BEFORE THE ARBITRATOR

In the Matter of an Arbitration of a Dispute Between

THE BARGAINING UNIT OF THE GREEN BAY POLICE DEPARTMENT

and

THE CITY OF GREEN BAY

Case 290
No. 57302
MA-10585

Appearances:

Parins Law Firm, S.C., by **Attorney Timothy J. Parins,** 125 South Jefferson Street, Green Bay, Wisconsin, on behalf of the labor organization.

Attorney Lanny M. Schimmel, Assistant City Attorney, 100 North Jefferson Street, Green Bay, Wisconsin, on behalf of the municipal employer.

ARBITRATION AWARD

The Bargaining Unit of the Green Bay Police Department ("the Union") and the City of Green Bay ("the City") are parties to a collective bargaining agreement which provides for final and binding resolution of disputes arising thereunder. The Union made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to shift reassignment. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Green Bay, Wisconsin on July 22,1999, with a stenographic transcript being made available to the parties by August 9, 1999. The parties filed written arguments and reply briefs, with the record closing on September 20, 1999.

ISSUE

The union states the issues as follows:

"Whether the grievance was timely filed and advanced pursuant to the grievance procedure set forth in the current contract?"

"Whether the assignment of Officer Arts to the afternoon shift violated the collective bargaining agreement?"

The city states the issues as follows:

"Did the union fail to advance this grievance to step three on the collectively bargained grievance process in a timely manner?"

"Did the city violate the collective bargaining agreement by asking Officer Arts to voluntarily switch to another shift for a 30-day period; and, if so, what is the proper remedy?"

I state the issues as follows:

"Did the union fail to advance this grievance in a timely manner, such that it has waived its right to seek further remedy?"

"If not, did the city violate the collective bargaining agreement by asking Officer Arts to voluntarily switch to another shift for a 30-day period; and if the city did so violate the collective bargaining agreement, what is the proper remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3

GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEDURES

3.01 GRIEVANCE DEFINITION. A grievance is defined as any complaint involving wages, hours and conditions of employment of members of the bargaining unit, other than proceedings conducted pursuant to Section 62.13, Wis. Stats. A grievant may be an employee or the Union. Upon the mutual agreement of the parties hereto, grievances involving the same issues may be consolidated in one proceeding.

3.02 SUBJECT MATTER LIMIT. Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the relief sought, the date the incident or violation occurred and the signature of the grievant and the date.

3.03 CHIEF INVESTIGATION. The Chief of the department may confer with the Union and such employees or other persons he deems appropriate before making his determination.

3.04 COMPUTATION OF TIME. The days indicated at each step should be considered a maximum. Days shall mean working days Monday through Friday, excluding holidays. The failure of the party to file or appeal the grievance in a timely fashion as provided herein shall be deemed a waiver of the grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure. The time limits may be extended by mutual consent.

3.05 WAIVER OF STEPS. Steps in the procedure may be waived by mutual agreement of the parties.

3.06 STEPS AND PROCEDURE.

(1) STEP ONE. The grievant or a Union representative on his/her behalf shall have the right to present the grievance in writing to the Chief within fifteen (15) working days after he/she or the Union knew or should have known of the event giving rise to such grievance. The Chief shall furnish the grievant and the Union representative an answer within five (5) working days after receiving the grievance.

(2) STEP TWO. If the grievance is not satisfactorily resolved at the first step, the grievant or the Union representative shall prepare a written grievance and present it to the Personnel Director within ten (10) working days of the Chief's response. The Personnel Director shall review the grievance and respond in writing within five (5) calendar days after his receipt of the written grievance.

(3) STEP THREE. If the grievance is not resolved at the second step, the grievant or the Union representative shall present the written grievance to the Personnel Committee within five (5) working days of the Personnel Director's response. The Personnel Committee shall review the grievance and

respond in writing within five (5) days after their decision which shall be made at the next regularly scheduled Personnel Committee meeting. In reaching their decision, the Personnel Committee may hold a fact-finding hearing after having received a written statement of fact and position by each party. The grievant and the Union shall be given a five (5) day notice of said hearing.

(4) STEP FOUR. If no agreement is reached in step 3, the dispute may be referred to arbitration. The party desiring arbitration shall, within fifteen (15) days of receiving the Personnel Committee decision, petition the Wisconsin Employment Relations Commission for arbitration with a copy of such petition sent to the other party.

