would "not change the employe's work hours to avoid payment of overtime" and that "employes called-in for court or other reasons will have the opportunity to work their regular shift."

The Employer had the opportunity in negotiating the terms of the settlement to set forth its concerns, and in fact negotiated exceptions to the terms. Further evidence of the Employer's fully-informed participation in the settlement is the subsequent inclusion of an exception stated in enumerated paragraph 3 of the September 19, 1995 letter. Further, the Employer's

representatives, Conway and the Sheriff, participated in the drafting and signing of the Memorandum of Understanding (MOU), along with the Association's representative, Daley. The terms of that settlement agreement are "crystal clear". The Association agreed to specific exemptions to the call-in and overtime provisions as a compromise from its original position that no exceptions existed and did so in a desire to secure labor peace and to "give management some consideration on its concerns on the cost of overtime." In the MOU the parties agreed that there would be certain specified exceptions to the overtime pay provisions during the life of the parties' Agreement that was to expire on December 31, 1996.

The instant grievance arose in August of 1996, well within the period of time covered by the MOU and the circumstances involved do not fit within any of the specific exceptions in the MOU. Instead, these instances are simply an effort by the Employer to avoid the payment of overtime, contrary to its agreement in the MOU. The Association cites Kennecott Copper Corporation, 6 LA 820 (Arbitrator Kleinsorge) for the proposition that even though an employer has the right under the agreement to adjust shifts or hours, it may not abuse that right by changing shifts in order to avoid its obligations to pay overtime under the agreement. In this case, the overtime provisions of Articles 13 and 14 obligate the Employer to pay overtime when hours or shifts are "adjusted". Further, the Employer agreed in the MOU, in clear and unambiguous language, to provide the overtime premiums. To ignore those clear and unambiguous obligations would render the collective bargaining process and the grievance procedure, by which the further clarifications were obtained, meaningless. The Association cites Elkouri and Elkouri, How Arbitration Works, for the principle that if language of an agreement is clear and unequivocal, it will generally not be given a meaning other than that expressed, and that the parties to a contract are charged with the full knowledge of its provisions and the significance of its language.

Next, the Association asserts that the Employer's own exhibits and the admissions of its witnesses disprove its assertion that there was a consistent past practice of adjusting regular shifts and hours without paying overtime or call-in pay to the employes who had their hours adjusted for "special events". The payroll records submitted by the Employer do not predate June of 1995. The Traas grievance was filed as a result of the Employer's actions in August of 1995 and that grievance was amended as a class action grievance upon the discovery that the Employer had "begun" the practice of "adjusting" other employes' hours for situations such as SWAT training, dive team training, etc. The Employer did not provide any payroll sheets prior to June, 1995 to indicate a consistent past practice because it was only then that it had "invented" the practice. Paragraph 1 of the September 19, 1995 summary of the settlement of the Traas and class action grievances stated that "Traas and all similarly effected employees who had been called in for court or other reasons outside of their regularly scheduled work shift shall be paid the minimum call-in of 3 hours at time and one-half for all such occurrences . . ." Presumably, the payroll lists the Employer submitted as evidence of its past practice are the lists of the very employes which it was obligated to pay pursuant to the settlement. Further, the Employer did not produce as witnesses the affected employes noted in the payroll records as having had shift adjustments imposed without being paid overtime, while the Association witnesses who were questioned as to past occurrences

testified that those adjustments had been by "mutual agreement", which situation is provided for in the settlement agreement.

With regard to the assertion that the MOU did not cover adjustment of shifts and hours for "special events", the Association asserts that the Employer had ample opportunity to raise the specific exemptions to be included in the list of situations the Association had agreed to identify as being exempt from the overtime and call-in provisions per the settlement. The Employer fully participated in identifying the specific exemptions and agreed to the language that stated it would not generally adjust work hours or shifts, nor generally deny employes the opportunity to work their regular shifts. The Sheriff conceded on cross-examination that "special events", if not specifically exempted, would fall in the category of "all other" reasons not exempted from the overtime premium.

