

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**THE BERLIN PROFESSIONAL POLICEMEN'S
UNION LOCAL 514-B, AFSCME, AFL-CIO**

and

**THE CITY OF BERLIN
(POLICE DEPARTMENT)**

Case 46
No. 58588
MA-11004

Appearances:

Mr. Lee W. Gierke, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, appearing on behalf of the Union.

Attorney Matthew G. Chier, City of Berlin, 111 South Pearl Street, Berlin, Wisconsin 54923, appearing on behalf of the City.

ARBITRATION AWARD

The Berlin Professional Policemen's Union, Local 514-B, AFSCME, AFL-CIO, hereafter the Union, and City of Berlin (Police Department), hereafter City or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the City concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated and an arbitration hearing was held in Berlin, Wisconsin on May 3, 2000. The hearing was not transcribed and the record was closed on June 17, 2000, upon receipt of post-hearing written argument.

ISSUE

The parties stipulated to the following statement of the issue:

Did the City of Berlin violate the Collective Bargaining Agreement with AFSCME Local 514-B when, after it made the decision not to fill the open Communications Officer Flex Position in January, 2000, it did not revert the flex shift Police Officer position back to a fixed shift position?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 RECOGNITION

This Agreement made and entered into at Berlin, Wisconsin, pursuant to the provisions of Chapter 111.70 and Chapter 41 and 62.13 of the Wisconsin Statutes by and between the City of Berlin, a municipal corporation, as municipal Employer with the Police Chief as its agent hereinafter referred to as the City, and the Berlin professional Policemen's Union, as sole bargaining agent for all full time and part-time Employees of the Berlin Police Department, excluding the Chief of Police and Captain, Communications Officers, and Municipal Employees hereinafter referred to as the Union.

ARTICLE 3 MANAGEMENT RIGHTS

Unless otherwise herein provided, the management of the work and direction of the working forces, including the right to hire, promote, demote, or suspend, or discharge for proper cause and the right to lay off Employees due to lack of work or funds, is vested exclusively in the Employer.

The Employer may adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin or any other governmental agency having jurisdiction over the City, such rules shall be submitted for the Union thirty (30) days prior to their effective dates. The Union shall have thirty days from submission to decide whether to grieve the reasonableness of the rule or accept it as reasonable.

Action to amend or to otherwise alter or change said rules and regulations by the Union shall be taken through the Grievance Procedure in this Agreement.

If any action taken by the Employer under the established work rules and after the Grievance Procedures have been completed is determined as unjustified, any wages or benefits lost by the Employee as a result of such action shall be restored.

The right of contracting or subcontracting is vested in the Employer provided that the present work force is not reduced in number of hours.

ARTICLE 4

HOURS

A normal workday shall consist of an eight (8) hour shift. The normal work week for all Employees shall average thirty-seven and one-half (37 ½) hours based on a fifty-two (52) week year. All Employees shall work a continuous schedule of six (6) days on and three (3) days off.

Employees shall initially select a shift on the basis of seniority, and thereafter shift assignment selections will be conducted on an annual basis by seniority with implementation the first Monday each January.

- a. There will be no overtime paid by the City caused by seniority bumping or shift selection process.
- b. There shall not be two (2) probationary patrolmen permanently assigned to any given shift.
- c. Any vacancies occurring after the aforementioned annual shift selection shall be filled by seniority.

Once the Chief of Police decides to fill all or part of a vacancy, the existing policy for shift coverage shall be maintained to seek volunteers to fill the shift. If volunteers are not available, the Chief may assign employees to work the vacancy by reverse seniority.

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ARTICLE 18

GRIEVANCE PROCEDURE

Grievances within the meaning of the Grievance Procedure shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and items concerning wages, hours and conditions of employment and about alleged violations of this Agreement.

