BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BARGAINING UNIT OF THE GREEN BAY POLICE DEPARTMENT

and

CITY OF GREEN BAY

Case 294
No. 57695
MA-10726

Appearances:

Mr. Thomas J. Parins, Jr., Parins Law Firm, S.C., Attorneys at Law, 125 South Jefferson Street, P.O. Box 1626, Green Bay, Wisconsin 54301, appearing on behalf of the Bargaining Unit of the Green Bay Police Department, referred to below as the Union or as the Bargaining Unit.

Mr. Lanny M. Schimmel, Assistant City Attorney, City of Green Bay, Room 200, City Hall, 100 North Jefferson Street, Green Bay, Wisconsin 54301, appearing on behalf of City of Green Bay, referred to below as the Employer or as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the City agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of William Resch, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 7, 1999, in Green Bay, Wisconsin. A transcript of that hearing was filed with the Commission on November 4, 1999. The parties filed briefs and reply briefs by February 22, 2000.

ISSUES

The parties stipulated that the grievance poses the following issue:

> Did the City violate the collective bargaining agreement by limiting the Grievant to twelve and three quarter hours?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
RECOGNITION/MANAGEMENT RIGHTS

. . .

1.03 MANAGEMENT RIGHTS. The Union recognizes the prerogative of the City, subject to its duties to collectively bargain, to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not abridged, delegated or modified by this Agreement, are retained by the City including the power . . . to determine reasonable schedules of work, to establish the methods and processes by which such work is performed. The City further has the right to establish reasonable work rules. . . . The City agrees that it may not exercise the above rights, prerogatives, powers or authority in any manner which alters, changes or modifies any aspect of the wages, hours or conditions of employment of the Bargaining Unit, or the terms of this agreement, as administered, without first collectively bargaining the same or the effects thereof.

. . .

ARTICLE 3
GRIEVANCE PROCEDURES AND DISCIPLINARY PROCEEDINGS

. . .

3.06 STEPS IN 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.

. . .

ARTICLE 4
HOURS

. . .

4.02 SHIFT EMPLOYEES. (1) The work week for shift employees shall consist of five (5) duty days with three (3) days off in a repeating cycle. The

work week for non-shift employees shall be five (5) duty days during the normal work week with weekends off, as modified by the schedule set forth in the departmental reorganization of October, 1986 and shall be administered as to each employee as it now is.

(2) The normal tour of duty shall be 8 ½ hours including roll call time. However, officers may return to the station after 8 ¼ hours in order to submit all usual and required written reports and information and to ascertain that they have been properly and correctly submitted before leaving the premises. In no event shall the completion of a required report become a matter involving overtime except with approval or at direction of the officer's supervisor.

. . .

ARTICLE 6
OVERTIME

. . .

6.03 ALLOCATION OF OVERTIME. (1) Posting. All overtime of the department schedule, where practicable, shall be posted. . . . No shift overtime shall be allocated or assigned where it will result in an officer working more than a shift and one-half in any 24-hour period. Management may refuse overtime where there is a legitimate safety concern. Practicability of posting shall be determined in light of time available for posting and departmental or public security, or other relevant and sufficient factors. This paragraph shall not apply to overtime resulting from an extension of a person's normal work day duty, nor shall it apply to overtime not assigned by the City of Green Bay.

. . .

ARTICLE 7
SELECTION PROCEDURE FOR POLICE SCHOOL LIAISON PROGRAM K-9 UNIT AND ERU

. . .

7.03 APPOINTMENTS TO K-9 UNIT. . . .

(2) The K-9 Unit will work four days on, followed by four days off, on a rotating schedule. They will work ten hours a day, including 30 minutes per day for grooming, kennel care, usual and customary veterinary time and vehicle upkeep.

BACKGROUND

The Processing of the Grievance

The Union filed the grievance in a letter to Police Chief James Lewis, dated September 9, 1997 (references to dates are to 1997, unless otherwise noted), which states:

> The Green Bay Police Bargaining Unit is filing this grievance in regards to (the Grievant) being ordered to take 1.3 hours of vacation on August 23, 1997 by Capt. Parins.
>
> The incident arises out of (the Grievant's) working non-shift overtime in excess of 12.75 hours. Capt. Parins indicated that the contract would not allow (the Grievant) to work more than 12.75 hours. Sec. 6.03 of the contract only regulates shift overtime, which the overtime in question does not regulate.
>
> (The Grievant) and the Bargaining Unit hereby grieve the fact that (the Grievant) was ordered to take vacation time, even though non-shift overtime is routinely allowed to be over 12.75 hours.
>
> The remedy sought is the return of the 1.3 hours of vacation to (the Grievant) and to pay him for the 1.3 hours as overtime.