A review of the excerpts of past labor agreements covering this bargaining unit shows that the relevant language of Articles 13 and 14 has been amended over the years. In the 1970-71 Agreement, the language was changed to provide for time and one-half for all hours worked in excess of the employe's regularly-scheduled 8 hour shift and on his day off, with noted exceptions of organized training and the firing range. In the 1992-94 Agreement, there was a dramatic change in the language of the provision so that it now provided for "all hours worked in excess of the employe's regularly-scheduled eight (8) hour shift and on the employe's day off" be paid at time and one-half. The present Sheriff was then a member of the Association's bargaining team and signatory to that labor agreement. Contrary to the Employer's claim that the excerpts from the agreements support its assertion of a long-standing practice, those excerpts demonstrate that the overtime call-in provisions have been anything but consistent. The Sheriff also admitted on cross-examination that "special events" such as the Cascade Picnic, are a part of the "all hours" referred to in the new language of the 1992-94 Agreement requiring payment of overtime. The Association requests that the Grievants be paid time and one-half for all hours worked outside their regularly scheduled work shifts and be made whole for the hours of their regular work shifts that they were denied the opportunity to work.

Employer

The Employer asserts that the language of the parties' Agreement is clear that the Employer retains the right to establish the hours of work and that overtime is only paid for hours worked in excess of the employe's regular 8 hour shift. In addition, there is an established past practice that is clear and unequivocal that employes' work schedules are adjusted to provide the necessary coverage at "special events" without the payment of overtime.

While the Agreement specifies the work schedule to be a standard work week of 6-3, 8 hours per day, it does not specify which 8 hours an employe is designated to work. The grievance, itself, shows that various employes work various hours - Smith's regular shift being 9:00 p.m. to 5:00 a.m., while Benning's and Cowen's regular shift is 11:00 p.m. to 7:00 a.m.

Article 5, Management Rights, in the Agreement provides: "Except as otherwise provided in this Agreement, the Employer shall have the right to determine the. . . specific hours of employment." The adjustments of the individuals' hours involved in this case comply with that provision granting the Employer the right to make changes as it deems necessary for the effective operation of the Department. Further, Article 13 provides that time and one-half is to be paid for all hours worked in excess of the employe's regular scheduled 8 hour shift. The Grievants did not work in excess of 8 hours and the payment of straight time for those hours complies with Article 13.

The Employer asserts that the payroll records it submitted showing the hours worked for the June Road America cycle races, Cascade Picnic and the Howards Grove Picnic in 1995 and 1996 demonstrate that numerous employes worked various hours and did not receive overtime pay, unless they worked in excess of 8 hours or worked on a day off. Further, the Grievants agreed that they did not receive overtime when they worked on those occasions. This clearly indicates that the practice had been established and accepted by the parties. The Employer notes that for a past practice to be binding, it must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Citing, Fairweather's Practice and Procedure in Labor Arbitration, (Third Ed., 1991, BNA, Washington, D.C.), p. 182. The testimony of the Sheriff and Inspector Grasse, both of whom are long-term employes of the Department, indicated that it has been a long-accepted practice and the understood way of doing business in the Department to change an individual employe's hours for these "special events" situations. Further, the payroll records establish that the practice was clearly enunciated and acted upon. Numerous individuals had their schedules adjusted to provide service during the special events and none requested or were paid overtime unless it was on their day off, or if they worked more than 8 hours, circumstances which are provided for in the Agreement. Thus, it has been demonstrated that this has been the accepted and understood way of doing things over many years without grievances being filed.

The Employer also asserts that bargaining history supports its position. The language with regard to the payment of time and one-half has not changed since 1971, and indicates that time and one-half shall be paid for all hours worked in excess of the employe's regularly-scheduled 8 hour shift. Even when the Association began representing this unit, there was no attempt to change that language or to clarify existing practices between the parties. The Association's initial proposals for its first agreement with the Employer did not contain suggested changes in the areas of standard work week, or the time and one-half provisions in Article 13, or the call-in time and standby provisions in Article 14. Thus, indicating an established practice with regard to the scheduling of work that was mutually understood and accepted.

The Employer notes the Association's reliance upon the MOU and asserts that settlement outlined the understanding of the parties with regard to the payment of overtime and the hours of work in certain circumstances. The Association's President, Inspector Grasse and the Sheriff all testified that when the MOU was negotiated there was never any discussion regarding special

events, lending credence to the conclusion that special events were outside the realm of the call-ins for court or the training sessions that were part of that Memorandum. Further, the Traas grievance was with regard to split shifts and denial of call-in pay for an individual called to court - different circumstances than those at issue in this grievance and not reflective of the practice of the parties regarding scheduling for special events.