All such grievances shall be processed as follows:

Step 1. If an Employee has a grievance, he shall first present the grievance orally to the Captain. Said grievance shall be presented within the Employee's first five (5) working days after the date of the event or occurrence which gave rise to the complaint, vacation or sick leave time not to be counted as working days. If such grievance is not presented within the specified time period, it shall be deemed waived and abandoned and shall not thereafter form the basis of a grievance between the parties hereto.

Step 2. If the grievance is not settled in Step 1 within five (5) working days after having been presented to the Captain, then the grievance may be presented to the Chief of Police in writing. The Chief shall, in five (5) working days, give a written response to the grievance.

Step 3. If the grievance has not been satisfactorily resolved in Step 2 of the Grievance Procedure, the grievance may then be presented to the Common Council Committee of Jurisdiction or the City Police and Fire Commission, whichever has jurisdiction over the particular grievance. The Committee of Proper Jurisdiction shall, within ten (10) working days of receipt of the grievance, give written response to the grievance unless such time be extended by mutual consent.

Step 4. If the Employee's grievance is not satisfactorily resolved in Step 3 of the Grievance Procedure, either party may submit said grievance to arbitration by giving notice in writing to the other party provided such notice is given within ten (10) days after receipt of the decision as provided in Step 3 of this procedure. Either of the parties hereto, may submit the grievance to an arbitrator to be selected by the Wisconsin Employment Relations Commission provided the arbitrator so appointed is acceptable to both parties. In the event the arbitrator is not acceptable to either party, a second arbitrator shall be requested, and that arbitrator shall hear the grievance irrespective of any objections raised by either of the parties hereto.

Each party shall share equally in the costs, if any, of the arbitrator. The decision of the arbitrator shall be final and binding on both parties, except for a judicial review.

APPENDIX B

PARAMETERS FOR ADDING 5TH FULL-TIME POLICE OFFICER

I. CONCEPT AND INTENT

- A. Communications officers should provide staffing for the communications center.
- B. Police Officers should provide staffing for the police duties.
- C. Employees who work in the communication center will be adequately trained to perform job responsibilities.

II. CREATE 2 TOTAL FLEX TYPE SHIFTS FOR NEW HIRE JUNIOR COMMUNICATION OFFICERS AND JUNIOR POLICE OFFICER

- A. Both positions would operate on an established 9 day cycle consisting of 6 working days and 3 off days, but neither work nor off days would necessarily be consecutive.
- B. Flex type shifts normally will be 12-8, 8-4, or 4-12 work assignments. Minimum 8 hour shifts; no split shifts.
- C. Flex schedules would normally be assigned on the 25th of the month.
 - 1. Shifts would be subject to reassignment up to 24 hours before beginning of shift. (24 hour notification required in advance)
 - 2. There shall be no 16 hour assignments (12 hour maximum).

III. VACATION POLICY

- A. Retain a policy of 3 employees off any given day with following restrictions:
 - 1. 1 Communication Officer off
 - 2. 2 Police Officers off
- B. No more than 2 employees off per shift regardless of job classification, including Captain.
- C. Any exceptions to vacation policy will be by mutual agreement.
 - 1. Any exceptions in excess to restricted numbers of Employees off shall be subject to voluntary overtime within job classification to meet minimum staffing levels.
- D. All employees except Chief of Police or Captain will be counted for vacation restrictions, except as identified in III. B.

IV. FLEX SHIFT VACATION POLICY

- A. Vacations will be within framework of established 9 day work cycle.
 - 1. Less than 3 days vacation = just vacation days.
 - 2. 3-5 days = vacation days + 3 off days.
 - 3. 6 days vacation = vacation days + 6 off days (12 days).
 - 4. 12 days vacation = vacation days + 9 off days (21 days off).
 - 5. 18 days vacation = vacation days + 12 off days (30 days off).
- B. Flex employees will specify dates desired within framework of established 9 day work cycle and off days from cycle before and after vacation will be scheduled and assigned accordingly.