Lewis responded in a letter, dated September 12, which states:

> I have reviewed your grievance . . . that (the Grievant) be allowed to perform a combination of patrol duties and swat training that is in excess of 12.75 hours. You accurately describe Article 6.03 as prohibiting shift work in excess of 12.75 hours, however you fail to recognize that Article 6.03 also continues with the statement that "Management may refuse overtime where there is a legitimate safety concern."
>
> We have attempted to accommodate officers in working in excess of the 12.75 hours prohibition in less potentially hazardous areas, however I don't believe that you can identify any areas more hazardous in law enforcement than field patrol duties and swat incidents or training, other than possibly bomb disposal. Captain Parins was attempting to give (the Grievant) some flexibility so that he could gain the maximum benefit and stay within our safety concerns. In fact, I believe (the Grievant) has previously used this flexibility in order to be able to take some overtime assignments that he felt were beneficial.
>
> We realize that certain incidents such as Packers games are an exception to this rule as will be potential future emergency incidents that we cannot anticipate or

> control. However, planned for events such as swat training and patrol are exactly what Article 6.03 was intended to address so that we can minimize the danger to the officers as much as possible in light of the wealth of information that is available that makes a correlation between fatigue and increased potential for mistakes of a safety nature.
>
> I believe that this is an area in which we clearly have the same goal and concern and that is officer safety. I must reject this grievance based on the fact that Article 6.03 allows for the consideration of legitimate safety concerns.

The Union responded in a letter dated September 15 by "moving the pending grievances to the next step of the grievance procedure." The City's Personnel Director, Kathryn Koehler, responded in a letter dated September 19, which states:

> I have had an opportunity to speak with the Chief regarding the . . . grievance. Article 6 of the contract states that management may refuse overtime when there is a legitimate safety concern. The Chief was legitimately concerned about having an officer participate in SWAT training, which involved live ammunition, when that officer had worked over 12 hours.
>
> The Chief exercised discretion clearly afforded him under the contract. I am hereby denying the grievance at my level.

The Union responded by processing the grievance to the Personnel Committee. The parties were unable to resolve the grievance at that level, and the Union submitted it to the Commission for the appointment of an arbitrator.

The Events of August 23 and August 24

At the arbitration hearing, the parties stipulated that the Grievant was scheduled for, and attended, SWAT training from 3:00 p.m. until 7:00 p.m. on August 23. The parties also stipulated that the Grievant's regularly scheduled shift was for 7:00 p.m. on August 23 to 5:00 a.m. on August 24.

The Grievant has served as a K-9 officer for the City for roughly eleven years. On August 23, after the completion of SWAT training, he reported to roll call for his regular shift. At roll call, Lieutenant Galvin asked the Grievant if he had attended SWAT training. After the Grievant informed Galvin that he had done so, Galvin asked the Grievant if he anticipated working his entire shift. The Grievant responded that he did, and Galvin responded that this would put him beyond 12.75 hours worked within a twenty-four hour period. Galvin then took the matter up with Captain Parins, who advised Galvin that the Grievant would have to take vacation to complete his regular shift. The Grievant left work at 3:45 a.m., and submitted a vacation request for the hours between 3:45 a.m. and 5:00 a.m. Neither Galvin nor Parins

sought to determine whether the Grievant was fatigued or articulated any specific safety concern to him. Rather, their decision turned on the total number of hours worked by the Grievant on August 23 and 24.

The Grievant acknowledged that he received a memo from Lieutenant Secor, which stated that K-9 officers were not eligible to work an extra half shift, because the normal shift for such officers is ten hours. A "shift and one-half" for a K-9 officer thus put the officer in excess of 12.75 hours within a twenty-four hour period. The Grievant could not, however, recall at hearing whether he received this memo before or after August 23.

Evidence Regarding Bargaining History

The parties inserted, in Section 6.03, the sentence including the "shift and one-half" reference in the 1996-98 labor agreement. The negotiations that produced the agreement started in January of 1996 and were completed the following September. The City originally proposed to limit officers to working no more than twelve hours in a twenty-four hour period. The Union countered by seeking to set a limitation that permitted vacant shifts to be split in half. This ultimately prompted the agreement on the reference to "shift and one-half." At the time this reference was agreed to, Dannie Younk was President of the Union. He and Lewis agreed that neither party discussed, during these negotiations, the impact of the "shift and one-half" reference on K-9 officers. Lewis noted that the City had no intention of granting K-9 officers the ability to work fifteen hours by agreeing to the "shift and one-half" reference.

