BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN, INC.
for and on behalf of its affiliate local THE GERMANTOWN TELECOMMUNICATORS' ASSOCIATION, LOCAL 507

and

VILLAGE OF GERMANTOWN, Wisconsin

Case 44
No. 54342
MA-9634

(A.Hadler grievance dated 5-14-96)

Appearances:

Mr. Patrick J. Coraggio and **Mr. Kevin W. Naylor,** Labor Consultants, Labor Association of Wisconsin, Inc., 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of the Union.

Mr. James R. Korom, von Briesen, Purtell & Roper, S.C., 411 Building Office, Suite 700, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Village.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance, arising under terms of the parties' 1994-95 Agreement (Agreement) which had expired but remained in effect pending results of negotiations regarding a successor agreement. The Commission designated the undersigned Marshall L. Gratz as the Arbitrator.

The grievance was heard by the Arbitrator at the Germantown Police Department Conference Room on November 16, 1996. The proceedings were not transcribed, however the parties agreed that the Arbitrator could maintain a cassette tape recording of the evidence and arguments presented at the hearing for the Arbitrator's exclusive use in award preparation.

The parties submitted initial and reply briefs, the last of which was exchanged by the Arbitrator on February 13, 1997, marking the close of the record. On February 15, 1997, the Arbitrator received a letter in which the Village objected to consideration of portions of the Association's reply brief.

ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. What shall be the disposition of the grievance contained in Exhibit 5?

The grievance referred to in the stipulated issue, above, is described and quoted at length in the BACKGROUND set forth below.

PORTIONS OF THE AGREEMENT

Article III - Management Rights

Section 3.01: - The Village possesses the right to operate the Police department and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the Police Department.

B. To establish reasonable work rules and schedules of work consistent with the terms of this Agreement.

. . .

F. To maintain efficiency of Police Department operations.

. . .

Section 3.02: These rights shall be exercised consistently with Chapter 111 of the Wisconsin Statutes and the express terms of this Agreement. Nothing herein contained shall divest the Association of any of its rights under Wisconsin Statutes.

. . .

ARTICLE V - GRIEVANCE PROCEDURE

. . .

Section 5.05: The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for final and binding arbitration. The arbitrator shall have no authority to grant wage increases or decreases. The arbitrator shall confine himself to the precise issue(s) submitted for arbitration. The decision of the arbitrator within the limits of his authority shall be final and binding on the parties.

. . .

ARTICLE VI - SENIORITY CLAUSE

Section 6.01 - Seniority: Seniority shall be determined by the employe's length of service as a full-time dispatcher retroactive back to the last date of hire. . . .

. . .

Section 6.03 - Shift Preference: Dispatchers shall be assigned shifts by seniority preference. Effective October 1, 1992, and each year thereafter, during the month of October of each calendar year, but not later than the 1st of the month, the Employer shall post shifts for the forthcoming calendar year. Posting will close on November 1st. The employees shall bid for the shifts, and where more employees bid for a shift than there are openings, the most senior employee(s) bidding for the shift shall be awarded their shift selection. Employees whose initial selection is not approved shall be given an opportunity to bid on the shifts that remain open until all shifts are filled. Employees shall be advised of the shift assignments as soon as possible, but not later than November 15th. The shift assignments shall go into effect as of January 1st of each year, or as soon as practicable, thereafter.

A. Mutual trading of shifts, whether single days or weeks, shall be allowed with at least 48 hours notice so long as such trading does not require the Employer to pay overtime, and with the approval of the Chief or his designee.

B. Single day shift trades will be completed within fourteen (14) days of the date of the initial shift trade.

. . .

ARTICLE XII -- WORK DAY AND WORK WEEK

Section 12.01 - Work Day: A normal work day for all employees shall consist of working eight (8) consecutive hours on an established shift. All employees shall be entitled to a thirty (30) minute paid lunch break during the tour of their shift. Employees shall have at least sixteen (16) hours off between shifts except for the employees on relief shift or if mutually agreed otherwise between the employee and the Employer.

Section 12.02 - Work Week Cycle: The normal work week cycle for dispatchers shall be five (5) days on duty followed by two (2) days off, followed by four (4) days on duty followed by two (2) days off and then repeating the cycle.

. . .

ARTICLE XIV - OVERTIME

Section 14.01 - Overtime: Overtime is any time worked by an employee at the direction of the Village in excess of the normally scheduled work week and work day. Employees working overtime shall be compensated for such time at the pay rate of time and one-half based on their normal hourly rate of pay. Overtime will be

computed at the next highest quarter (1/4) hour. Employees who are called in prior to their regularly scheduled shift shall be allowed to complete their full regular shift unless mutually agreed otherwise.

. . .

