

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
OSHKOSH PROFESSIONAL POLICE OFFICERS ASSOCIATION
and
CITY OF OSHKOSH

Case 315
No. 58886
MA-11093

(Directive #116 - Overtime)

Appearances:

Attorney Frederick J. Mohr, P.O. Box 1015, Green Bay, Wisconsin 54305, appearing on behalf of Oshkosh Professional Police Officers Association.

Davis & Kuelthau, S.C. by **Mr. William G. Bracken**, Employment Relations Services Coordinator, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City of Oshkosh.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Oshkosh Professional Police Officers Association (hereinafter referred to as the Union or the Association) and the City of Oshkosh (hereinafter referred to as the Employer or the City) requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute. The undersigned was so designated. A hearing was held on July 7, 2000, in Oshkosh, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the hearing and a transcript was received on July 19th. The parties submitted post-hearing briefs and reply briefs, the last of which were received on September 6, 2000, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties were unable to reach a stipulation on the issue and agreed that the Arbitrator should frame the issue in his award. The Union views the issue as:

1. Did the City violate Directive 116 by failing to offer work to off duty second shift employees?
2. Did the City violate Article IV of the collective bargaining agreement by failing to pay Marilyn Harvot overtime for hours worked outside of her regularly scheduled day?

For its part, the City believes the issue to be:

1. Did the City violate the Contract and Directive 116 when it adjusted the work hours of Officer Harvot to meet a need to handle activities related to the last day of school at the University of Wisconsin-Oshkosh?
2. If so, what is the appropriate remedy?

The issue may be fairly stated as follows:

1. Did the City violate the Contract and/or Directive 116 on May 12, 2000, when it adjusted the work hours of Officer Harvot rather than offering the hours to off-duty second shift officers?
2. If so, what is the appropriate remedy, both as to Officer Harvot and the off-duty second shift officers?

RELEVANT CONTRACT LANGUAGE

...

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this Agreement, the City reserves and retains, solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Association. Nothing herein contained shall divest the Association from any of its rights under Wis. Stats. Sec. 111.70.

...

ARTICLE II

WORK WEEK

The normal work day shall consist of eight (8) hours, and consist of the following schedule:

Five (5) days on duty and two (2) days off and

Five (5) days on duty with three (3) days off.

Officers shall be paid in accordance with the rates listed in Schedule A. These rates include a ten-dollar (\$10.00) Bi-Weekly briefing pay allowance. Those officers working the 5-2, 5-2 schedule shall be provided with 16 additional days to be taken as time off during the calendar year. Any days not taken off by December 31st shall be forfeited by the employee.

...

ARTICLE IV

COMPENSATORY TIME

Work done in excess of the normally scheduled work day or work week shall be compensated at the rate of time and one half in either compensatory time or cash as the officer may choose. All compensatory time will be recorded and may be

used during the month in which it accrues subject to the approval of the department head. Employees may maintain a compensatory time balance of no more than one hundred sixty (160) hours. Unused balances of compensatory time or time accumulated in excess of one hundred sixty (160) hours shall be paid on the first pay period following the quarter in which it was accrued at the effective rate of pay when such time was earned. Officers shall not be allowed to carry over more than eighty (80) hours from year to year. The formula for computing the hourly rate shall be: Bi-Weekly rate + educational divided by 77.2 Hours.

. . .

ARTICLE V

CALL IN TIME AND COURT APPEARANCE

An officer called to return to duty or appear in Court at some time other than his [or her] regular scheduled duty day shall receive three (3) hours pay for the call or appearance unless the call or appearance is canceled by 7 p.m. of the day prior to the call or appearance. The officer, in addition, shall receive time and one-half for the time spent on the call or appearance.

Officers called or scheduled to appear in court during vacation shall be paid three (3) hours call-in pay plus time and one-half for time worked and, in addition thereto, shall receive an additional day of vacation returned. If notification of cancellation is given 24 hours prior to the start of vacation, no call pay is given. If cancellation occurs thereafter, a vacation day return shall be made. Vacation shall be defined to include off-days commencing on the officer's last day of work before the vacation and his/her first day of work after vacation. This provision shall apply only when vacation is taken in one week blocks. On trials lasting more than one day, no additional call-in pay shall be given after the first day. When an officer is on sick leave or workers compensation, the officer shall be considered to be working and will receive no extra pay for appearing in court on that date providing the appearance does not exceed eight (8) hours.