Lewis noted that the parties discussed exceptions to the "shift and one-half" limitation. At a minimum, the parties discussed the impact of Packer games and other special events such as Art Street and Amerifest. Beyond this, the parties discussed the impact on the limitation of unforeseen emergencies and unpredictable events such as court appearances.

Lewis noted that the City agreed, during bargaining with its supervisory unit, to set a limit of 14.25 hours as the maximum a supervisory officer can work within a twenty-four hour period. He noted that the supervisory unit agreed that this limit would "include everything" including "double shifts, trading, everything" (Transcript [Tr.] at 91). The City extended the same offer to the Union, but the Union "chose not to take it" (Tr. at 91).

Evidence Regarding Practice

The parties adduced evidence regarding past practice and regarding the City's implementation of Section 6.03 after the inclusion of the "shift and one-half" reference. Younk testified that shift overtime was overtime added to the beginning or the end of an officer's regular shift. He noted that training fell within his view of shift overtime.

The Grievant and current Union President, Steve Darm, disagreed with Younk's view on shift overtime. In the Grievant's view, shift overtime did not include "events like Packer games, other special events overtime" (Tr. at 25). The Grievant testified that "I was told that training didn't count toward our time" (Tr. at 31), and attributed this to Captain Tilkens (Tr. at 44). He added that after August 23 he attended SWAT training for four hours and was permitted to complete his regular shift immediately following the training.

It is undisputed that Tilkens authored a memo to Younk and two other officers, dated September 23, which reads thus:

> Officer Mike Reignier was omitted during scheduling for In-Service training during the month of September. Due to the fact the remaining scheduled days for training do not include any of Mike's regular days off. Specialist Younk and myself have found a solution to this situation. Mike will attend In-Service on the above date. He will attend training from 7:00 a.m. to 4:30 p.m. then report to his regular duty assignment until 7:45 p.m. This will enable Mike to attend the training and not force him to take a day off to do it. This will also insure the (sic) Mike's hours will not exceed twelve and three quarters.

Lewis testified that front line supervisors should have strictly applied the "shift and one-half" limitation at 12.75 hours, and should have denied overtime above that amount from the effective date of the 1996-98 agreement. From his perspective, the filing of the grievance reflected a change, dating from June, in the Union's view of Section 6.03. He testified that he was unaware, until the grievance hearing, that the Grievant may have worked hours exceeding the 12.75 hour limit. The limit reflects, from his view, well-established research documenting a link between employee fatigue and on-the-job errors. Such research covers employees from over-the-road truckers to police officers. That the City is legally responsible for the errors of its officers underscores the depth of the City's reasonable concern with the officer and public safety implications of these errors.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union states the issues thus:

1. Is the language of Section 6.03(1) of the bargaining agreement clear and unambiguous as it relates to "shift and one-half"?
2. In the event that Section 6.03(1) of the bargaining agreement is not clear and unambiguous what is a "shift and one-half"?

3. Can the limitation set forth in Section 6.03(1) of the bargaining agreement be applied to the regularly scheduled shift of an officer rather than limiting the overtime?
4. Is the language of Section 6.03(1) of the bargaining agreement clear and unambiguous as it relates to the term "shift overtime" regarding the type of overtime that is limited in the section?
5. In the event that Section 6.03(1) of the bargaining agreement is not clear and unambiguous, is the type of activity that (the Grievant) engaged in (SWAT Training) subject to the shift and one-half limitation?

The Union argues initially that "the type of overtime that (the Grievant) worked does not and cannot count toward the shift and one-half limitation as it was not 'shift overtime'." More specifically, the Union argues that three sections of the contract "deal with the hours in a shift." Since those provisions establish varying schedules of hours, it is clear that Section 6.03 cannot be read to set a uniform limit of 12.75 hours, which presumes all shifts are a uniform 8.5 hours. Since a "shift and one-half" is fifteen hours for the Grievant, it is apparent that Section 6.03 does not govern his grievance.

The Union then contends that Section 6.03(1), by its terms, does not apply to the grievance since the Grievant was sent home not from an overtime shift, but from his normal shift. The City's attempt to apply the section to the Grievant's "normally scheduled shift, not the overtime" constitutes "an illegal application of the limitation." Since the matter cannot be considered a disciplinary suspension, the City had no basis to order him off his normal shift.