ARTICLE XV - STAFFING PROCEDURES

Section 15.01 Telecommunicator staffing vacancies shall be resolved by the Communications Supervisor or supervisor on duty, through following these sequential steps:

1. Assign the full-time or the regular part-time dispatcher normally scheduled during the hours which require a replacement;

2. Assign the noon - 8 P.M. or 8:00 P.M. - 4:00 A.M. dispatcher next scheduled to work with a practicable change of reporting time;

3. Assign on a seniority basis the full-time dispatchers not scheduled to work and if not available the regular part-time dispatcher;

4. Assign extended hours equally to the dispatcher on duty and the dispatcher next scheduled to work. With the concurrence of the supervisor and the individuals involved, extended hours may be assigned on an other than equal basis.

. . .

ARTICLE XXXIII - AMENDMENTS AND SAVINGS CLAUSE

Section 33.01: This Agreement may not be amended except by the mutual consent of the parties in writing.

. . .

ARTICLE XXXIV - CONDITIONS OF AGREEMENT

Section 34.01: This Agreement constitutes an entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

. . .

BACKGROUND

The Village and Association are parties to collective bargaining agreements, including the Agreement. The Agreement was executed on January 24, 1994 and by its terms covered calendar years 1994 and 1995. The Agreement's terms remained in effect at all material times in 1996 while negotiations of a successor were pending. The Agreement covers a bargaining unit consisting of the non-supervisory Telecommunicators (also referred to as dispatchers) employed by the Village.

The Grievant has been employed by the Village as a Telecommunicator since about 1992. She is also a member of the Association's bargaining team participating in the negotiations for a successor to the Agreement which were pending and unresolved at the time of the hearing in this case.

The Village employs seven Telecommunicators, all full time, to cover the Village Police Department's around-the-clock emergency services dispatch operation.

On November 7, 1995, Grievant and her fellow employes received the results of their seniority-based shift selection process in memorandum form, specifying which of the shifts offered by the Village in that process each had selected. Those shifts consisted of three permanent shifts (one each for day shift, second shift and third shift) and four relief shifts. The relief shifts were identified on that as: "Relief Shift Day Shift/11:00AM-7:00PM," "Relief Shift Third Shift.8:00AM-4:00PM," "Relief Shift Based Off 7:00 PM - 3:00 AM" and "Relief Shift Based Off Second Shift." When the employes were originally asked for their shift preferences, the Village's October 1, 1996 memorandum described the relief shifts without using the term "based on," as follows: "Relief Shift (11AM-7PM; Day Shift, 2nd Shift)," "Relief Shift (11AM-7PM & 2d Shift)," "Relief Shift (11AM-7:PM; Day Shift; 3rd Shift)," and "Relief Shift (7PM-3AM; 2nd Shift; 3rd Shift)."

For 1996, based on her seniority and shift preferences, Grievant was assigned to the last of the relief shifts listed above. Grievant had previously selected and worked the permanent third shift in 1994 and the first shift relief shift in 1995.

The grievance giving rise to this case relates to one of the monthly Telecommunicator work schedules that is routinely posted by the Village 20-30 days in advance of the first day of the month it covers.

That grievance, in its amended form as contained in Exhibit 5, was dated May 14, 1996 and signed by the Grievant on May 31, 1996. In it, Grievant alleges that the Village violated Arts III, VI, VII, XV and "any other appropriate article," and posits the following Issue, Facts, and Remedy:

Issue:

The grievant, Jacqi Hadler, alleges that the employer violated the expressed and implied terms of the collective bargaining agreement by switching her normally scheduled hours.

Facts:

1. That there is a collective bargaining agreement in force and effect between the Village of Germantown and the Germantown Telecommunicators' Association, represented by the Labor Association of Wisconsin, Inc.

2. That the grievant is a member of the Germantown Telecommunicators' Association.

3. That on May 14, 1996, Communications Supervisor, Sue Mourey, posted a staff Duty Schedule wherein the grievant was scheduled to work the hours of 12:00 midnight to 8:00 a.m. on Sunday June 2, 1996 and Monday June 3, 1996.

4. That the grievant's normal shift is from 7:00 p.m. to 3:00 a.m.

5. That as a result of this change in reporting time the grievant was required to report for duty nineteen (19) hours early.

6. That as a result of this unilateral change in schedule the grievant did not receive two (2) full days off pursuant to Article XX - Work Day and Work Week.

7. That as a result of this unilateral change in schedule the grievant did not receive sixteen (16) hours off between shifts pursuant to Article XII - Work Day and Work Week.

8. That this unilateral change in the grievant's schedule is an unreasonable exercise of Management's Rights.

Remedy:

The grievant respectfully requests that the employer cease and desist from violating the expressed and implied terms of the collective bargaining agreement. The grievant further requests that the employer pay her at the rate of time and one-half for all hours worked outside of her normally scheduled hours. If this grievance should proceed to arbitration, the grievant respectfully requests that the arbitrator award the above remedy, as well as any other remedy deemed appropriate by the arbitrator.