V. WORK SHIFT ASSIGNMENTS

A. Communications Officers

1. 8a – 4 p
2. 12a – 8 a
3. (3 days) 12a – 8a
- (3 days) 4p – 12m
4. 4p – 12a
5. Flex 9 day work cycle

B. Police Officer Shifts

1. 8a – 4p
2. 8a – 4p
3. 8a – 4p
4. 8a – 4p
5. 4p – 12a
6. 4p – 12a
7. 4p – 12a
8. 4p – 12a
9. 12a – 8a
10. 12a – 8a
11. 12a – 8a
12. 9 day work cycle.

C. No employee shall be assigned to work more than three (3) mandatory 12 hour shifts per work cycle.

1. Under this circumstance the next junior employee shall be assigned.

D. Time Certification shall not be considered criterion for filling a Communication Center vacancy by sworn officers.

VI. FLEX POSITION OPTIONS

- ### A. Flex employees may indicate preference for shift or overtime on the overtime posting but will be assigned shifts by management based on staffing needs.

1. Flex employees will not be privileged for specific shifts, unless assigned.

VII. FLEX OFFICER POSITION

- A. With transition of an existing full-time officer from a fixed to a flex shift, all conditions of employment with respect to seniority, pay schedules, vacation, sick leave and probationary status will remain unchanged.

VIII. SIDE BAR AGREEMENT TO CONTRACT

- A. Permit 2 flex positions within 9 day work schedule to be established.
- B. Specify reverse seniority by classification.

APPENDIX C

IMPLEMENTATION OF APPENDIX C WHEN A COMMUNICATION OFFICER POSITION IS VACANT

IF THERE ARE FIVE (5) FULL TIME COMMUNICATION OFFICERS ON THE SCHEDULE, THE VACANCY WILL BE FILLED IN THE FOLLOWING MANNER:

1. Seek a Part-Time Communication Officer to volunteer to fill in.
2. Seek a Full-Time Communication Officer, by seniority, to volunteer to fill in.
3. Order in a Full-Time Communication operator, but not on days off.
4. Fill in with an on duty Police Officer.
5. Seek a Police Officer, by seniority, to volunteer to fill in.
6. Order in a Police Officer by reverse seniority.

IF THERE ARE LESS THAN FIVE (5) FULL TIME COMMUNICATION OFFICERS ON THE SCHEDULE THE VACANCY WILL BE FILLED IN THE FOLLOWING MANNER:

1. Seek a Part-Time Communication Officer to volunteer to fill in.
2. Fill in with an on duty Police Officer.

3. Seek a Full Time Communication Officer, by seniority, to volunteer to fill in.
4. Order in a Full Time Communication operator, but not on days off.
5. Seek a Police Officer, by seniority, to volunteer to fill in.
6. Order in a Police Officer by reverse seniority.

BACKGROUND

In July, 1994, Communications Officer Margaret Beuthin filed a grievance over the fact that she, a more senior employe, had been called in to work 12-hour shifts to fill-in for a Communications Officer that was on family leave. Prior to the start of the arbitration hearing on that grievance, the City's labor attorney made a proposal to the Union regarding staffing. The Union did not accept the proposal and the parties arbitrated the grievance.

Following the conclusion of the arbitration hearing, but prior to the receipt of the arbitration award, the City presented the Union with two proposals. The Departmental Meeting Minutes of January 10, 1995 state as follows:

Chief DOBSON stated the purpose of this meeting is to provide Police Department personnel an opportunity for input into resolving the Staffing issue and to present two plans of action in which to reach that resolution.

Mark ROHLOFF stated that there is a City wide budget problem in which personnel costs are of priority concern. In the City, 50% of the budget is absorbed in personnel costs while in the Police Department personnel costs take up 90% of the budget. The options presented would reduce costs and provide staffing to maintain minimum coverage.

PLAN A.

1. Hire a 5th full-time Communications Officer on a 9 day work cycle.
2. Both the Junior Communications Officer and the Junior Police Officer would work a total flex shift. No guarantee of off days or shift work days.
3. On the 25th of each month the scheduling would be posted for the following month.