The Employer also asserts that Article 5, Management Rights, of the Agreement, provides that it has the right to determine the specific hours of employment and also grants the Sheriff the authority to determine hours of work. The Employer cites Elkouri and Elkouri, How Arbitration Works, (4th Ed.) for the propositions that arbitrators recognize the broad authority of management to determine the methods of operation and that the scheduling of work is a normal and customary function of management, which right ordinarily will not be deemed to be limited absent an express provision in the agreement, and that where there is no express restriction on the right to determine starting times for shifts, employers have been permitted to unilaterally change starting and stopping times. There are no provisions in the parties' Agreement that prohibits the assignment of hours of work. The language expressly indicates that overtime is to be paid for hours worked in excess of the 8 hour shift or on an employes' day off, and there is no provision stating what the hours of work are to be. While the Association contends that the situations in the past where hours were changed and overtime was not paid were based on mutual agreement to change the hours, rather than management rights, the right to assign work is a fundamental management right that can only be limited or restricted in direct contract negotiations, and such a restriction must be clearly stated and then only extends as far as it is clearly expressed. Citing, Olin Mathieson Chemical Corporation, 42 LA 1025, 1040 (Klamon, 1964). Here, there is no contract language limiting the hours of work, and the Employer has the inherent right to establish such.

The Employer asserts that there were numerous references made at the hearing to the overtime costs the Employer had incurred and that the Association noted the fact that the MOU was the result of the Employer's concern with the cost of doing business and the impact of paying overtime. Since the assignment of hours for special events had not created a negative impact on the Department by generating overtime costs, there was no need to include it in the MOU, it having been an accepted practice to adjust starting times to staff those functions without paying overtime. While numerous other issues were referenced in the Memorandum, the issue of special events was ignored, thus indicating it was not a concern to either the employes or the Employer since overtime had not been paid when hours were adjusted in those situations. The Employer concludes that it acted within its rights under the Agreement and consistent with past practice, and requests that the grievance therefore be denied.

DISCUSSION

There is no factual dispute as to what took place with regard to the change in the Grievants' work hours, i.e., on the days in question they were assigned to work an eight-hour shift at the 1996 Cascade Picnic other than their regularly-scheduled shift, were not permitted to work

their respective regularly scheduled shift, and were not paid overtime.

The Employer argues that the parties' Agreement does not establish specific hours of work and reserves to management the right to determine an employe's hours of employment. The Employer also argues that the Agreement does not contain any limitation on its "inherent right" to establish the hours of work. The Employer's argument goes too far. While the Agreement does not specifically set forth what the work hours are to be and Article 5, Management Rights, ostensibly reserves to management the right to "determine the specific hours of employment. . ." Article 10, Section IV, Work Week, Paragraph 5, provides that "Temporary changes can be made in the schedule. . ." That right to make "temporary changes" infers that the parties recognize that there is an otherwise regular schedule of work hours that an employe normally works. This is further borne out by Article 13, Time and One-Half, which provides for payment at the rate of one and one-half "for all hours worked in excess of the employee's regularly scheduled eight (8) hour shift. . ." (Emphasis added). The Agreement also provides for shift selection within classifications by seniority. Again, indicating that there are what the parties view as a regular schedule of work shifts and that under normal conditions an individual employe will work the same schedule of hours week-in and week-out.

The question still remains as to whether the Employer had the right to make a "temporary change" in the Grievants' respective work schedules in the instant case. Article 10, Section IV, paragraph 5, of the Agreement, provides:

> 5. Temporary changes can be made in the schedule by the Sheriff or his/her designee, which shall be limited to Inspector and Deputy Inspector when in his/her judgment it would be in the best interest of the operation of the department.

The language of that provision would appear to give broad discretion to the Sheriff or his designee in deciding whether a temporary change is appropriate. However, the evidence establishes that in resolving the Traas/Class Action grievances in 1995, the parties reached a mutual understanding that limited that discretion. That understanding was memorialized in their September 21, 1995 Memorandum of Understanding (MOU), which provided, in relevant part:

> The following document is a memorandum of understanding between the Sheriff of Sheboygan County (for the Employer) and the Wisconsin Professional Police Association/Law Enforcement Employee Relations division (for the Deputy Sheriff Association) as a result of the parties settlement of the Traas/Association-Class grievance. The memorandum is to provide guidelines as to application of Articles 13 and 14 of the labor agreement pertaining to adjustment of work hours and call-in circumstances. The

> memorandum is to be in effect for the interim period of the current labor agreement until December 31, 1996 when the parties may negotiate specific language into a successor agreement.
>
> 1. The employer shall not generally adjust work hours or shifts for the purpose of avoidance of overtime payment called for in Articles 13 and 14 of the labor agreement. Employees shall not be generally denied the opportunity to work their regular work shifts.
>
> . . .