That amended grievance was ultimately submitted to arbitration as noted above. At the arbitration hearing, the Association presented testimony of the Grievant and rested its case in chief. The Village presented testimony by Mourey and Chief of Police Gerald Blum and rested its case in chief, concluding the evidentiary hearing.

The work schedules in evidence reveal that the Grievant was scheduled to work 4PM-Midnight on May 30, 1996, and scheduled to work next from Midnight-8AM on June 2, 1996.

Additional background is set forth in the summaries of the parties' positions and in the DISCUSSION which follows.

POSITION OF THE PARTIES

The Association

In its initial brief, the Association argues as follows. Pursuant to Sec. 6.03, the Grievant chose to work a relief shift which commences at 7:00 PM and ends at 3:00 AM Section 12.02 defines the normal work week as five days on duty followed by two days off, followed by four days on duty followed by two days off duty, and then repeating the cycle. As stated in the grievance, the schedule in question included a unilateral change in Grievant's starting time that required her to come to work nineteen hours earlier than normal thereby violating her Sec. 12.02 right to have two days off.

Agreement Sec. 5.05 limits the Arbitrator's role to construction of the contractual language as agreed to by the parties (citing published award) and to the issue submitted by the parties regarding whether the Village violated the Agreement. The Arbitrator's role is not to determine whether the Village made a good bargain when it agreed to the terms of the Agreement or would experience unanticipated costs and difficulties in staffing if a violation is found in this case.

The Association filed the instant grievance to protect its existing contractual rights, not to gain a new benefit. The language in Sec. 12.02 is clear and unequivocal, so the Association should not be forced to bargain again for a benefit already provided by the Agreement.

The Village's efforts to supersede that clear contract language based on past practice have failed. The evidence shows that the Association is unaware of any such practice and that no such practice exists. The Village's evidence relates to a period of less than three years, in which the parties negotiated only one interim Agreement, involving only one parallel and ungrieved incident, and in surrounding circumstances in which the Village unilaterally eliminated part-time employes some time in late 1993 and then assigned four of the seven bargaining unit members to a relief shift.

The alleged practice also lacks the necessary element of mutuality of understanding by the parties as to the meaning and application of Sec. 12.02. The Arbitrator should disregard Mourey's testimony that she asked the two first shift

Telecommunicators how the scheduling had been done in the past and created schedules including the one at issue here consistent with their description of past scheduling. Section 33.01 precludes amendments of the Agreement by other than the exclusive bargaining representative, and Sec. 34.01 precludes verbal agreements from superseding the terms of the Agreement. If the Village is allowed to solicit binding Agreement interpretations from individual members, the collective bargaining process will be damaged beyond repair.

No grievance was filed regarding the Village's having similarly changed Grievant's schedule for May 26, 1996, but this was due to Grievant's attempt to find a replacement on her own rather than to the Association accepting the propriety of the Village's actions. In any event, if the Grievant mutually agreed to the change in starting time, the Village would have been able ***to*** cause the employe to start 19 hours early without violating the Agreement. However, the record establishes that Grievant did not agree to the instant 19 hour deviation from her normal schedule of two off days. The Village's actions in this case reflect a mistaken assumption that Telecommunicators who are assigned to a relief shift have waived

their Sec. 12.02 rights to work a 5-2, 4-2 work week and can be ordered to work a 5-1, 4-1 work week.

While no grievance was filed when Grievant was previously scheduled to start 3 hours early at 4:00 PM [on May 30, 1996], the inconvenience involved is significantly different and less than that involved in the 19 hours early change at issue in this case. While depriving an employee of three hours off between shifts may be viewed as reasonable under certain circumstances, the same cannot be said for ordering an employe to report 19 hours early on one of her off days.

The work schedules in evidence show "that each employe within the bargaining unit is normally scheduled to work a 5-2, 4-2 schedule. This amounts to a total of 64 hours off between the last working day of the work week and the first working day of the following work week." (Union brief at 13) The Village is attempting to reduce Grievant's amount of time off between work weeks by 19 hours.

The Agreement language shows that sort of latitude was clearly not mutually intended by the parties. Article XII is divided into two sections to guarantee all unit members a full complement of off days, even though only non-relief shift employes are protected against involuntary deprivation of at least 16 hours off between shifts. Clearly the parties contemplated the probability that a relief shift employe may have less than 16 hours between shifts due to staffing needs, but there was never any intent to reduce or shorten a relief shift employe's off days. Thus, unlike Sec. 12.01, there is no exception allowing the Village to cancel an employe's off day and require the employe to report 19 hours early.