4. There would be 8 hrs. minimum notification in advance of a work shift.
5. There would be no 16 hr. work shifts assigned but possibly 12 hr. work shifts maximum would be assigned.

PLAN B.

1. Attempt would be made for staffing needs coverage with part-time employees.
2. One Police Officer position reduced to part-time.

The above plans of action would keep Officers in the field doing Police work and Communications Officers in the Communications Center doing Communications work. Plan A does not comply with current language contained in the Union Contract.

A sidebar agreement would need to be added the Union Contract for Plan A permitting:

1. Establishment of 2 flex positions on a 9 day work cycle.
2. Reverse seniority by job classification.

Chief Dobson stated that the above plans would allow for more staff available when needed.

An acceptance of Plan A is requested no later than 01-31-95 so that the Common Council can authorize the additional staffing position in an effort to implement the plan as soon as possible. Failure to accept Plan A may result in the implementation of Plan B.

Chief Dobson, Captain Morehouse and Mark Rohloff left the room so that the employees could discuss the plans further. All three returned a short time later and were requested by the employees to present their options on paper so that it could be discussed at the Union Meeting to be held 01-12-94.

On March 6, 1995, representatives of the City and the Union executed a Memorandum of Understanding that states as follows:

The undersigned parties agree to the terms and conditions of the attached Local 514B letter dated January 31, 1995 and Plan A Staffing Plan for the duration of the present collective bargaining agreement.

Provisions of this staffing plan shall be subject to the next bargaining process for inclusion into a future contract.

The attached letter states as follows:

January 31, 1995

TO: James W. DOBSON

FROM: Kevin J. BLOCK

REF: (new) Plan A Proposal

Dear Mr. DOBSON,

On behalf of the B.P.P.U. Local 514B I, am writing this letter to inform you of the following. On 01-30-95 at about 6:30 PM our union members met. A vote was taken reference the above-mentioned proposal. The outcome of the vote was that the union will accept the new revised Plan A that I have attached. It is the union's understanding that the following apply to this agreement:

- 1) Plan A is the side bar agreement to our current contract that expires 12-31-95.
- 2) Plan A will not take effect for any employee until all new hires are properly trained and ready to work on their own.
- 3) Both sides entering into this agreement will make every effort to make the transition as easy as possible for the flex employees.
- 4) Both sides agree to keep an open line of communication when problems may result from this agreement, with the intent to improve working relations between management and employees.

The union will have its next meeting on 2-16-95. If you could please inform me of the decision made on this proposal by this date it would be appreciated.

Also attached to the Memorandum of Understanding was a three-page document entitled "Plan A Parameters for Adding a 5th Full-time Communications Officer." In all significant respects, the body of the attached Plan A mirrors the language of Appendix B that has been attached to all subsequent Union collective bargaining agreements.

On September 8, 1995, representatives of the Union and the City executed a Letter of Acceptance, in which the Union accepted the removal of non-sworn employees from the collective bargaining unit represented by the Union. Subsequently, the Communications Officers were placed in another collective bargaining unit represented by AFSCME. Appendix B and C were attached to all subsequent Union labor contracts.

On December 9, 1999, the City Police and Fire Commission recommended to the Common Council that the City Communications/Dispatch Center be closed and combined with the Green Lake County Sheriff's Department. On January 5, 2000, the City Police and Fire Commission accepted the resignation of a full-time Communications Officer and decided that it would not hire any additional Communications Officers.

On January 11, 2000, the City Common Council adopted "A Resolution Closing and Combining Communications/Dispatch Center With Green Lake County Sheriff's Department". The Resolution required the closure to be completed in a timely and efficient fashion, with a deadline of not later than December 31, 2000, and authorized the lay-off of all current Communications/Dispatch employees.