3.07 GRIEVANCE ARBITRATION PROCEDURE.

(1) ACCESS TO RECORDS. The employee or his/her bargaining unit shall have access to the City's investigative file and all other pertinent documents or information once a disciplinary action has been meted out, but no sooner than three (3) days after such discipline has been meted out. Access to the employee's personnel file shall be subject to the restrictions of Section 103.13(3) Wis. Stats. Nothing in this paragraph shall prohibit or restrict the City from taking a statement of the employee as part of an investigation to determine whether the employee should be disciplined.

(2) DISCLOSURE OF WITNESSES. Any time after step 2 of the grievance procedure, either party may demand a list of witnesses that the other party intends to call by furnishing the other party with a list of witnesses of the demanding party. The other party, upon whom the request is made, shall respond to that request within three (3) working days of the date of the request. The parties shall be under a continuing obligation to update and supplement the list of witnesses so provided. Any witness not identified in response to a demand before the date of the informal pre-hearing conference shall not be allowed as a witness in the case in chief in these proceedings.

(3) DEPOSITIONS. (a) Once a witness has been identified pursuant to the procedures set forth above, that witness may be deposed.

(b) Either party may identify witnesses they intend to call in these proceedings without receiving a demand from the other party. Upon identification of such witness, the party so identifying the witness shall, upon notice to the other party, be permitted to depose that witness for purposes of perpetuating testimony for the grievance hearing.

(c) Any depositions taken, whether during the investigation of the actions leading up to the discipline or at any point thereafter, may be used by either party at any step in the grievance procedure as may be otherwise provided by law.

3.08 COSTS. The party initiating the grievance shall pay for the administrative costs for initiating arbitration. Any other expenses or costs of the arbitration proceeding, including fees of the arbitrator, shall be split equally between the parties. The arbitration hearing shall be conducted in the City of Green Bay, at a mutually agreeable time.

3.09 DECISION OF ARBITRATOR. The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of this Agreement. The arbitrator's decision shall be final and binding.

3.10 REPRESENTATIVES. The Bargaining Unit may appoint representatives of the bargaining unit and shall inform the City of the names of the individuals so appointed and of any change thereafter made in such appointments. The City shall allow the representatives the necessary time to process grievances during the course of the duty day.

. . .

ARTICLE 5

SHIFT ASSIGNMENTS

5.01 ASSIGNMENTS IN GENERAL. Assignments to shift positions shall be by seniority among those persons possessing the qualifications for the position to be filled. Assignments shall be made and persons with appropriate qualifications and seniority may bid for shift positions only when a vacancy exists in such position. In the case of Detective Sergeants, seniority shall mean seniority in rank.

. . .

5.04 TEMPORARY ASSIGNMENTS. The Chief may, upon written notice to the Bargaining Unit, temporarily assign officers to special duties or projects for a period of up to 30 days; provided however that no officer may be temporarily assigned to any duties or projects which have historically been or

normally are performed by or assigned to Bargaining Unit members as part of their job duties. If the assignment is voluntary, no premium pay shall be earned by the officer. An officer's performance of any temporary assignment shall not impact on promotion (excepting that such might increase the officer's personal knowledge or experience), and shall not become part of the officer's personnel file or work record for promotional purposes.

5.07 SAFETY STAFFING (1) Policy. Both the City and the Bargaining Unit keep officer safety as a foremost priority in all aspects of working conditions. It is recognized that the primary safeguard for officers is the police force itself, with each officer receiving protection through teamwork with, backup for or by, and general interdependency with other officers.

(2) Staffing Requirements. In order to serve the above general policy, the following minimum officer safety staffing shall be maintained at all times, subject only to the provisions of subparagraph (3) and Section 5.09 below:

. . .

(b) A minimum of twelve uniform officers shall be on active patrol duty in the City from 6:30 a.m. until 7:00 p.m. with the exception of the period between the start of the early day shift and the start of the late day shift. (further text omitted)

5.10 ASSIGNMENT OF POSITIONS. (1) Assignments to job or duty positions shall be made only when a vacancy exists, and there shall be no bumping. Job or duty position vacancies shall be posted and assigned on the basis of seniority amongst those bidding as follows:

. . .

(b) Positions within the uniform Operations Department shall be assigned to the most senior police officer bidding.

BACKGROUND

This grievance concerns the temporary reassignment of Green Bay patrol officer James Arts from the day shift to the afternoon shift in 1996.