The Village also violated the Agreement by exercising its Art. III right to establish schedules of work in an unreasonable manner. It is not reasonable for the Village to call in an employe 19 hours early and then claim she has received her full

allotment of time off. Common sense dictates that if the "work day" consists of eight consecutive hours and the department has three eight hour shifts on which relief shifts are to be "based," a day off would then be made up of three work shifts, i.e., 24 consecutive hours. Furthermore, Black's Law Dictionary (5 ed, 357) defines a "day" as "a period of time consisting of twenty-four hours and including the solar day and the night. . . [and as] That period of time, within the limits of a natural day, set apart either by law or by common usage for the transaction of business or the performance of labor; as in banking, in laws regulating the hours of labor, in contracts for so many 'days work,' and the like. . . ." It is not reasonable that a full "day off" under the Agreement can be three hours less than a "work day" as defined by the same Agreement. Indeed Mourey testified that she did not take into consideration the number of hours an employe had off but rather the days she was off. In her view, five hours makes up one day for purposes of Art. XII. On the contrary, Grievant should have had sixty-four hours off as was the longstanding practice, not the lesser number of hours off that she was in fact scheduled off. Furthermore, the Village did not submit any proof to support its claim that if the Association prevails in this case the Village would encounter financial hardships so severe and catastrophic that they would be forced to deny vacation and compensatory time off for the bargaining unit's membership.

The Art. XV Staffing Procedure was put into the Agreement to cover the very type of situation involved in this case. The Village has just found it easier to cut short the off days of the Grievant rather than follow the procedure in Art. XV and pay overtime.

In its reply brief, the Association argues as follows. The Association is neither seeking to preclude relief shift Telecommunicators from coming in early if the change in schedule occurs during the middle of their 5- and 4-day on-duty periods nor to preclude the Village from scheduling relief shift employes on "bad bump shifts." The Association seeks only to prevent the Village from cutting a Telecommunicator's off days short without mutual consent.

Section 14.04 expressly provides the Village with the right to schedule training so as to avoid the payment of overtime, but that the Village must do so in a way that does not result in the loss of off days. That language further supports the Association's contention that off days were meant to be guaranteed and that the Association did not intend to allow the Village the right to cut them short as the Village did in this case.

Only 4 of the Village's 20 examples are relevant to the case at hand, because only 4 of those examples involve the Village scheduling an employe to come in 19 hours early. The other 16 examples relate either to situations in which: the employe's off days were not shortened by the posted schedule; the employe was paid the overtime premium for working outside their normal schedule; the employe was working an irregular schedule altogether rather than the normal 5-2, 4-2 schedule; and/or the employe worked the hours in question as a result of a trade pursuant to Sec. 13.01.

With regard to the remaining four instances, September 17, 1994 involved Schweitzer at a time when she was a probationary employe such that she may have been uncomfortable in filing a grievance. Schweitzer may also have mutually agreed to this change in her schedule. In any event, the Village should have called her as a witness on that subject if it intended to rely on this date as relevant to the instant grievance. On January 18, 1995, it is likely that Welch was willing to agree to the change in her schedule to accommodate a fellow employe who was absent due to a death in her family; inasmuch as Welch, herself, had taken time off due to a death in her family earlier in the same week. While Welch came in 19 hours early on February 26, 1995, we have no evidence or testimony explaining if she was ordered in or volunteered to work. Regarding May 26, 1995, Grievant testified that she did not see the changed schedule until after the deadline for filing a grievance had passed, not that she did not see Schweitzer during that time.

The Village's examples, as a whole, show only that the Village has been allowed to change relief shift hours in the middle of the on duty portions of the work cycle consistent with the language of the Agreement. The Village's evidence does not show an established practice sufficient to bind the Association to an understanding that the Village has the right to require an objecting employe to come in to work 19 hours earlier than normal.

The Yaeger award attached to the City's brief should not be considered by the Arbitrator because it was not introduced at the hearing. If the Arbitrator decides to consider Yaeger's decision, then the Arbitrator should also consider the copies of the grievance and parties' briefs in that case that the Association has attached to its reply brief. In any event, the Yaeger award is not on point with the instant case. Arbitrator Yaeger did not agree with the Village's claim that staffing problems covered by Sec. 5.07 of the police agreement are defined as last minute occurrences, but only that that section was not intended to cover overtime created by special assignments of the sort involved in that case, which are hardly parallel to the coverage of vacancies arising due to employes taking paid time off.

The instant grievance was not filed because of Grievant's selfishness or the Association's inability to achieve set schedules for all employes at the bargaining table. Grievances do not lack merit simply because they are filed during the pendency of contract negotiations. Had Ms. Mourey contacted LAW, Inc., rather than the bargaining unit employes working on first shift she would have been told that an employe's off days cannot be cut short by 19 hours. The Association is pursuing this grievance, not just the Grievant.

For those reasons, the Arbitrator should grant the grievance and the relief requested in it.

The Employer

The Village changed Grievant's hours consistent with the parties' established past practice. The Grievant, having benefited from that scheduling system in the past, and having failed to get it changed in collective bargaining, now seeks to change through grievance arbitration the parts of it that she does not like.