On or about January 11, 2000, the Union filed a grievance alleging that the Police and Fire Commission's January 5, 2000 decision to not hire additional Communications Officers, thereby leaving the dispatch center with only four full-time dispatchers, violated Appendix B of the Union's labor contract. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

At the time that the language was bargained, the intent was to have a "flex police officer" as long as there were five full-time employees in the Communications Center. Following the exclusion of the Communications Officers from the Police unit, the City continued to maintain the five Communications Officers required by the contract. There was

no violation of the contract until January 2000. The grievance was filed in response to this contractual violation.

The grievance was filed within five working days of the event that gave rise to the grievance. The grievance is timely.

By failing to raise the question of timeliness at any time prior to arbitration, the City has effectively waived that defense. If a violation occurred at the time that the Communications Officers were excluded from the Police unit, the same violation would be reoccurring in January, 2000. The remedy for a tardy filing of a reoccurring grievance is not forfeiture of contractual rights for all of eternity.

The Union called three witnesses who testified as to the intent of the language of the collective bargaining agreement. The unrebutted testimony demonstrates that, during the negotiations to reach this agreement, the City Administrator assured the Union negotiating team that if the City went with less than five Communications Officers, then the flex officer would be restored to a straight shift position. It was with that understanding and agreement that the Union reluctantly went along with the proposal to create the flex officer positions.

Following the exclusion of the Communications Officers from the Police unit, Appendices B and C remained in the contract. The Union's subsequent proposal to remove language relating to the Communications Officers was rejected by the City. If the Appendices are no longer in effect, then work hours are controlled by Article 4.

The collective bargaining agreement must be construed as a whole. Logic dictates that the language in Appendix B and Appendix C no longer applies and that police officers' work hours should be determined strictly by the language in Article 4 – Hours of Work.

The City has violated the collective bargaining agreement by continuing to have a police officer work a "flex schedule" after the City made the decision not to keep five full-time Communications Center Officers. Therefore, the Union respectfully requests the Arbitrator to sustain the grievance. The remedy for the instant grievance is to have the junior officer who is now working a "flex schedule" to be immediately put on a straight shift schedule of an eight (8) hour shift of six (6) days on and three days off.

City

Appendix B of the contract resulted from negotiations revolving around previous arbitration litigation relating to the filling of vacant shifts in the Communications Center. The City understood the Union's concession to be that there would be two (2) total flex-type shifts created, one involving a new hire Junior Communications Officer and the other a Junior Police Officer. Additionally, officers gave up certain vacation scheduling rights.

Appendix B relieved some Police Officer scheduling problems. However, the primary benefit to the Union and concession by the City involved an additional fifth full-time Communications Officer. The fifth full-time Communications Officer was not a benefit negotiated to the Police Officers, but was an accommodation to the Communications Officers.

Appendix B, on its face, does not contain a specific requirement that the City have a fifth full-time Communications Center Officer. Although members of the police union claim that there was an additional benefit to the Police Officers in that they were less frequently required to fill vacant Communications Center shifts, such a benefit was not stated in the Agreement. To accept this testimony as fact would be to violate the parol evidence rule.

On September 8, 1995, the Union accepted the removal of Communications Officers from the Union. The Communications Officers became a part of the City public works union.

The closing of the Communications Center is no different than the removal of the Communications Officers from the Union. The Union's bargaining unit members could not possibly be damaged by either event.

If there were a lost benefit of the bargain, as claimed by the Union, the time to file the grievance would have been when the Communications Officers were removed from the police union and made a part of the public works union. The police union never grieved the separation of these employees.

The Communications Officers are not members of the police unit. Therefore, there is no possible damage to the Union by failing to fill vacancies for Communications Officers.

Appendix B has remained in the contract. Appendix B contains agreements other than the addition of a fifth full-time Communications Officer.

As a result of the closing of the Communications Center, Appendix B should be amended, if not deleted in its entirety. The City's right to flex the shift of at least one Police Officer is consistent with established practice that has not been grieved by the Union.

During the transition period, the City has been unable to hire anyone for the Communications Center. The City should not be held responsible for that which it cannot accomplish, i.e., the hiring of additional full-time workers who will be terminated within a few months.