Since Section 6.03(1) governs "shift overtime" and since the Grievant worked his regularly scheduled shift, it follows that the section does not apply here. Section 6.03(1) must be applied to "that overtime which is set in a regular shift." Several contract provisions exempt certain types of work from Section 6.03(1). That the City has permitted employees to work their scheduled shift after training sessions underscores the unpersuasiveness of the City's reading of Section 6.03(1).

The City did not articulate any safety concerns at the time the Grievant was ordered home, and the Union concludes that this establishes that the safety exemption of Section 6.03(1) has no bearing on the grievance. The City's practice of working officers beyond 12.75 hours for special events such as Packer games establishes that the "shift and one-half" limitation does not, standing alone, define a safe shift. Any other conclusion would permit the City to "have its cake and eat it" too. The City's citation of hours limitations for the trucking industry at best establishes a general concern unrelated to the interpretation of a labor agreement covering police officers. The labor agreement permits the trading of shifts, and the resulting double shifts establish that the City's general concern has no bearing on interpreting the contract.

The Union concludes that "it is clear that the City violated the collective bargaining agreement." To remedy this violation the Union requests that "the 1.3 hours of vacation that (the Grievant) was forced to take should be returned to him."

The City's Initial Brief

The City states the issue for decision thus: "Did the City violate the collective bargaining agreement by limiting (the Grievant) to 12.75 hours?" The City initially contends that Section 6.03 permits it to refuse overtime "where there is a legitimate safety concern." SWAT training and K-9 duty are stressful functions, warranting the City's legitimate concerns. To adopt the Union's view of the grievance would take the City from a proactive to a reactive approach to safety issues. The City argues that the Union's view is "foolish and negligent" by forcing the City "to take no action pertaining to officer fatigue until it found an officer 'sleeping somewhere'." More specifically, the City notes that Section 6.03(1) explicitly states the City's concern by limiting officers to a "shift and one-half". Lewis' unrebutted testimony underscores that the City had "a legitimate and serious safety concern" when it restricted the Grievant to a "shift and one-half."

The language of Section 6.03(1) mandates the "shift and one-half" limitation on overtime that the Union seeks to overturn through the grievance. Established past practice underscores that "'shift overtime' hours includes training time." Beyond this, the Union failed to allege in the initial grievance filing that the 12.75 hour limit did not apply to K-9 officers, but instead specifically referred to the limit not applying to SWAT training. From this, the City concludes that the Union has waived any claim to challenge whether the "shift and one-half" limit constitutes more than 12.75 hours for a K-9 officer.

Evidence of bargaining history establishes that the "shift and one-half" limit applies to the Grievant and imposes a 12.75 hours limit on all officers. The City originally proposed a twelve-hour limit, and agreed to the limit stated in Section 6.03 "in response to Bargaining Unit requests to allow two officers to equally split an open shift." At no point did the City agree to a limit that applied differently to K-9 officers than to other officers. That K-9 officers receive eight and one-half hours for holidays and vacations underscores this. The City has uniformly applied the limit to all officers.

The City then argues that the grievance was not filed in a timely fashion. Secor's August 4, 1997 memo should be considered the event causing the grievance. The Union's September 9 filing should not be considered to comply with Section 3.06(1). Any other conclusion would violate arbitral precedent.

Even if the grievance could be considered timely and meritorious under the labor agreement, the City contends that the Grievant should not receive any remedy since he deliberately disobeyed a direct order by attempting to work his normal shift. That the Grievant

has worked beyond a "shift and one-half" since the incident posed here underscores this "blatant disregard for the orders of his superiors."

Viewing the record as a whole, the City concludes that the grievance must be denied.

The Union's Reply Brief

The Union argues initially that the August 4, 1997 memo attached to the City's brief cannot be considered evidence, particularly evidence "to make an argument on timeliness." Noting that admission of the document would violate arbitral authority as well as fundamental concepts of due process, the Union concludes "(t)his memo should not be allowed into evidence."

The Union contends Section 6.03 cannot be applied to the grievance as the City asserts. The City ordered the Grievant off of a regular shift. It did not deny or limit his overtime. Beyond this, the contention that the grievance turns on a safety issue "cannot be sustained." That the City orders officers to work beyond a "shift and one-half" on "a regular non-emergency basis" rebuts this assertion. A review of the evidence fails to demonstrate any "legitimate safety concern" on the City's part. In any event, the language of Section 6.03 authorizes the City to act on safety concerns on a case-by-case basis, not on the general basis asserted here.