A call is defined as a request to return to duty at some time other than the regularly scheduled time not scheduled at least twenty-four (24) hours in advance and not immediately following the officer's regularly scheduled shift.

No call or Court Appearance shall preclude an officer from working his/her regularly scheduled shift except by his [or her] request and upon approval of his [or her] department head. An officer called to return to duty and then called

back and told not to return to duty is entitled to one (1) hour of call-in. If the officer returns to duty at the Police Department, he/she shall receive 3 hours call time. If the officer declines the call, no call-in is paid.

...

ARTICLE X

PREVIOUS BENEFITS

The employer agrees to maintain in substantially the same manner, all benefits, policies, and procedures related to wages, hours, and conditions of employment that are mandatory subjects of bargaining not specifically referred to or altered by this Agreement.

...

ARTICLE XIII

RULES & EVALUATION REPORTS

The Association recognizes that the employer may adopt and publish rules from time to time, however, the employer shall submit such rules to the Association for its information prior to the effective date.

For this purpose, rules shall be defined as any rules, regulations, policies, directives, and postings published by the Department or the city affecting the department. Such rules shall be submitted to the Wage Board Chairman and the Association President and shall also be posted for knowledge and record. All such rules shall bear the signature of the Chief of Police or his designee. In the event of a dispute to such rules, the Association shall have fifteen (15) days after inception to dispute such rules through the grievance procedure.

Evaluation reports of employees shall be submitted to the evaluated employee in final form and identical to those filed in the personnel office and in the office of the Chief of the Department.

...

MEMORANDUM OF UNDERSTANDING

I. As an addition to this Contract, the parties agree to attach this Memorandum of Understanding which is the result of a Stipulation entered into between the parties and which defines in-service training. The Memorandum of Understanding is as follows:

The parties agree: 1) that the Chief can require employees to attend in-service training; 2) that employees will, in the future, have the right to select dates of attendance, based on seniority on shifts; and 3) that the City recognizes it has the obligation to bargain the effects of its determination of in-service training on wages, hours, and working conditions, including, but not limited to, scheduling and compensation while attending.

...

RELEVANT POLICIES AND DIRECTIVES

...

DIRECTIVE

116 - Overtime Work

Effective Date: 01/29/96

Objective: Standardization of procedures for overtime assignments

Definitions:

Unanticipated Shift Shortage - A staffing shortage that occurs within 24 hours of the start of an affected shift.

Anticipated Shift Shortage - A staffing shortage that is known more than 24 hours in advance of the affected shift.

Emergency - An emergency is an unanticipated circumstance which requires immediate police action to quell a disturbance or preserve the public peace or safety.

Scheduled event - A known, pre-arranged activity such as EAA Traffic assignments.

Procedures:

Unanticipated Shift Shortage:

- Unanticipated shift shortages shall be filled by seniority from the preceding shift.
- Shift shortages occurring after 4:00 pm, but identified prior to 2:30 pm will be offered by seniority to Officers working 6:30 am - 2:30 pm and 8:00 am - 4:00 pm. No call in pay will be paid.

- Reasonable efforts will be made to allow for 2 hours minimum and 4.5 hours maximum of overtime, but officers may be released at anytime if not needed.
- If it is known that Officers will be needed for more than 4.5 hours, off duty Officers from the affected shift will be called by seniority.
- If no Off-duty Officers are available, the shortage is to be filled by seniority within the affected division.

Anticipated Shift Shortage:

- Shift shortages anticipated more than 24 hours in advance will be first offered by seniority to off-duty Officers from the affected shift, and then by seniority to Officers from the affected division.

Scheduled Events:

- The scheduling of overtime for scheduled events such as EAA traffic assignments will be made available on the basis of departmental seniority unless:
 - a. The activity requires special training or unique characteristics which a senior Officer may not possess.
 - b. The assignment of a senior officer results in increased overtime due to the costs of call in, or
 - c. The time required to locate the more senior Officer could adversely affect the success of the operation.

The above provisions do not apply in emergency situations or extensions of assignments.

...

POLICY 200 : PATROL SERVICES

...