In the 1996-98 collective bargaining agreement between the City of Green Bay and the Green Bay Police Bargaining Unit, the parties agreed to eliminate the position of sergeant. This decision resulted in approximately 15-17 sergeants losing that designation. As part of that personnel transaction, the union was concerned that sergeants would remain on their old shifts, which might be less desirable than the ones their seniority might ordinarily allow them to bid for, which bidding opportunities they missed due to their previously being sergeants. To address this situation, Union President Rick Demrow in about August or September 1996 proposed to Police Chief James Lewis that sergeants be allowed to switch to the shift of their choice outside the normal posting process. This was a favor the union sought from the chief, which would have involved his providing the former sergeants with a unique shift selection process outside the terms of the collective bargaining agreement.

At that time, Lewis was aware that an imminent undercover wiretap operation in conjunction with the federal Drug Enforcement Administration would already divert certain personnel from their normal shifts, which had mandatory minimum staffing levels. Lewis did not share with Demrow the facts about the undercover operation, but he did discuss with him the department's possible need for flexibility in making temporary shift reassignments so that the shift movement by sergeants did not jeopardize the mandated minimum staffing levels. For general matters of contract administration, the bargaining unit has authorized and designated its President to act on its behalf. Lewis would not have allowed the informal shift changes by sergeants if he did not believe that Demrow had approved of the department temporarily reassigning patrol officers to maintain proper staffing levels.

At around this time, the Commander of Operations, Captain Boncher, approached Officer Jim Arts, then assigned to the day shift, to ask if he wouldn't mind switching shifts for a 30-day assignment because of a special project. Although Arts didn't know that this project was the undercover investigation, he accepted the change. Lewis did not ask Demrow specifically about reassigning Arts from the day shift to the afternoon shift on a temporary basis. Demrow did understand from his earlier conversations with Lewis that there would be some moving of personnel between shifts to accommodate the granting of new shift preferences to the former sergeants. At hearing, Demrow testified that the temporary reassignment of Arts fell under what he and Chief Lewis had discussed, although he believed Lewis would have brought the matter to the bargaining unit and discussed the specific implementation before it was executed.

On October 9, 1996, Commander of Operations Captain Boncher sent a memo to the Shift Commanders and the bargaining unit that, effective the following day, four officers would be on temporary 30 day assignments. Three officers were moved from various shifts to the detective division; Officer Jim Arts went from the day shift (to which he had posted on the basis of seniority) to the afternoon shift, performing his normal patrol duties. In the period between October 10-November 10, 1996, Arts worked 17 afternoon shifts, was off 12 days, took time off on one day and was sick on two days.

On October 21,1996, attorney Thomas J. Parins, on behalf of the bargaining unit, wrote to Lewis as follows:

> The Bargaining Unit does hereby grieve the recent assignment of Officer Aerts(sic) to the afternoon shift from the day shift.
>
> The basis for this grievance is that the job and shift assignment in question was not posted as required by Sections 5.01 and 5.10 of the labor contract.
>
> The remedy being sought is the payment of wages as if the City had called in officers to perform the duties being performed by Officer Aerts on the afternoon shift.

Arts did not complain about his reassignment, and was unaware of the grievance until he saw his name on the grievance in a packet of material at a union meeting. On October 21, 1996, Lewis replied to Parins as follows:

> I received your grievance regarding Officer Aerts, I assume you are referring to Off. Jim Arts.
>
> This is part of your previous grievance of October 14, 1996 involving an investigation. It has become apparent that you desire to control the department's flexibility in conducting certain required activities, in spite of the fact that we discussed this at the previous bargaining sessions.
>
> As I previously advised you, the Union President, Rick Demrow, has been kept appraised of this project. I believe that these transfers are proper under Sections 5.04 of the contract.

On October 23, 1996, Assistant City Attorney Judith Schmidt-Lehman wrote to Parins as follows:

> It has come to my attention that several recent grievances (Allen, Buckley, Johnson and Trimberger) have been presented to Police Chief Lewis outside the time constraints found in Section 3.06(1) of the Bargaining Contract. This letter will serve to notify you and the Union that, absent unusual circumstances, the City intends to strictly rely upon the time constraints found in Section 3.06 of the Agreement. These restrictions were mutually bargained for the benefit of both parties and will not be ignored by the City in the future.

If you have any questions or concerns, please let me or Personnel Director Alexander Little know so that we may discuss them.

On October 29, 1996 Parins wrote to Personnel Director Little as follows:

Enclosed please find a copy of the grievance regarding the above referenced matter by the Bargaining Unit dated October 21, 1996, and the response of Chief Lewis rejecting such grievance also dated October 21, 1996. We hereby advance this grievance to Step 2 of the grievance procedure.

. . .