The Union contends that it has consistently argued that all officers can work a "shift and one-half," thus making a fifteen-hour shift possible for K-9 officers. Even if this argument is not apparent in the initial grievance, the Union asserts it is stated clearly at the Step 3 grievance filing made to the Personnel Committee. Nor can the City credibly contend that the Union waived its contention that K-9 officers can work beyond the 12.75-hour limit. Its failure to assert the waiver until its initial brief dooms this line of City argument.

Clear contract language makes it evident that the 12.75-hour limit does not apply to K-9 officers. Nor can vacation, holiday or personal day practice obscure this issue, since an officer takes "the entire day off, not just 8.5 hours."

City attempts to brand the grievance untimely must be rejected. That line of argument is itself untimely, since not brought until the City's initial brief. Beyond this, the argument rests on a memo not introduced into evidence. Even if the memo could be treated as evidence, the record fails to show when it was distributed or whether the document is what it purports to be. Even if it is taken to be what it purports to be, the grievance timelines date not from the memo, but from the date the City ordered the Grievant off of his regular shift.

The contention that the Grievant disobeyed an order has no evidentiary support. Rather, the evidence establishes that "(h)e believed that he was doing what he was supposed to

do." If he had been insubordinate, the City's recourse would, in any event, be disciplinary and the City never disciplined the Grievant.

The Union concludes that "it must be found that the city did act in contravention of the contract" and that "the 1.3 hours of vacation that he was ordered to take must be returned to him."

The City's Reply Brief

The City contends that Section 6.03 permits it to enforce the "shift and one-half" limitation as a "legitimate" safety concern. Union attempts to demand a "specific" concern improperly impose on the City a higher standard than that stated by Section 6.03. The Union's contention that officers can trade to work double shifts is "nothing other than an attempt to mislead the Arbitrator." The City "has vigorously attempted to prohibit the alleged practice of officers trading shifts," and the asserted practice "exists only because the City has been hamstrung by an injunction pursued by the Bargaining Unit."

The assertion that Section 6.03 cannot apply to shortening regular hours is, the City contends, "nothing short of ridiculous." Since the Grievant "shoulders the responsibility of complying with orders without constant oversight," he had the responsibility of complying with the "shift and one-half" requirement. His attempt to work overtime beyond that limit constitutes a deliberate attempt to circumvent a direct order. Nor can the City be faulted for acting punitively toward the Grievant: "Rather than taking away 1.25 of overtime (at one and one-half time), he was allowed to take 1.25 hours of vacation at straight time." Thus, the City acted "in a fair and equitable manner, despite the fact that the situation resulted from (the Grievant's) disregard of a direct order."

The Union's assertion that special event overtime can be considered in addressing the grievance is unpersuasive. The size of the City's police force, coupled with the size of special events such as Packer games, makes it "impossible to maintain adequate staffing during such events without requiring a limited number of officers to work more than 12.75 hours." This is a practical limitation on staffing forced on the City. It provides no basis to undercut the City's concern with safety. Nor does the record establish any past practice with regard to training. Testimony offered by Union witnesses "involves training conducted on an officer's day off, and, even more importantly, does not involve consecutive hours."

The City concludes that it acted "in furtherance of a legitimate safety interest and in accordance with the contractual limitations on working hours" by limiting the Grievant to 12.75 hours on August 23 and 24, 1997. The Grievant's deliberate disregard of a direct order further underscores that the grievance poses no contract violation warranting a remedy.

DISCUSSION

The stipulated issue is broad, and the resolution of that issue is complicated by a series of arguments from each party that bring broader issues into dispute than the evidence will support.

With this as background, to focus on what can be resolved, it is helpful to narrow what can be considered in dispute. The City's timeliness argument affords no persuasive basis to avoid addressing the grievance on its merit. The parties' conduct, at least through the initial brief, indicated a mutual desire to have the grievance addressed on its merit. At hearing, the parties stipulated that they "do not have any procedural defects to argue in the processing of the grievance" (Tr. at 5). Beyond this, their stipulation of relevant agreement provisions included only a portion of the labor agreement (Joint Exhibit 8), and did not include Section 3.06(1), which governs the asserted untimeliness.