The times at which relief shift employes are scheduled to work -- as opposed to the scheduling of permanent shift employes -- have always been subject to variation depending on various circumstances which may arise. When Grievant selected her current relief shift, she knowingly accepted the associated potential inconvenience of such changes.

The Village attempts to grant employe requests for vacation time and compensatory time off if there is adequate notice to the department to change the schedule of a relief shift dispatcher. Where there is an option, efforts are made by the department to use the relief shift employe whose schedule change will be least disruptive. The number of changes in the schedules of the relief shift employes is directly related to the needs and desires of other bargaining unit employes for more time off and maximum flexibility in its use.

When Susan Mourey took over responsibility for the schedule, she asked the dispatchers on duty on the first shift how to do the schedule and has developed schedules accordingly ever since, including her scheduling of the Grievant in the instant case.

A review of the schedules from the beginning of 1994 shows: (a) that throughout 1994 and 1995, Grievant frequently was granted time off which resulted in a change in the

schedule of a relief shift Telecommunicator. (b) Several examples where Grievant's own requests for time off led to an individual normally scheduled to work the 7:00 PM-3:00 AM shift to work midnights, starting 19 hours prior to their usual start time. (c) Several other examples in which the 7:00 PM-3:00 AM relief shift employe was required to come in to work at midnight on the first day back from her two off days. (d) And notably an instance where Grievant, herself, experienced the same kind of change that she has grieved in this case, but filed no grievance. Grievant offered no satisfactory explanation for not grieving that change. The schedule posted on April 12, 1996 itself contradicts her testimony that she did not see Telecommunicator Schweitzer until after the deadline for filing a grievance had passed.

The Village submits that a grievance was filed regarding the instant case but not the one a few days earlier because it became clear in the interim that the Association's bargaining representatives, including Grievant, were not able to obtain at the bargaining table the change in existing practice that they are seeking through this grievance. In that regard, the Association initially proposed permanent shifts for all employes and subsequently offered language that would limit the Village's flexibility in the use of relief shift employes.

The work schedules are posted every month for all to see. Grievant has worked as both a permanent third shift employe and as a relief shift employe, so she has seen the schedule every month as it affected herself and the other employes.

The Union has not pointed to any clear and unambiguous contract language to support their effort to undo the parties' consistent and longstanding practice reflected in those schedules.

Section 3.01.B. expressly reserves to the Village the right to establish "schedules of work consistent with the terms of this Agreement." The word "reasonable" in that section applies only to the Village's right to establish "work rules." In any event, the change made in Grievant's schedule was a reasonable exercise of the Village's scheduling right because it is no different than other changes the Village has made in employes' schedules over time without grievances being filed. The change is also reasonable because: scheduling seven full time dispatchers to provide around-the-clock coverage becomes increasingly complicated as bargaining unit employes want both more time off and maximum flexibility when using it; the Village has attempted to grant employe requests for vacation and compensatory time off if there is adequate notice to the department to change the schedule of a relief shift employe; such schedule changes are not done for the convenience of the department, but only to accommodate other employes' time off requests; and avoidance of schedule changes of the kind involved in this case would be unreasonable in that it would force the Village either to be less accommodating to employe time off requests or to experience substantial unanticipated costs to bring in another employe on overtime.

Article VI merely establishes the method for assignment of employes to the various shifts established by the Village. It does not limit the Village's right to establish or vary employes' schedules of work. Indeed, the Grievant selected and was notified of her assignment to the "relief shift based off 7:00 o'clock PM - 3:00 o'clock AM" pursuant to that Article.

The contention in the grievance that Grievant was entitled to 16 hours off between shifts is squarely contradicted by the express exclusion of relief shift employes from the 16 hour provision in Sec. 12.01.

Section 12.02 merely describes the normal work cycle for dispatchers as 5-2, 4-2. That section must have been intended to mean something other than that employes would be relieved from performing duties during a dictionary-defined two days consisting of 48 consecutive hours, midnight to midnight to midnight, because: the schedules in evidence for 1994-96 show numerous instances where relief shift employes' work schedules were modified in ways that did not provide them with two days off defined that way; employes are not charged two vacation days when their shift includes parts of two calendar days; and Grievant worked only 5 hours on calendar 6-16-96 and 11 hours between midnight and midnight on the 17th but was neither paid nor eligible for overtime pay for work in excess of eight hours " on the 17th" Rather, the language of Sec. 12.02.B., when

interpreted in the context of the parties' clear and unequivocal past practice, reflects that the parties simply agreed, for example, to treat the 7:00 PM to 3:00 AM shift as worked on the "day" on which that shift began. The parties have used the term "day" to mean a payroll day, a day on the schedule, and not as a midnight to midnight 24 hour day as defined in the dictionary. Reading Sec. 12.02.B. in the context of the parties' practice, the Grievant in this case received her two days off. The Arbitrator should adopt that interpretation, which is consistent with common sense and practice, despite the fact that it does not comport with a strict dictionary definition of the term.