The city does not have the right to change an officer's shift. An officer receives a shift assignment by the bidding procedure in the contract. Once assigned a shift, an officer cannot be "bumped" from that assignment.

The only exception to this rule is found in Section 5.04 regarding temporary assignments. This section does not apply to this circumstance as Officer Arts was given a patrol assignment. The assignment of Officer Arts is definitely one which is normally performed by Bargaining Unit members as part of their job duties.

The position taken by the Bargaining Unit in this case is absolutely no different that now previous Chiefs have operated in the past. If the City had wanted a change regarding shift assignments under the contract, as administered, this should have been something brought to the bargaining table.

Over the next several months the parties discussed resolution of numerous grievances, including this one.

Demrow was promoted to Lieutenant and left the union in February 1997. Subsequent to the October 1996 exchanges, he did not have any further discussions regarding the Arts grievance prior to leaving the union. At hearing, he could not recall any specific settlement negotiations about this grievance at that time, nor could he recall anything that would have kept the union from forwarding it to the personnel committee other than trying to settle it outside of that forum.

On June 19, 1997, Atty. Thomas J. Parins, Jr. wrote to Chief Lews as follows:

I understand from speaking with my father that you would like a recap of the proposal that we made to you to settle the outstanding grievances. Our proposal is as follows:

. . .

7. The grievance regarding Officer Arts temporary assignment to the afternoon shift is held open at this time. Discussions as to how to handle this are ongoing.

. . .

This settlement offer, if accepted, will settle all grievances that are outstanding, except those set forth above, which were filed or pending prior to March 1, 1997.

On July 31, 1998, following further discussions, the parties executed a Settlement Agreement which provide, in relevant part, as follows:

The City of Green Bay and the Green Bay Police Bargaining Unit do hereby enter into this agreement that sets forth the terms and conditions of settlement of certain pending grievances and other matters:

. . .

8) The following grievances shall constitute all matters which the Union asserts to be grievances currently pending between the parties in regard to the labor contract at the date of execution of this agreement. The listing below is not in any way intended to waive any and all procedural or substantive rights the City may have in regard to such matters. All other grievances are hereby withdrawn:

. . .

p. Arts grievance – switch from afternoon to day shift (10/21/96)

9) By withdrawing grievances, or other matters alleged to be pending, under this agreement, the Union makes no admission as to the merits of these grievances or other matters, and as such shall not be construed as a waiver of the right to bring grievances based on the underlying facts of the grievances withdrawn.

10) By settling the grievances or other matters alleged to be pending in this agreement, the City admits no liability and does not waive any procedural or substantive defenses that the City may have in regard to the merits of the grievances or other matters settled. This agreement shall not be construed as an admission by the City that any violation of the labor contract occurred in regard to any of the matters settled hereby.

Arts could not recall whether the parties specifically discussed his grievance during any further negotiations following this July, 1998 settlement. He was aware that all of the grievances listed in the July 1998 settlement were the subject of mediation before a mediator appointed by the Wisconsin Employment Relations Commission, and that the city maintained at that mediation that the grievance should be dismissed because it was untimely.

At some point during the pendancy of this grievance, the exact date not being a part of the record, the city experienced turnover in the position of personnel director, also known as the human resources director.

On December 3, 1998, Human Resources Director James Kalny wrote Atty. Parins, in part, as follows:

> We were disappointed that you missed the above-referenced mediation session. As you are aware, that session was the culmination of many negotiation sessions and the City had spent a considerable amount of time preparing for it in hopes of compromise and removing several issues from the table. At the mediation session, it became immediately clear that what was left of the union negotiation team lacked the background, leadership, or perhaps the desire, to start talking about compromise. The City offered to settle the very first grievance listed and upon review of the remaining twenty-six grievances, the association would not agree to the dismissal of even one of those grievances. The mediation session concluded with a suggestion by the mediator that we put together package proposals and submit them to her attention. Her rationale was that this should start some movement by both parties. Yet on December 1, 1998 I learned that you have decided to advance all of those grievances to the Personnel Committee. In many cases, these grievances are untimely and we will raise those objections.

> However, we also believe that this speaks to the amount of good faith that you have put into these negotiations in that you will not follow the suggestion of the mediator or even discuss these matters with us before you take such an aggressive action.

Apart from the reference in Kalny's letter, there is no evidence in the record as to the date on which the union advanced the grievance to the personnel committee. On February 4, 1999, Atty. Parins wrote to Ald. Timothy Hinkfuss, chair of the city's Personnel Committee, in part, as follows:

> Re: Arts Uposted (sic) Reassignment
> Packer Holdover
>
> Please accept the enclosed material as our arguments in the above-stated grievances. It is my understanding that these two grievances will be considered at the next Personnel Committee meeting, and that a response will be forwarded after that meeting. By copy of this letter, I am also sending copies of all the material to Mr. Kalny, who is representing the city.