Even if the asserted untimeliness is considered jurisdictional, the record affords no persuasive bar to determining the grievance's merit. The City asserts the day the Grievant "knew or should have known" of the grievance is August 4, the date of a memo authored by Lieutenant Secor. As a technical matter, this argument cannot be accepted. Although the Grievant mentioned this memo in his testimony, it was not introduced as an exhibit. Rather, the City attached the memo to its brief. An attachment to a brief cannot be considered evidence.

As a substantive matter, even if the memo could be considered evidence, it affords no basis to date the grievance from a point other than August 23. The memo came well after the execution of the 1996-98 labor agreement. Its purpose is unclear. Lewis testified that the "shift and one-half" limit was effective with the ratification of the agreement. Against this background, the memo did not alert the Bargaining Unit to anything new. What grievable event came with its promulgation is not apparent. The grievance, in any event, challenges the application of the "shift and one-half" limit to a K-9 officer. Until August 23, the contents of the memo had not been applied to any K-9 officer. There is, against this background, no persuasive evidentiary basis for the City's assertion that the grievance should have been filed prior to August 23. Since there is no contention the August 23 filing was untimely, there is no bar to the consideration of the grievance's merit.

This poses the stipulated issue, which the parties stated broadly. The broadest policy points raised by the parties cannot be considered posed by the evidence. Whether time limits generally or the "shift and one-half" limit specifically constitute wise law-enforcement policy affords no persuasive means to address the grievance. The agreement does not make an arbitrator the creator of law enforcement policy. Section 1.03 grants the City the authority "to establish reasonable work rules." Review of the reasonableness of a work rule affords a certain policy latitude to an arbitrator, but the parties have not litigated this case as one involving a work rule. The City did enter general evidence concerning the issue of employee fatigue, but neither party seeks to have the reasonableness of the "shift and one-half" limit scrutinized. More significantly, Section 6.03 specifies the "shift and one-half" limit. Thus, the grievance does not pose general issues of employment policy, but the interpretation of a specific reference within Section 6.03.

The grievance thus focuses on Section 6.03. Each side argues that the application of the section to the grievance is clear and unambiguous, but the evidence supports neither assertion. The reference to "shift overtime" does not have a single meaning within the Union, let alone between the Union and the City. The reference to "a legitimate safety concern" affords no insight on why an officer can be presumed to be fatigued after 12.75 hours for "shift overtime" but not for "special event" overtime. Even under the City's view, the reference must be interpreted in light of practical necessity, however grammatically clear the reference may be.

The breadth of certain arguments raised by the parties complicates these ambiguities. The Union generally contends that Section 6.03 applies to overtime only, and has no bearing on regular hours. This argument, however sound technically, is unpersuasive practically. The limitation in Section 6.03 concerns "an officer working." The limitation concerns hours worked "in any 24-hour period" and is indifferent to whether the "working" hours are regular or overtime. The limitation refers to the allocation of overtime, but only as the means to limit total hours worked, whether or not those hours are paid as overtime. No other conclusion is practically possible in a police department. Under the Union's view, the Grievant's overtime could not be limited because he worked the overtime prior to starting his normal shift. This has no practical meaning in an operation staffed on a twenty-four hour per day basis. If it did, the City would simply have to limit overtime preceding a shift so that the following straight-time hours did not exceed the limit. How this would benefit unit members is not apparent. Would the Grievant have been better treated to lose 1.25 hours of training paid at time and one-half rather than 1.25 hours of his regular shift paid at straight time? More significantly, the parties discussed splitting shifts in the bargaining that amended Section 6.03 to include the sentence specifically limiting the assignment of overtime to a "shift and one-half." This makes it unpersuasive to apply the sentence differently to an employee working overtime on the front end of a shift than to an employee working overtime on the back end of the shift.

The City's attempt to resolve the grievance broadly is also unpersuasive. The City contends that a 12.75 hour limit constitutes "a legitimate safety concern" within the meaning of the sentence following the express "shift and one-half" limit. This contention, however, has no apparent limitation and renders one of the cited sentences meaningless. The City views the "shift and one-half" limit as a work rule, having general applicability without regard to a specific officer's state of health or mind at any specific shift. If this is true, and if this constitutes "a legitimate safety concern," then there was no reason to expressly state the limitation in the labor agreement. In arbitration, all of the provisions of a contract must be given meaning. Here, reading the "shift and one-half" limit as the definition of "a legitimate safety concern" renders one of the two references superfluous. Beyond this, the City's broad interpretation makes it difficult to determine why the apparently broad mandate to limit hours within a twenty-four hour period to "a shift and one-half" has no bearing on certain types of overtime.