The Union's reliance on the Article XV procedure for staffing vacancies is also misplaced. Under the Union's interpretation, every vacation request would cause overtime, and the Village could never change relief shift employes from a permanent set of regularly scheduled hours without their permission. Why would there be a relief shift? Why would there be an exemption of relief shift employes from the Sec. 12.01 16-hours-off-between-shifts requirement? And why would there be evidence of past practice whereby relief shift employes have often worked other than the hours their shift is based on without overtime compensation being paid them? The record establishes that the vacancy staffing procedure has not historically been utilized to cover vacation or compensatory time off requests, but only for last minute vacancies, such as sick leave. The Chief testified that that has been true for both the Telecommunicators unit and the sworn officer unit for several years. Arbitrator Yaeger's award in the police unit is attached to the Village's brief for reference in that regard, along with Arbitrator Greco's CITY OF WAUPUN (UTILITY) award holding that where, as here, the same parties negotiate materially the same agreement language in two units of the same employer's employes, the past practices developed under one are relevant to the interpretation of the agreement in the other. Finally, the language of Art. XV itself contemplates last minute call-in situations, rather than a procedure applicable to all requests for time off, in that: the department would always be able to assign the individuals listed in Sec. 15.01(1), rendering the other provisions meaningless; and Sec. 15.01(4) refers to the "dispatcher on duty," rather than including any reference to the dispatcher who "will be" on duty in connection with an advance notice absence.

In its reply brief, the Village objects to reliance on facts not in evidence relating to an asserted Village unilateral elimination of a part-time employe in 1993 and scheduling of four of seven employees as relief shift employees. The Village provided evidence amply reflecting the longstanding nature of the parties' scheduling practice. The fact that the parties negotiated a contract without changing the language governing scheduling supports the Village's case, not the Union's. The past practice evidence shows seven instances when a person on a 7:00 PM-3:00 AM relief shift was scheduled to work at midnight, 19 hours before the start of their shift, on the first day back from their off-days, and that there were another five times when the 7:00 PM-3:00 AM relief shift employe was directed to come in to work at midnight on days other than those immediately following their off-day group. This is sufficient frequency to establish a practice. The Union's claim that the past practice evidence lacks the mutuality of understanding element must be rejected in light of the facts that: the Association admits it negotiated

the Agreement after four relief shift employes were in place and being used regularly; Ms. Mourey learned how to schedule from the bargaining unit employes themselves; the department posts the monthly schedule for all to see -- including Grievant, the Association president, and all other Association officers -- enabling them to observe all of the various historical instances noted above. Yet, no grievances or objections were ever filed, and Grievant herself experienced a change a few days earlier similar to the one she grieved in this case and has not offered a valid excuse for not grieving that prior instance.

The parties have agreed to treat an individual working from 7:00 PM-3:00 PM as if that person worked their entire shift on the day on which that shift began. Arbitrators (citing published awards) often use an interpretation consistent with common sense and practice even if it does not comport with a strict dictionary definition of a contract term. The practice evidence indicates that on numerous occasions employes' off days consisted of less than 64 and in some cases less than 48 hours off because of a change necessitated by a day off request by a fellow bargaining unit employe; that the parties have used the term "day" in the Agreement to mean a payroll day, i.e., a day on the schedule when the employe begins a shift of work. Viewing the Agreement that way, Grievant in this case received her two days off.

For those reasons, the grievance should be denied.

DISCUSSION

Status of Evidence Not Presented at November 19, 1996 Hearing

Both parties have objected to consideration by the Arbitrator of facts and documents referenced in or attached to their counterpart's post-hearing arguments, which were not introduced into evidence during the November 19, 1996 hearing in this matter.

Both parties' contentions in this regard have merit. The Arbitrator finds it appropriate and necessary to limit the evidence he takes into consideration in this case to that which was received into the record at the November 19, 1996 hearing. Accordingly, facts asserted and documents submitted that are not supported by the evidence adduced on November 19 will be disregarded. (In that regard, for example, the Arbitrator has found and

therefore given consideration in this case to testimony by the Grievant regarding the Village's unilateral actions in late 1993 referred to in the Association' post-hearing arguments.)

The Yaeger and Greco grievance arbitration awards attached to the Village's brief will be given only the sort of consideration that the Arbitrator will be giving to the various published awards cited by both of the parties in their post-hearing arguments. Neither the Yaeger nor the Greco awards will be treated as evidence in this case. Grievance awards on which a party relies as evidence need to be submitted along with the balance of the evidence submitted during the evidentiary hearing to avoid a denial of a fair hearing to the other party.

Claimed Violation of Sec. 12.02

The Association claims that by requiring Grievant, over her objection, to start work 19 hours earlier than her normal 7:00 PM start on Sunday, June 2, 1996, the Village deprived her of the "two days off" that Sec. 12.02 specifies will be part of all bargaining unit employes' "normal work week cycle."