200.05 SHIFTS

The Oshkosh Police Department will make patrol units available twenty-four hours a day, seven days a week to the citizens of the City of Oshkosh. Shift staffing will be based on calls for service and overall patrol workload.

Continuous 24 hour coverage will be accomplished through the overlap of established shifts and by a separate resume for overlap officers. Over-lapping shifts for the first shift will be accomplished with the use of one-on-one cars assigned to that shift. Over-lapping of the second and third shifts will be accomplished with officers assigned to earlier/later shift starting times so as to provide over-lapping coverage while other officers are in resume.

The Captain of the Patrol Services Bureau (PSB) will make all shift assignments based upon seniority, officer preference and Departmental needs.

At the beginning of each shift, and during the resume for overlap officers, the patrol supervisors will conduct roll call in the Resume Room of the Safety Building. During this time the patrol supervisors will notify officers of their assigned patrol number and vehicle, provide information concerning daily patrol activity and concerns assign complaints carried over from the previous shift, notify officers of changes in schedules inform officers of new policy and directives and evaluate readiness for patrol.

Each patrol sergeant will be assigned personnel on the shift for the purpose of formal supervision and evaluation. During patrol duties, supervisors on duty will be responsible for the supervision of all on-duty shift officers, non-sworn personnel, or any other employee assigned to work during the shift.

Following resume each patrol officer must check the assigned vehicles, complete a vehicle check sheet and begin or continue patrol duties. Unless there is business at the safety building near the end of the shift, officers must remain available in their vehicle until five minutes before termination of the shift.

...

BACKGROUND

There is virtually no disagreement about the facts underlying this grievance. Employer provides general governmental services to the people of Oshkosh, Wisconsin, including police protection. The Union is the exclusive bargaining representative for the sergeants and officers in the Police Department. Marilyn Harvot is an officer who, in May of 2000, was assigned to the first shift, from 6:30 a.m. to 2:30 p.m. She was one of the two least senior officers assigned to that shift.

Officers work eight hour shifts, on a 5-2, 5-3 schedule. They are assigned to their normal shift hours pursuant to Departmental Policy 200, by posting into a vacancy by seniority. The Department runs three primary shifts and two overlap shifts:

1 st Shift	6:30 a.m. to 2:30 p.m.
2 nd Shift	2:30 p.m. to 10:30 p.m.
3 rd Shift	10:30 p.m. to 6:30 a.m.
Overlap	8:00 a.m. to 4:00 p.m.
Overlap	8:00 p.m. to 4:00 a.m.

Non-probationary officers are not routinely rotated through the shifts.

May 12, 2000, was the date set for graduation ceremonies at the University of Wisconsin-Oshkosh. Graduation generates a good deal more traffic than normal and also a great deal of business in the evening for some of the bars. In reviewing the work schedules for the day, Captain Jay Puestohl decided that there should be additional coverage on the second shift. He decided to change the hours of two first shift officers rather than calling in anyone on overtime. Puestohl had the officers polled by seniority to determine if there were any volunteers. There were none, so on May 10th he called Officers Harvot and Strasser, the two least senior officers, and told them that they would work from 10:30 a.m. to 6:30 p.m. on the 12th. Officer Harvot worked the hours and was paid her normal rate of pay for the day. Officer Strasser called in sick and no one was assigned to take his place.

The Union filed the instant grievance on the 12th, protesting the changing of schedules for first shift officers instead of offering the time to off-duty second shift officers on an overtime basis. The grievance cited Departmental Policy 200, Directive 116 and the shift preference sheet for 2000. Departmental Policy 200, Section 200.05, deals with the shifts members of the Department work. It provides, inter alia, that “[The] Captain of the Patrol Services Bureau (PSB) will make all shift assignments based upon seniority, officer preference and Departmental needs.” In practice, this means that senior officers are able to claim vacancies on their preferred shifts. An annual sign up sheet is used to express officer preferences for shifts. Directive 116 is the policy governing overtime in the Department. It addresses both unanticipated shortages on a shift and anticipated shortages. In the event of an anticipated shortage on a shift, known more than 24 hours in advance, the Directive requires that the hours be offered in seniority order to the off-duty officers from that shift. If none wish to work, the hours are then offered to other officers from the division in which the shortage occurs.