At its meeting of February 9, 1999, the Personnel Committee denied the grievance, which denial was communicated to Atty. Parins by correspondence from Hinkfuss dated the following day. That letter also reminded Parins that the union had 15 days from receipt of the decision to forward the grievance to the Wisconsin Employment Relations Commission for arbitration. On February 22,1999 the union filed with the WERC its request for grievance arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> There is no question the grievance was timely filed and advanced to step 2, and timely advanced from step 3 to step 4. The only issue is the advancement from step 2, the personnel director, to step 3, the personnel committee.
>
> All of the witnesses testified to the fact that the city and the bargaining unit were continually negotiating this grievance, along with numerous others, seeking a package settlement. This grievance was specifically discussed at mediation in late 1998. When no resolution was made, the matter was sent to the personnel committee on December 1,1998, and set for committee hearing in February 1999.

That the union was acting in good faith is shown by the December 3, 1999 letter from Human Resources Director Kalny to union attorney Parins, in which Kalny states that the advancement by the union to the personnel committee was "an aggressive action." For the city to now come in at this arbitration and state that the grievances are untimely because they weren't advanced to the personnel committee as set forth in the contract is very duplicitous. The city is telling the union to negotiate and attempt a package settlement, and until we do, do not advance them to the personnel committee; but once the union does advance them to the personnel committee, the city says, ah-ha, these grievances are not timely. The city should not be able to have its cake and eat it too. If they are negotiating a settlement and want to settle these prior to being advanced to the personnel committee, they should not be allowed, when they are advanced to the personnel committee, to say they are untimely. Why would the advancement of the grievances to the personnel committee be such an "aggressive action" if both parties did not believe that they were negotiating the settlement of the grievances in good faith, and that the time periods for advancing to the personnel committee were tolled.

The negotiations also took so long, through no fault of the union, because the city had a new Mayor, two new personnel directors, and a new chief. The bargaining unit, in good faith, agreed with the city's request during this period of transition and turmoil, to allow it to get up to speed. The bargaining unit should not be penalized for delaying the processing of the grievances at the city's request.

The bargaining unit did not sit back and deliberately allow this grievance to go stale. There were definitely extenuating circumstances involved with this grievance, such that the arbitrator should find a waiver of the time limitations. The bargaining unit asserts that the grievance was timely filed and timely brought through the grievance process, and should be decided on its merits.

Regarding the merits, this is a very simple fact situation. It is undisputed that Officer Arts' normal shift assignment was the day shift, but was approached by management and asked if he would work the afternoon shift as a temporary 30-day assignment, which he accepted. This was not done pursuant to the provisions of Article V in the contract.

The city's argument that this shift change was necessitated by the change of sergeants to different posts at the request of the bargaining unit is not credible for several reasons. It is very clear from the chief's letter of October 21, 1996 that the shift-change involved only the wiretap investigation. When the city

later looked at the section which the chief cited and realized it did not apply, it had to come up with some other reason for making the transfer. The city came up with the movement of the sergeants argument. If this was the reason, it would have been so stated in the original letter of denial. For the city to come in now and assert that reasoning at arbitration should not be allowed. Also, Arts is listed with the three other officers that were assigned to the wiretap investigation, further showing that this assignment was part of that investigation, not the sergeant move.

Secondly, the argument that this is related to the movement of the sergeants needs to be disbelieved because the conversation between the chief and union president in which this agreement was allegedly made took place in August; the assignment of Arts did not take place until October. If the moving of the sergeants had necessitated the movement of some officers, this would have taken place well before the change in Arts' shift. The chief even set forth that if he had not reassigned the officers for the confidential investigation, that the Officer Arts' move would not have been necessary.

It should also be pointed out that the city also violated Article 36.01 by making an agreement with Officer Arts individually that conflicted with the provisions of the collective bargaining agreement. The city should have posted the assignment or approached the union about the opening. It did neither but chose to ignore the contract and bargain with Officer Arts individually a change in his shift in contravention of the provisions of the contract.

The city's argument equating this to light duty must also fail as those assignments are being done pursuant to an agreement and long standing past practice.