In Sec. 3.01.B., the parties recognize that the Village possesses the right, among others, "to establish reasonable work rules and schedules of work consistent with the terms of this Agreement." The Arbitrator finds that language makes the Village's right to establish both "work rules" and "schedules of work" subject to the limitations both that they be "reasonable" and that they be "consistent with the terms of this Agreement." If the parties intended to parse the modifiers as the Village asserts, they would have put those rights into separate sections or used punctuation and/or syntax reflecting such a separation.

In Section 12.01, the parties define the "normal work day for all employes" as eight consecutive hours "on an established shift." In the same section, they implicitly recognize that a "relief shift" can be an "established shift" by their express reference to "employes on relief shift." They then differentiate relief shifts from non-relief shifts regarding scheduling by providing in Sec. 12.01 only with regard to non-relief shift employes that such employes "shall have at least sixteen (16) hours between shifts."

In Section 12.02, the parties define the "normal work week cycle" for all employes without excepting relief shift employes. The normal work week cycle is defined as "five (5) days on duty followed by two (2) days off, followed by four (4) days on duty followed by two (2) days off and then repeating the cycle."

In Section 14.01 the parties define overtime as any time worked by an employe at the direction of the Village "in excess of the normally scheduled work week or work day," and they provide that overtime shall be compensated at a time and one-half premium rate. Elsewhere in the overtime article, the parties authorize the Village "to schedule training so as to avoid the payment of overtime," but they require that "[s]uch scheduling shall be done with prior notice to the affected employe and shall not result in the loss of off days."

The parties have also agreed, in Art. XV, on a series of sequential steps to be

followed by the Communications Supervisor or supervisor on duty for filling "Telecommunicator staffing vacancies."

Read together and in harmony with the balance of the Agreement, the provisions above make it clear that the Village's right to establish work schedules for relief shift employes is subject to various limitations. Among those are a requirement that the employes have a 5-2, 4-2 "normal work week cycle" including "two days off" following each 5-day and 4-day on-duty portion of the cycle. Because the parties have specified the

normal work week cycle, a schedule that provides the employe with a normal work week cycle consistent with the requirements of Sec. 12.02 must be considered, per se, reasonable within the meaning of Sec. 3.01.B.

It is also clear from Sec. 12.01 that the Village is authorized in at least some instances to establish a relief employe's schedule in such a way that the employe has less than 16 hours between shifts. It follows that the parties recognize and agree that the Village has the right to vary relief employe work schedules--at least between on-duty days--in such a way as to cover employe time off requests that the Village has received prior to its preparation of the posted schedule. Thus, the Art. XV process necessarily applies only to staffing vacancies that the Village is otherwise precluded by the Agreement from covering (or that the Village chooses not to cover) by exercise of the rights accorded it in the Agreement to establish relief employes' schedules.

The above provisions also leave some questions unanswered. For example, of precisely what must the "two days off" consist to conform to the requirements of Secs. 2.02 and 14.04? Is it freedom from work for a period that includes two consecutive periods from midnight to midnight? Or is it freedom from work for the period of 64 hours characteristic of the off days on a non-relief schedule? Or is it freedom from work for a period of 48 hours following the employe's scheduled quitting time? Or is it freedom from being scheduled to start a shift on two consecutive calendar/schedule days?

Common sense and common parlance, taken together, suggest to the Arbitrator that "two days off" means freedom from work for a period of 48 hours, because there are 24 hours in a day, and an employe is not ordinarily viewed as "off" for a period of time if required to work during any portion of that time.

The Village disagrees. It argues that the parties have defined "day" differently elsewhere in the Agreement because an employe who is scheduled to work a 7PM-3AM shift followed immediately by a 4PM-midnight shift would not be paid overtime even though the employe worked in excess of eight hours between midnight and midnight. The Association's position also disagrees with the above interpretation. The Association asserts that the parties have defined "day" differently elsewhere in the Agreement because the normal work week cycle of 5-2, 4-2 coupled with the normal work day of eight hours work produces two periods of 64 hours off in each cycle.

Neither of those contentions is persuasive. The overtime language in the Agreement is not based on the concept of the number of hours worked within a "day" or within any other set measuring period of time. Rather, it is based on the number of hours worked

outside of the normally scheduled work week or work day, i.e., outside of the hours the employe is scheduled to work by the Village consistent with the terms of the Agreement. The parties' overtime language therefore does not define a "day" one way or the other. The Village's contention that two days off can mean 45 hours off--as was the case for Grievant on May 23-26, 1996--is significantly at odds with the conventional meanings of the term day as a 24 hour period and of "off" duty as meaning not at work during any portion of the "off" duty period.