The Department denied the grievance, asserting that there was no overtime to be worked and that it had a practice of changing shift hours. The grievance was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the July 7th hearing, in addition to the facts recited above, the following testimony was taken:

Captain Jay Puestohl testified that Harvot was assigned to her normal patrol on the 12th until 2:30 p.m., when she was reassigned to the graduation ceremony. Puestohl said that he did not schedule officers to this work on an overtime basis because he believed that overtime was not necessary. In his opinion, the first four hours of the first shift were adequately

covered, but that it would be desirable to have extra coverage on the first four hours of the second shift. Puestohl said that he did not normally do the shift scheduling, so he could not be sure, but he believed that it was not uncommon to change shift hours for purposes other than training without paying overtime. He conceded that officers select shifts by posting and seniority and that shifts were not normally changed, but expressed the opinion that shift hours could be changed without paying overtime, so long as at least 24 hours notice was given before the change.

On cross-examination, Puestohl said that the most common examples of shift adjustments were Water Fest, parades, Fourth of July, student move-in day, any very large student parties, Community Policing and background investigations. In all of these cases, shift hours are adjusted and overtime is not paid. On re-direct examination, Puestohl stated that he was not sure whether the Water Fest and Fourth of July shift adjustments were done on a voluntary basis, but that he knew the background investigation shift changes were voluntary.

Officer Tom Lichtfuss testified that he has been a member of the Department for 18 years and is a member of the Association's Committee. Lichtfuss said that he was not aware on any instance of a non-probationary officer having his or shift hours involuntarily changed without receiving overtime pay. He acknowledged that this happened with sergeants, but said that that was only because they had to cover for lieutenants. Lichtfuss expressed the opinion that the rescheduling on May 12th was to cover an "anticipated shift shortage" under Directive 116 and the additional hours should therefore have been offered to off-duty second shift officers as overtime. On cross-examination, Lichtfuss agreed that there was nothing in the collective bargaining agreement that specified the hours of the shifts or that dealt with changes in hours.

Chief David Erickson testified that he has been with the Department since 1970 and has been the Chief of Police for five and a half years. Erickson testified that the number of officers required on a given shift was a decision within the discretion of the shift commander. The factors in making this decision include the day of the week, the time of the year, weather conditions and any known special events. The Chief stated that he was unaware of any restriction in the labor agreement on his ability to adjust hours or staffing levels. He cited training as the most common reason for adjusting hours and said no overtime was ever paid for those adjustment, whether the change was voluntary or mandatory. Background investigations, assessment of applicants for the police force and special details were the other common examples. He recalled that when he was the captain of patrol he had reassigned junior officers to new shifts on two occasions, without paying premium pay. Reviewing seven exhibits, he cited them as examples of officers having their shift hours adjusted without overtime being paid.

Chief Erickson expressed the opinion that Directive 116 was not relevant to this dispute, since it governs overtime distribution and there was no overtime in this case. Nor was there a need for overtime here. He observed that Officer Strasser had called in sick and had

not been replaced. Had there been a manning shortage or some other compelling need for overtime, Strasser would have been replaced. The Chief said that the Hahn Award clearly gave him the right to avoid overtime by adjusting shift hours and that was what was done here.

On cross-examination, Chief Erickson reviewed each of the seven documents he had testified about on direct examination and agreed that all of them were cases of voluntary shift changes or of training where a specific policy authorized a change in hours.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that there are two glaring defects with the actions taken by the City. The manner in which the hours were assigned violated Departmental directives and the manner in which Officer Harvot was paid violated Article IV of the labor agreement. Addressing the first of these defects, the Union argues that the City violated Directive 116 by failing to offer the extra hours worked by Officer Harvot to off duty second shift personnel. The Directive is clear and unambiguous that “Shift shortages anticipated more than 24 hours in advance will be first offered by seniority to off duty officers from the affected shift and then by seniority to officers from the affected division.” Captain Puestohl testified that he perceived a need for additional staffing on the second shift on graduation day. He knew of this need well in advance. Yet rather than call the off-duty second shift personnel, he changed Officer Harvot’s hours of work. This simply ignores the language of the directive. Even if the graduation is treated as a “scheduled event” the City violated the directive. In the case of scheduled events, extra work must be offered “on the basis of departmental seniority.” Either way, the City cannot square its actions with the language of Directive 116.