The scope of Paragraph 1 is further clarified by the summary of the understandings reached by the parties at their September 18, 1995 meeting, as set forth in the Association Representative's September 19th letter:

> 3. The employer will not change the employees work hours to avoid payment of overtime. Employees called-in for court or other reasons will have the opportunity to work their regular shift. The parties mutually recognize the routine practice of filling the overlap on the regular shifts.

The last sentence of paragraph 3 was added at the request of the Employer after reviewing the letter. Those understandings were subsequently incorporated in the September 21st MOU.

The Employer asserts that the MOU did not address the practice of changing employes' regular work hours to cover "special events", such as the Cascade Picnic. According to the Employer, the Association stressed that the MOU was the result of the Employer's concerns with paying overtime, and since the practice has been to adjust employes' hours for special events without paying overtime, such situations were not of concern to either party and were not covered by their MOU. That argument is not persuasive, as it simply states that the Employer had no overtime concerns regarding special events because it adjusted the employes' work hours and did not pay overtime. The evidence indicates that the MOU was the result of actions the Employer had taken to avoid having to pay overtime and the employes' concerns in that regard. The Employer's actions with regards to the Grievants was of the same nature as the actions addressed by the MOU, i.e., changing an employe's work hours to avoid having to pay overtime. The Employer negotiated specific exceptions to the agreement it would not adjust hours without paying overtime, e.g., to ensure employes are sufficiently rested when they have been working for an excessive duration and for mandatory training. To whatever extent a practice could be said to exist with regard to changing employes' work hours to cover "special events" without paying overtime, such practice was superseded by the parties' MOU for its duration. Paragraph 1 of the MOU expressly provided that the Employer agreed it would "not generally adjust work hours or

shifts" for the purpose of avoiding payment of overtime and that employes would "not be generally denied the opportunity to work their regular work shifts." The wording is broad in scope and the Employer negotiated the specific exceptions to the proscriptions, which exceptions do not include "special events."

It is therefore concluded that the Employer was bound for the life of the September 21, 1995 Memorandum of Understanding not to change employes' regular work hours or shifts in order to avoid paying overtime 1/ and not to deny employes the opportunity to work their regular shifts when they were assigned to work outside those hours. Therefore, it is further concluded that the Employer violated the parties' Agreement, as amended by the Memorandum of Understanding, when it changed the Grievants' work hours and at the same time refused to permit them to work their regular hours.

Remedy

With regard to remedy, payment is to be based upon the hours the Grievants worked on the dates in question and their regular work hours. Article 13 of the Agreement provides for payment at the rate of time and one-half for "all hours worked in excess of the employee's regularly scheduled eight (8) hour shift. . ." 2/

In Smith's case, he was assigned to work, and did work, 6:00 p.m. to 2:00 a.m., and was not permitted to work his regular work hours of 9:00 p.m. to 5:00 a.m. Due to the 5-hour overlap of the hours he worked and his regular hours (9:00 p.m. to 2:00 a.m.), Smith would have worked a total of 11 hours (3 hours in excess of his regular 8 hour shift) had he been permitted to finish his regular shift and is therefore entitled to 3 hours of overtime in addition to the pay he received.

In Benning's case, he was assigned to work, and did work, 6:00 p.m. to 2:00 a.m., and was not permitted to work his regular work hours of 11:00 p.m. to 7:00 a.m. Due to the 3-hour overlap of the hours he worked and his regular hours (11:00 p.m. to 2:00 a.m.), Benning would have worked a total of 13 (5 hours in excess of his regular 8 hour shift) hours had he been permitted to finish his regular shift and is therefore entitled to 5 hours of overtime in addition to the pay he received.

In Cowen's case, he was assigned to work, and did work, 1:00 p.m. to 9:45 p.m., and was not permitted to work his regular hours of 11:00 p.m. to 7:00 a.m. There was no overlap of the

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1/ Except in those limited circumstances set forth in the MOU.

2/ Since all of the Grievants worked at least three hours outside their respective regular shifts, Article 14, which guarantees a minimum of three hours for call-in, has no impact.

hours Cowen worked and his regular hours. Therefore, had Cowen been permitted to work his regular shift, he would have worked a total of 16 (8 hours in excess of his regular 8 hour shift) hours and is therefore entitled to 8 hours of overtime in addition to the pay he received.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance of Deputies Smith, Benning and Cowen is sustained. Therefore, the Employer is directed to immediately make the Grievants whole by paying them overtime in the amount set forth in the Remedy section of this Award.

Dated at Madison, Wisconsin, this 17th day of July, 1997.

By David E. Shaw /s/
David E. Shaw, Arbitrator

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