The Association's contention that a normal work day of eight consecutive hours in a 5-2, 4-2 normal work week cycle produces (and hence mandates) a period of 64 hours off twice in the cycle begs the question at issue in this case. The Agreement clearly affords the Village both the right to establish relief shifts and the right to schedule employes on relief shifts with less time between shifts than it could in scheduling an employe on a non-relief shift. The question remains to what extent does the "two days off" specification in Sec. 12.02 limit the Village in its scheduling of employes on relief shifts. The Association's contention "two days off" means 64 hours off is significantly at odds with the conventional meaning of the term "day" as a 24 hour period.

The Arbitrator therefore concludes, based on the language of the Agreement, that "two days off" in Sec. 12.02 means freedom from work for a period of 48 hours from the preceding scheduled quitting time -- not 64 hours and not less than 48.

The record evidence relating to matters outside the four corners of the Agreement does not persuade the Arbitrator to conclude otherwise.

The posted work schedules for 1994, 1995 and 1996 show that relief shift employes were ordinarily accorded a 64 hours off twice during their scheduled work week cycle, but that on a few occasions they were scheduled such that their "two off days" consisted of less than 64 hours. While such instances were very much the exception, rather than the rule, they nonetheless occurred and were not met with a grievance or other form of objection by the affected employe or anyone else.

The Association's contention, that those exceptions should be disregarded absent affirmative proof of the reason why the employe did not grieve, is not persuasive. Unlike both the Sec. 12.01 language regarding administration of the 16-hours between shifts requirement for non-relief employes and the Sec. 14.01 language regarding completion of a full shift, Sec. 12.02 does not expressly authorize deviations from its terms by mutual agreement between the employee and the Employer. It is therefore by no means clear that a schedule providing less off time than is mandated by Sec. 12.02 would be rendered consistent with the requirements of that section just because an individual agreement to that schedule has been reached between the employe and the employer. For that reason, and perhaps others, it was not incumbent on the Village to call the employes and former employes involved to inquire why they did not grieve or otherwise object to the schedules involved.

The Village's contention that the work schedule evidence requires the conclusion that the Agreement permits the Village to schedule relief employes so that their "two days off"

could consist of less than 48 hours (e.g., 45 hours in Grievant's schedule for May 23-26, 1996) is also unpersuasive. The number of instances in which the Village shortened the employes' off days below 48 is quite limited. More importantly, the language of the Agreement itself provides that the employes are to be scheduled with "two days off," and the Arbitrator finds that a period of less than 48 hours must be rejected as inconsistent with that Agreement requirement.

The evidence concerning parallel Association efforts to resolve its concerns through the bargaining process do not persuade the Arbitrator that the parties intended "two days off" in the Agreement to means something other than 48 hours off. The Grievant and Association had every right to test the extent of their rights to time off under the existing language of the Agreement while simultaneously seeking to resolve their concerns through the bargaining process.

Therefore, the Grievant's schedule at issue would violate the "two days off" requirement of Sec. 12.02 if and to the extent that it failed to provide her with at least 48 hours off duty after her last scheduled quitting time preceding the time she was scheduled to start work on June 2, 1996.

According to the work schedule in evidence, Hadler was scheduled from 4PM-Midnight on May 30, 1996, and she was next scheduled to work at the very beginning of (i.e., Midnight on) June 2, 1996. In the particular circumstances referred to in the instant grievance, therefore, she was accorded 48 hours off, and no violation of Sec. 12.02 occurred.

Claimed Unreasonable Exercise of Management's Rights

There remains the Association's contentions to the effect that the Grievant's schedule was unreasonable and hence an action in excess of the rights reserved to the Village in Sec. 3.01 generally and Sec. 3.01.B., in particular.

As noted above, it is the Arbitrator's opinion that because the parties have specified the normal work week cycle, a schedule that provides the employe with a normal work week cycle consistent with the requirements of Sec. 12.02, as interpreted above, must be considered, per se, reasonable within the meaning of Sec. 3.01.B.

To the extent that a schedule does not provide the relief employe with a normal work week cycle consistent with the requirements of Sec. 12.02, as interpreted above, that schedule would be, per se, not reasonable within the meaning of Sec. 3.01.B. The schedule at issue in the incident described in Exhibit 5 accorded Grievant 48 hours off, so it did not violate Sec. 3.01.B. or any other provision of the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and

award of the Arbitrator on the ISSUES noted above that

The disposition of the grievance contained in Exhibit 5 shall be as follows:

a. Section 12.02 of the Agreement requires the Village to schedule relief shift employes in such a way that their "two days off" consist of at least 48 hours off duty. The Village's failure to do so would violate both Secs. 12.02 and 3.01.B.

b. The Village scheduled Grievant to work 4:00 PM-Midnight on May 30, 1996, and Midnight-8:00 AM on June 2, 1996. The Village thereby provided Grievant "two days off" consisting of 48 hours, and therefore did not violate Sec. 12.02, Sec. 3.01.B, or any other provision of the Agreement.

c. Accordingly, the grievance contained in Exhibit 5 is denied.

Dated at Shorewood, Wisconsin this 15th day of December, 1997.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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