The City’s claim that Directive 116 is inapplicable because, by changing Harvot’s hours, no overtime was worked, cannot be accepted. It does violence to other portions of the contract, specifically the definition of overtime in Article IV: “Work done in excess of the normally scheduled work day or work week shall be compensated at the rate of time and on-half...” It also ignores the references in Policy 200 to “established shifts.” If the City can simply change officers’ hours of work to avoid overtime and thus seniority, there are no established shifts and there are no normally scheduled work days. Accepting the City’s view means, in effect, that despite the elaborate departmental policies and the negotiated provisions of the labor agreement regarding shifts, overtime and assignments, the employees’ work schedules are whatever the City wants them to be, whenever the City wants them to change. That cannot be reconciled with the principle that contracts must be read as a whole, giving full meaning and effect to each provision.

The City's citation of past instances in which schedules were changed without paying overtime are inapposite. While it is true that officers have worked different hours for events in the past, these were voluntary changes. Officer Lichtfuss testified, there has never been an involuntary change in shift hours without the payment of overtime and that practice is the best evidence of the parties' understanding of how such situations must be handled. The clear language of the Directive requires that four hours of overtime be offered to the two most senior members of the second shift who were not offered the opportunity to work.

The City also violated the contract in the way in which Officer Harvot was compensated. Officer Harvot was paid only straight time for the hours worked outside of her normal schedule. It is undisputed that Officer Harvot normally works the first shift, from 6:30 a.m. to 2:30 p.m. On May 12th, the City directed her to work from 10:30 a.m. to 6:30 p.m. Article IV of the contract provides that officers are to be paid time and one-half their normal rate for work "done in excess of the normally scheduled work day..." The normally scheduled workday is that established by the Department under Policy 200, which sets five specific shifts and allows officer to select them by seniority. The clear and unambiguous language of this Article requires premium pay for hours outside of the normal shift and Officer Harvot worked four hours on May 12th that were outside of her normal workday. To hold that she is not entitled to premium pay would eviscerate the officers' seniority and bidding rights and destroy the stability they are entitled to in their private lives. It would also contradict the City's own directives. Directive 125, applicable to training, allows for changes in the normal work schedule to accommodate training. Voluntary changes do not result in overtime under that Directive, but involuntary changes do yield overtime. There is no similar language allowing for schedule changes under Directive 116, Policy 200 or Article IV. This indicates that the City has no such generalized right and mandates a penalty for their unilateral actions in this case.

The City's reliance on the Management Rights clause as authority to create shifts at its whim is misplaced. That is a general provision and it is axiomatic that general provisions do not govern over specific provisions. The rules and directives are incorporated into the contract by reference and Policy 200 specifically establishes the Department's shifts. Likewise, the City cannot rely on the arbitral precedent it cites. While it argues that Arbitrator Greco's CITY OF RHINELANDER case applies to this case, the critical facts are not at all similar. In RHINELANDER, Greco found that there was no relevant contract language requiring overtime for shift changes and a 20-year practice of making such changes without paying overtime. Here, the contract incorporates specific policies clearly establishing the normal shifts, and the practice is that shift changes have been compensated with overtime. As for Arbitrator Hahn's 1997 decision in Oshkosh, the arbitrator did rule that the City did have unfettered discretion to change schedules to avoid overtime. However, he made his ruling on an incomplete record. Arbitrator Hahn did not have the benefit of Policy 200 in the record before him, and thus, did not realize that there were fixed shifts in the Department, modifying management's discretion in that area. Further, the record in that case included evidence of three instances in which

sergeants' schedules had been changed without paying overtime. In this record, there is evidence of voluntary changes in shift hours, but there is no evidence of any prior instance where an officer's shift had been involuntarily changed without the payment of overtime.

Because the contract language is clear and because the general provisions of the Management Rights clause cannot trump the specific language establishing fixed shifts, time and one half for work outside of the normal schedule and the order for claiming extra work, the Union urges that the arbitrator grant the grievance, compensate the second shift officers who were entitled to the additional hours on May 12th, and compensate Officer Harvot for the change in her shift hours.