The Union's grievance is untimely and without merit. The Union's grievance should be denied.

DISCUSSION

At the start of the arbitration hearing, the City made the claim that the grievance was not filed in a timely manner. The City argues that the grievance is not timely because the grievance issue was required to be raised at the time that the Communications Officers were excluded from the Police unit in September of 1995. In a prior Award involving the Union and the City, Arbitrator Jane Buffett states as follows:

Grievance timelines help to promote good labor relations by facilitating the speedy resolution of problems. In spite of the usefulness of timelines, however, parties occasionally find it appropriate to waive them. Such a waiver may be made either explicitly through agreement, or impliedly, through action or inaction. I conclude that by failing to object at any time prior to hearing to the timeliness of the grievance, the City effectively waived that objection as to this grievance. The grievance procedure timeline, therefore, does not operate to bar this particular grievance and the grievance is arbitrable.

The record establishes that the City did not raise the timeliness issue until the arbitration hearing. The undersigned agrees with Arbitrator Buffett's conclusion that, by failing to raise a timeliness objection at any time prior to hearing, the City has effectively waived that objection as to this grievance.

A party's unilateral understanding does not give rise to a contractual obligation. Thus, arguments regarding a party's unilateral understanding of the benefits, or concessions, of the bargain are not persuasive.

Following the Communications Officers' exclusion from the Union's bargaining unit, the parties continued to attach Appendix B to their collective bargaining agreement. By this conduct, the parties demonstrated their mutual intent to incorporate the language of Appendix B into their labor contract.

The undersigned must give effect to the plain language of the contract, including the language of Appendix B. Where the contract language is ambiguous, then extrinsic evidence, e.g., negotiation history or past practice, may be of assistance in determining the parties' mutual intent.

Section II of Appendix B states: **CREATE 2 TOTAL FLEX TYPE SHIFTS FOR NEW HIRE JUNIOR COMMUNICATION OFFICERS AND JUNIOR POLICE OFFICER.** This language does not provide the City with discretion to create only a Police Officer flex shift position. Rather, it requires the City to create both a "junior" Police Officer flex shift position and a "new hire junior" flex shift Communications Officer position.

Although Appendix B is entitled “Parameters for Adding 5th Full-time Police Officer”, the record clearly demonstrates that the correct title, as agreed upon by the parties when they initially entered into their flex shift agreement, is “Parameters for Adding 5th Full-time Communications Officer.” One may reasonably conclude, therefore, that the “new hire junior” flex shift Communications Officer position referenced in Appendix B is the 5th full-time Communications Officer position.

Following the execution of the Memorandum of March 6, 1995, the City created and maintained a 5th full-time Communications Officer position. Prior to January 2000, any vacancy in the 5th full-time Communications Officer position was a result of attrition and the City made reasonable attempts to fill any vacant 5th full-time Communications Officer position.

The testimony of Patrolman Block demonstrates that, on January 5, 2000, the City Police and Fire Commission determined that it would not hire into the Communications Officer position. On that same date, the Commission accepted the resignation of Communications Officer Gary Boening. With Boening’s departure, there were fewer than five full-time Communications Officers.

On January 11, 2000, the City Common Council approved “A Resolution Closing and Combining Communications/Dispatch Center with Green Lake County Sheriff’s Department” in which the Council resolved to close its Communications Center by December 31, 2000 and to lay-off all Communications Officers on the effective date of closure. It may be, as the City argues, that the impending closure of the Communications Center would have made it impossible for the City to hire additional Communications Center Officers. Inasmuch as this “impossibility to hire” would be a logical result of the City’s decision to close the Communications Center and lay-off Communications Officers, the City may not reasonably claim that it would not be responsible for any resulting inability to hire.

By its conduct in January 2000, the City effectively abolished the 5th full-time Communications Officer position. Appendix B addresses the creation of two positions, but is silent with respect to the abolition of these positions. Given the ambiguity concerning the City’s right to abolish a position created under Appendix B, it is appropriate to give consideration to the evidence of negotiations history.