It is, then, necessary to narrow the focus of the grievance. Ultimately, two sentences of Section 6.03 govern it. The first includes the reference to "shift and one-half," and the second includes the reference to "a legitimate safety concern." More specifically, the ambiguities posed by these two sentences turn on what constitutes "shift overtime," what constitutes a "shift and one-half" and what constitutes a "legitimate safety concern."

The first ambiguity is what "shift overtime" means. The Union broadly asserts that the reference does not include the Grievant's SWAT training on August 23. As noted above, it is apparent there is no shared understanding on this point between Union witnesses, much less between Union and City representatives. This makes a general conclusion on this point unreliable. To resolve the point narrowly, the issue is whether the Grievant's training on August 23 is "shift overtime." The record supports the City's view of this point. Lewis' and Younk's testimony indicate the parties understood that the "shift and one-half" limitation did not apply to all overtime situations. The parties specifically discussed, at some point preceding or following reaching a tentative contract agreement, emergencies and Packer games. Lewis' more detailed and unrebutted testimony establishes that the parties discussed unforeseeable events such as court appearances and emergencies as well as foreseeable events that put practical stains on staffing. Among the foreseeable events were Packer games, Amerifest and Art Fest. That Younk and Lewis were the only testifying witnesses who appeared at the table throughout the negotiations for a 1996-98 agreement is significant.

Against this background, the reference to "shift overtime" must be read to add to the "shift and one-half" limit a certain latitude regarding scheduling overtime. That latitude, as discussed at the table, involved events not predictably attached to specific shifts. That Lewis and Younk testified that SWAT training fell within "shift overtime" is significant. The SWAT training of August 23 is predictable and predictably tied to the beginning of the Grievant's normal shift. There is, then, no persuasive basis to tie this training to the events discussed at bargaining to be exempted from the "shift and one-half" limitation. The SWAT training was, therefore, "shift overtime" within the contractual limit of "shift and one-half".

The next ambiguity is whether the "shift and one-half" limitation connotes something other than 12.75 hours as applied to a K-9 officer. While the City makes a stronger policy argument on this point than the Union does, the issue here is contract interpretation. The issue is not to determine what is the best policy result, but to square the disputed reference to what the parties agreed to in bargaining. As preface to this, it must be noted that "shift and one-half" does not specify, on its face, a number of hours. If shifts vary in length, the "shift and one-half" limit varies, on its face, with the length of the underlying shift.

Bargaining history, although not definitive, supports the Union's interpretation. Witnesses agree the point was not specifically discussed at the table. It is, however, apparent that the parties considered, but could not agree, on setting a specific hour limit. The City initially proposed specifying twelve hours. The City later offered to specify fourteen hours if the Union agreed to limit certain practices impacting hours worked. As Lewis noted, the Bargaining Unit, unlike the supervisory unit, would not accept this proposal. This means the reference to "shift and one-half," as opposed to the statement of a specific and uniform limit, cannot be considered inadvertent. To interpret that reference as if it connotes a specific hour limit would be, against this background, to grant a benefit in arbitration not reached in negotiation.

In sum, "shift and one-half" refers to shifts, not to specific hours. Thus K-9 officers, whose shifts are set at ten hours per day under Section 7.03(2), cannot be limited under the phrase "shift and one-half" to 12.75 hours. Rather, that limit is fifteen. The Grievant could have filled his shift on August 23 without going over the "shift and one-half" limit.

The final ambiguity concerns the reference to "a legitimate safety concern." As noted above, this reference must be interpreted to give it meaning independent of the sentence stating the "shift and one-half" limit. The "shift and one-half" limit is analogous to a work rule that sets a general standard without regard to its application to a specific officer. Against this background, the following sentence reserves to the City the case by case discretion to "refuse overtime" when it has "a legitimate safety concern." This concern, unlike the general reference to "shift and one-half," is tied to the specific exercise of discretion. Under this sentence, the City could deny, on the facts of a specific case, overtime not falling within the "shift and one-half" limitation. Thus, the City could, as "a legitimate safety concern," deny overtime to an officer scheduled to fill one-half of a shift beyond his normal shift if the officer appeared ill or unduly fatigued. That denial, not specifically mandated by the "shift and one-half" limit, is authorized under the "legitimate safety concern" reference. This reading permits both the "shift and one-half" and the "legitimate safety concern" references to have independent meaning.