Clearly the temporary assignment of Officer Arts does not fall under the provisions of Section 5.04, which sets forth specific procedures. Specifically, the city failed to give written notice, as required; there is no testimony that the notice was ever sent to the bargaining unit, except that the bargaining unit is listed in the "to:" section of the notice. It was the testimony of the former union president that he never received that notice. Also, section 5.04 states that no officer may be temporarily assigned to any duties normally performed by bargaining unit members, and there is no dispute the patrol duties Arts performed were the usual and customary duties of patrol officers.

The specific language of section 5.04 was changed for the 1996-98 contract precisely to protect against this type of assignment. If the city is allowed to make an assignment like this one it can move officers as it pleases to make up for shortages that are created by management. This is completely opposite to what the section was designed for.

The real reason Arts was moved to the afternoon shift was so that the city would not have to pay overtime. The overtime was created by the temporary assignment of two officers to the wiretap investigation. The chief knew when he made the temporary assignment that it would be creating an opening that would need to be filled on the afternoon shift. Yet he still made the temporary assignment. Because of his decision to do the wiretap investigation, the chief now wants to circumvent the contract so that they don't have to pay overtime. This cannot be allowed.

As remedy, the city should be required to pay to the bargaining unit an amount equal to 17 shifts of overtime. In the alternative, the city should be required to pay to Arts directly overtime for all hours that he worked outside his normally scheduled shifts.

In support of its position that the grievance should be denied, the city asserts and avers as follows:

Having failed to advance the grievance to step three for over two years, the union's grievance is untimely. The union had the right and duty to advance the grievance to the personnel committee as of November 11, 1996, yet failed to do so until February 1999. Forwarding a grievance from step 2 to step 3 some 28 months after constructive denial of the grievance is prima facie evidence of an untimely appeal.

The union argues that alleged ongoing negotiations somehow acted as mutual consent to extend the time limits, but it utterly fails to support this allegation with sufficient evidence. First, it cannot even prove that negotiations were ongoing. But even if they were, that alone would not establish that the city consented to extend the contractual time limits.

The former union president could not recall any negotiations being held about this grievance between October 29, 1996 and February 1997. This official also testified he did receive the city's notice that it would not ignore the procedural time limits. The chief testified the union had been repeatedly warned about the timeliness problem with this grievance, and that the union was never led to believe that the city consented to an extension.

Even if there were ongoing negotiations in November 1996 which tolled the timelines, the agreement of July 31, 1998 affirmed the denial of this grievance and made its advancement to step 3 in February 1999 untimely. By that July 1998 agreement, which lists this grievance as "pending," the city explicitly stated that it did not waive any procedural or substantive defense. Further, the city gave the union notice that it considered this grievance to have surpassed the timeliness requirements and that this grievance was not negotiated after the signing of the July 1998 agreement. Despite this notice and the complete lack of any further action, the union waited six more months, until February 1999, to advance the grievance to the personnel committee. Had the union observed the contractual time limits, the grievance would have been advanced to the personnel committee no later than August 7, 1998.

Given the excessive length of time which passed between steps 2 and 3, the union's failure to present evidence that the city consented to extend the time limits, and the clear denial of the grievance in July, 1998, the arbitrator lacks jurisdiction to consider the merits of this grievance, and it should be dismissed.

As to the merits, the movement of Arts was contemplated by the agreement between the chief and the union president, and the union is estopped from repudiating the agreement. The chief and union president met in August 1996, at the union's request, to discuss the implementation of the elimination of the sergeant position. The parties agreed that sergeants would be allowed to move into day shifts without going through the posting process, and that the city could temporarily move officers between shifts to ensure that contractually mandated staffing levels were maintained. It is undisputed that the need for Arts to switch shifts would not have arisen if the chief had not allowed the sergeants to switch shifts, which the chief would not have authorized if the union had not agreed to allow the temporary switch of other officers, such as Arts. Under this grievance, though, the union attempts to reap the benefits of the agreement (the sergeants being allowed to post into day shifts) while repudiating the very limited concession it granted (the temporary shift-switch of officers such as Arts). This would result in a manifest injustice, and the union should be estopped from prevailing in this grievance.

Also, the established practice of the parties allowed for Arts' voluntary and temporary switch from day to afternoon shift, which is different from a reassignment. Contrary to the union's assertion, Arts was not reassigned – he voluntarily accepted an offer to temporarily change shifts. The contract language on its fact excludes voluntary, temporary changes from the provisions of Article 5, and the practice of the parties confirms this conclusion. Indeed, the

union admits that the provisions of Article 5 do not apply to voluntary changes. Past practice is clear that voluntary, temporary shift changes occur on a regular and frequent basis. While these usually occur in the context of an injury to an officer, it is clear the practice does apply to the voluntary shift change by Arts, so that the grievance should again be denied.