At the January 10, 1995 Departmental Meeting, the City presented a “Plan A” in which the City proposed to hire a fifth full-time Communications Officer and to have both the junior Communications Officer and the junior Police Officer work a “total flex shift.” The Union responded to the City’s proposal of January 10, 1995 with a letter dated January 31, 1995.

The Union's letter of January 31, 1995 stated certain Union understandings. Among the Union "understandings" was that "Plan A will not take effect for any employee until all new hires are properly trained and ready to work on their own."

Given the fact that the "new hire" referenced in "Plan A" was the 5th full-time Communications Officer, the Union was expressing an understanding that the City's right to schedule a flex shift Police Officer was contingent upon the City's employment of a 5th full-time Communications Officer. This Union understanding became a mutual understanding when the parties executed the Memorandum of March 6, 1995 in which the parties agreed to "Plan A" and the Union's letter of January 31, 1995.

The Appendix B that was attached to the parties' subsequent collective bargaining agreements was, in all significant respects, the "Plan A" that was agreed to in the March 6, 1995 Memorandum of Understanding.

After the parties had agreed to exclude the Communications Officers from the Union's collective bargaining agreement, the Union asked the City if Appendix B should be retained or changed. The City responded that Appendix B should be retained because Police Officers and Communications Officers were in the same department and continued to work together.

It is not evident that, after the execution of the March 6, 1995 Memorandum of Understanding, the parties bargained the substance of the terms and conditions of Appendix B. The undersigned is persuaded, therefore, that the mutual understandings that gave rise to the Memorandum of Understanding of March 6, 1995 also gave rise to its successor Appendix B.

In summary, upon consideration of the language of Appendix B and the relevant bargaining history, the undersigned concludes that Appendix B provides the City with a limited right to create and maintain a flex shift Police Officer position. Specifically, Appendix B provides the City with a right to create and maintain a flex shift Police Officer position if the City also creates and maintains a fifth full-time Communications Officer flex shift position.

The City argues that it has a "past practice" right to schedule a flex shift Police Officer position. However, the "practice" of scheduling a flex shift Police Officer did not begin until the parties implemented the March 6, 1995 Memorandum of Understanding. The undersigned is persuaded, therefore, that the "practice" of scheduling a flex shift Police Officer is, in fact, the exercise of rights provided in this Memorandum of Understanding and its successor Appendix B.

Conclusion

The evidence of the parties' prior conduct indicates that, at the time the parties negotiated the March 6, 1995 Memorandum of Understanding, both parties recognized that the City did not have a contractual right to schedule flex shifts. The Union argues that Article 4 requires the City to schedule Police Officers to fixed shifts. The City does not argue otherwise. The undersigned concludes, therefore, that the parties are in agreement on this point.

Appendix B provides an exception to the Article 4 requirement that the City schedule fixed shifts. As discussed above, this "exception" permits the City to establish and maintain a flex shift Police Officer if the City establishes and maintains a 5th full-time Communications Officer position.

Having effectively abolished the 5th full-time Communications Officer position in January 2000, the City does not have an Appendix B right to schedule a flex shift Police Officer. Thus, by continuing to schedule a flex shift Police Officer position, the City has violated Article 4 of the parties' collective bargaining agreement.

The Union does not seek a retrospective remedy. Rather, the Union seeks an order requiring the City to immediately revert the flex shift Police Officer position back to a fixed shift Police Officer position. The remedy sought by the Union is appropriate.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following:

AWARD

1. The City of Berlin violated the collective bargaining agreement with AFSCME Local 541-B when, after it made the decision not to fill the open Communications Officer Flex Position in January 2000, it did not revert the flex shift Police Officer position back to a fixed shift position.

2. In remedy of this contract violation, the City is to immediately revert the flex shift Police Officer position back to a fixed shift Police Officer position.

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

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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