In sum, Section 6.03 governs the events of August 23. The SWAT training afforded the Grievant on that date can be considered "shift overtime" subject to the "shift and one-half" limitation. That it preceded the Grievant's normal shift rather than following that shift is irrelevant to the operation of the "shift and one-half" limit. However, the "shift and one-half" limitation, applied to the Grievant, set a fifteen hour, not a 12.75 hour, limit. Thus, the City did not have any basis to send him home at 3:45 a.m. on August 24 under the "shift and one-half" limit. If the City had a "legitimate safety concern" based on the work performed by the Grievant on August 23 or 24 or on his individual physical or mental condition, it could have refused to offer him overtime. However, no City supervisor exercised discretion in assigning the Grievant to SWAT training or in setting his normal hours for the shift following that training. Rather, the City asserted the "shift and one-half" limit set a mandatory 12.75 hour limit on his work for that time period, without regard to his physical or mental condition at the time. Thus, the City had no demonstrated contractual basis to require the Grievant to use vacation to complete his scheduled shift on August 24.

The parties stipulated (Tr. at 6) that the resolution of the stipulated issue addressed the grievance, which poses no issue regarding remedy. It is, however, appropriate to tie the conclusions stated above more closely to the parties' arguments. The Award is expressly limited to the facts posed by the grievance. As noted above, the evidence will not support the broader arguments of the parties. The conclusion that "shift and one-half" cannot be interpreted as a uniform specification of a 12.75 hour limit, does not mean the City cannot consider fatigue issues regarding the assignment of overtime beyond 12.75 hours in a twenty-four hour period for K-9 officers. Rather, such fatigue issues must be addressed on a case by case basis as a "legitimate safety concern."

The rote application of a 12.75-hour limit must be secured in negotiation before it can be awarded in arbitration. As noted above, relevant bargaining history does not permit a conclusion that "shift and one-half" can be read as "12.75 hours." That vacation or any other type of paid leave is earned or awarded in other than ten-hour increments does not undercut this conclusion. Sections 4.02(2), 6.01 and 7.03(2), read together, set the shifts on which overtime is calculated. Those shifts vary from patrol officers to K-9 officers, and Section 6.03 turns on a "shift and one-half" thus varying with the underlying definition of a shift. As noted above, bargaining history underscores this. That evidence is less than definitive, but does demonstrate the parties actively considered and rejected specific hour limits before agreeing on the more elastic "shift and one-half." The City may not have specifically agreed to the implications of this language, but the language is more elastic than a specific hour limit, and language sets the policy enforced in arbitration.

Both parties have argued that the processing of the grievance dictates a conclusion that certain arguments have been waived. The record does not indicate the parties strictly apply grievance procedures. Both parties have, for example, cited, in their briefs, contract provisions not included in Joint Exhibit 8. The Union's argument concerning the inadmissibility of the Secor memo is technically sound, but I have addressed the underlying timeliness issue to indicate this technical point has no substantive effect on the grievance. The Union's submission of grievance documents with its reply brief underscores the parties seek something less than strict formality in the process.

Similarly, the City's assertion concerning the Union's failure to question the "shift and one-half" limitation in the September 9 grievance raises a technical issue. This is not to discount the force of the argument. The Grievant's testimony indicates greater concern with the definition of "shift overtime" than with the definition of "shift and one-half." However forceful the waiver argument, however, it affords no persuasive basis to limit the dispute on Section 6.03. The grievance cites Section 6.03, and there is no issue of factual surprise. Thus, the grievance put the entire section at issue. To find a waiver of a specific argument within that section would encourage the filing of a legal brief as a grievance. Beyond this, the stipulated issue was broadly stated, calling the entire agreement potentially into dispute. This makes the specific waiver asserted a dubious means to address the broadly stated issue. Evidence of bargaining history underscores this. Younk's testimony is a significant part of bargaining history, including the conclusion that training falls within "shift overtime." It is difficult to rely on that testimony where it addresses a City concern, then ignore that testimony where it underscores a Union view that "shift and one-half," for a K-9 officer, means fifteen hours.

The City forcefully argues that the Grievant may have disobeyed or at least subverted a direct order. This argument is disciplinary in nature and plays no role in the contract interpretation required by the grievance.

AWARD

The City did violate the collective bargaining agreement by limiting the Grievant to twelve and three quarter hours on August 23 and 24.

Dated at Madison, Wisconsin, this 17th day of May, 2000.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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