Further, the union's requested remedy is improper under the circumstances of the alleged violation. The proper remedy does not include the payment of overtime hours as the position would have been posted for a reassignment of regular hours, thereby creating no overtime. And even if overtime payment is the proper remedy, the union's claim (170 hours) far exceeds the actual amount of overtime which would have been created (48 hours). Further, as Arts is the employe who actually worked this time, if an award is made, it should be paid to Arts.

The union failed to advance the grievance to Step 3 in a timely manner, and is estopped from claiming a violation because it accepted the benefit of the agreement which allowed the city to make the temporary reassignment of Arts to the afternoon shift. Further, the department did not violate the collective bargaining agreement, as voluntary reassignments have been mutually recognized as an acceptable practice. Accordingly, the grievance should be denied.

In response, the union argues further as follows:

The city has made several inaccurate assertions. Contrary to the city's brief, the evidence clearly shows that there was no agreement to allow the chief to temporarily move officers between shifts as he felt necessary. That the bargaining unit agreed to be flexible did not give the chief carte balance to move officers as he pleased.

The city knows that its assertions about the grievance not being advanced to the personnel committee until February 1999 are simply untrue. The parties made an agreement on July 31,1998 that left this grievance unsettled. The city failed to mention there was a mediation session on November 23, 1998, requested by the city. The bargaining unit then advanced the grievances under the date of December 1, 1998; this was the basis for the December 3, 1998 letter from Kalny. For the city to now attempt to state that the grievance was not advanced until February, and attempt to make it seem as through the grievance sat dormant from July 31, 1998 to February 4, 1999 is a deliberate attempt to mislead the fact-finder.

The city errs in asserting that this grievance was not processed in a timely manner. The bargaining unit in good faith attempted to negotiate the settlement of the grievance and during the negotiations did not advance the grievance to step 3. That when it was advanced the personnel director called it an "aggressive action" is very telling as to the mind set of both the city and the bargaining unit. For the city to now come in and say that there was no response by the personnel director is ludicrous. There was an agreement to extend the time limits while the grievacne was being negotiated, this is clear by the December 3,1998 letter.

The city's contention that the grievance was not processed timely cannot be upheld. Pursuant to the collective bargaining agreement, there was mutual agreement here to extend the time limits. A settlement agreement was made, with this grievance being specifically mentioned as being unsettled; the unsettled grievances were then subject of a mediation. Obviously, this grievance along with many others were being negotiated. The city also mischaracterizes the union president's testimony regarding the settlement discussions on this grievance

The city knows that February 4, 1999 was the date the personnel committee held its hearing on this grievance, not the date the grievance was advanced. There was a request for mediation made through the WERC in August, the mediation was held on November 23 and the grievance was advanced on December 1, all 1998.

The city, making more of the agreement than there actually was, errs in asserting that the movement was contemplated in agreement between the police chief and the bargaining unit president. The agreement was to allow the former sergeants to move to their desired shifts, and that there might have to be some changes to balance the shifts; that is where the agreement stopped. There was never any discussion as to how the movement of the officers would be made or that the chief could make changes unilaterally in contravention of the contractual process. The bargaining unit president's understanding was that the chief would come to the bargaining unit to discuss how any changes would be made. The sergeants moved in August, but Arts' shift change was in October; to say the move of the sergeants necessitated the Arts shift cannot be believed, and if followed, would give the chief the ability to change shifts as he wanted and effectively end overtime. The bargaining unit would not agree to this and specifically negotiated against this type of assignment.

The city also errs in stating the collective bargaining agreement would not allow Arts to take a voluntary and temporary change in shifts; the collective bargaining agreement does not prevent that, and the established practice of the parties does allow for it.

The city further errs in asserting that the union's requested remedy is improper. The fact of the matter is that the city did not follow the collective bargaining agreement and is now attempting to sidestep its clear language. The city should have to pay overtime for all hours Officer Arts worked because it failed to follow the collective bargaining agreement.

The city knows that the change of shift was not proper under Sec. 5.04 of the collective bargaining agreement, and the city is now coming up with different reasons for allowance of the transfer. All must fail. This was an improper change of shift. The city also fails to justify how it can negotiate individually with Officer Arts. As to timeliness, the parties were negotiating this matter at the personnel director level, and it is unfair for the city to now come in to say it was untimely filed because it was participating in the negotiation and mediation. Accordingly, the grievance should be sustained and the remedy as requested ordered.

DISCUSSION

Before addressing the merits of the grievance, I must first assess whether it is properly before me under the process and procedure outlined in the collective bargaining agreement. The city vigorously argues that the union's delay in advancing the matter to the personnel committee constitutes a fatal flaw; the union just as vigorously argues against my finding the grievance to be time-barred.

The relevant language of the collective bargaining agreement is clear and unambiguous – the failure of a party to file or appeal the grievance in a timely fashion "shall be deemed a waiver of the grievance." Thus, if I find as a fact based on the record, taking into account all evidence and circumstances, that the union has been untimely at any one of the steps, I must deny and dismiss the entire grievance.

There is no dispute about the initial filing of the grievance, the union's appeal of the police chief's denial to the personnel director, or the union's request to the WERC for grievance arbitration – all of these steps were taken in a timely manner. The city maintains, however, that the appeal from the personnel director to the personnel committee was taken in an extremely untimely manner, such that further consideration of the matter is time-barred.

The union counters that the city itself asked for additional time to allow its new personnel to acclimate themselves, and that there were ongoing settlement discussions and mediation sessions which effectively tolled the running of time.

There are several aspects of this record that are less than clear. First, the union never established the dates on which the city changed personnel directors, a critical fact in determining the impact the city itself had on the timely processing of this grievance. Nor did the union establish with any specificity the date of grievance mediation, or the degree to which this grievance was the subject of ongoing negotiations.

Most importantly, neither the city, which argues that the appeal to the personnel committee was untimely, nor the union, which asserts to the contrary, entered into the record a single piece of evidence establishing the date on which that appeal was in fact taken. The city points to the union's letter of February 3, 1999 and asserts that the appeal was not taken until then. The union points to the city's letter of December 3, 1998, and declares that this establishes the appeal was taken by that date.

There are, however, enough relevant facts in the record to complete the necessary analysis.

On October 23, 1996, the city informed the bargaining unit's attorney that it intended to "strictly rely upon the time constraints" set forth in the collective bargaining agreement. While this correspondence was in regards to other grievances, it did serve to put the bargaining unit on notice that the city intended to require adherence to the time limits. Moreover, the city reiterated this position throughout the process.

On July 31, 1998, the parties executed a Settlement Agreement which established that several grievances had either been settled or withdrawn, but that the Arts grievance, among others, was still pending. By this agreement, signed by Atty. Parins, Chief Lewis and HR Director Kalny, the city explicitly did not "waive any and all procedural or substantive rights" it might have regarding the pending grievances.

Whatever flexibility the city may or may not have requested in its earlier consideration of the Arts grievance, this July 31, 1998 agreement constituted a denial by the personnel director. Under the explicit terms of the collective bargaining agreement, the union therefore had five calendar days in which to present the grievance to the Personnel Committee.

This it did not do. Under the union's statement of the timeline, appeal was taken to the committee by December 1, 1998; under the city's timeline, it was not until two months later.

But even the December 1 date is still four months – not the five days called for in the collective bargaining agreement -- after the personnel director's denial of July 31. The union attempts to explain that delay away by pointing to ongoing settlement discussions and the mediation session.

The union has two problems in making this case. First, it lacked any first-hand testimony as to the specifics of those discussions and sessions. Next, it lacked any effective rebuttal to the city's evidence and argument that a willingness to discuss did not entail an agreement to waive time lines.

There are also important policy implications here in considering whether the city's agreement to continue to discuss these matters constituted an effective waiver of the time limits. Public policy favors the peaceful resolution of labor disputes; it is better for the parties to settle their disagreements between themselves than not. An employer with a good faith belief in a procedural defense such as untimeliness would not engage in voluntary settlement efforts if to do so constituted a waiver of such defenses, thus thwarting efforts at voluntary resolution of disputes. As it has been said, "it has long been recognized that a Party who asserts a clear and timely objection to a procedural defenct in the other Party's case, may discuss a grievance on its merits without impairing his right to assert a procedural defense." NEW YORK RACING ASSN., 43 LA 129, 126 (Scheiber, 1964).

There are times when an artificial reliance on process will lead to a manifest injustice, such that arbitrators will find a way to finesse the procedural issues in order to address the substantive ones. This is not such a time.

The city asserted a clear and timely objection to the procedural defect in the union's case, namely the untimely manner in which the union advanced the grievance from Step Two to Step Three. Pursuant to the terms of the collective bargaining agreement, this failure by the union to appeal the grievance in a timely manner is deemed a waiver of the grievance.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 14th day of January, 2000.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

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