The Position of the Employer

The City takes the position that the grievance is without merit and should be denied. Certainly if the City decides to schedule overtime, the provisions of Directive 116 govern the distribution of that overtime. However, the contract contains no guarantee of overtime, nor anything that can be construed as a prohibition on the City's right to adjust schedules so as to avoid creating overtime. The scheduling of hours is a reserved right of management and it can only be abrogated by other specific contract language. Arbitrator Hahn made this point in 1997, when he considered this same issue in the context of a case involving the adjustment of a sergeant's schedule. He found that the City had the right to make such adjustments and that there was no restriction on that right.

The contract contains no restriction on scheduling, other than the specification that the normal workday is eight hours and the City's unilateral directives and policies likewise contain no restrictions. Policy 200 makes reference to shifts, but it does not define the times of those shifts. The contract does allow for overtime pay when officers work in excess of the normal workday, but that is not what happened here. The normal workday is eight hours and Officer Harvot worked only eight hours on May 12th. The City notes that, under Article V, it has the right to schedule employees outside of normal hours, paying call-in pay if it fails to give 24 hours' notice, but paying no premium if it gives adequate notice. Forty-eight hours notice was given in this case, and thus, no premium was due.

The City argues that arbitral precedent amply supports its position here. In the CITY OF RHINELANDER, Arbitrator Greco decided that overtime was not due to a dispatcher whose hours of work were changed, but who still worked only an eight-hour shift. As with RHINELANDER, the grievant here worked the normal hours and no premium pay is owed. More to the point, as noted above Arbitrator Hahn ruled in favor of the City's position when exactly the same issue arose with respect to sergeants. There is no difference between the rights of sergeants and patrol officers under the premium pay and scheduling provisions of this contract and there can be no different result in this case. This arbitrator must follow the law of the contract and following that law, as enunciated by Arbitrator Hahn, he must deny the grievance.

Finally, the City notes that the Police Department has routinely changed officers' hours in the past without paying overtime. Training, festivals, background investigations, Assessment Centers and Community Policing Adjustments are all occasions for which the City has changed shift hours of employees without paying overtime. Granted that some of these changes were voluntary, others were not, and there is no evidence that any premium has been paid.

In response to the Union, the City asserts that the Union's reliance on Directive 116 is based on a false premise. The Union assumes that there is overtime work here, and thus, the Directive controls the assignment of that work. If this were overtime work, the Union would be correct. However, the City is under no obligation to schedule overtime or to make it available. No employer is, except by operation of some specific contract language. If the City can avoid overtime by reallocating officers, it is entitled to do so. That is the holding of Arbitrator Hahn.

Likewise, the Union misunderstands Policy 200. The policy does, as the Union contends, address the manner in which shifts are claimed. However, it also speaks to daily assignments and specifies that "shift commanders must consider appropriate distribution of officers throughout the city, expected work load, special events or investigations, the expertise and input of officers" and requires that shift assignments be based upon "departmental needs." The daily assignment given to the Grievant on May 12th was determined by special events and the needs of the Department.

Nothing in the contract, nor in the Departmental rules, mandates the result sought by the Union. Moreover, the issue in this case has already been disposed of by Arbitrator Hahn. Accordingly, the City asks that the grievance be denied.

DISCUSSION

This grievance arose from the City's decision to change Officer Harvot's hours on May 12, 2000, so that she overlapped the second shift by four hours. The central issue in this case is whether the City has the right to change a junior officer's shift hours to avoid paying overtime. If it does, the overtime allocation system of Directive 116 does not come into play and the off-duty second shift officers had not claim on this work. If the City does not have the right to change Harvot's hours, the four hours of second shift work would necessarily have been overtime and Directive 116 would entitle the second shift officers to a chance at the hours on a seniority basis.

This same issue was addressed in a previous arbitration between these two parties, involving a sergeant named Tony Duff whose hours were changed to cover for the absence of a

lieutenant on another shift. In CITY OF OSHKOSH (POLICE), MA-9896 (HAHN, 9/22/97), the arbitrator squarely held that Directive 116 was only applicable to distribution of overtime hours and that the City had the right to adjust shift hours so as to avoid overtime:

. . .

Standing by itself, 116 is persuasive that when there is an anticipated shift shortage the shortage must be filled by offering the hours to off-duty officers. However, 116 cannot stand alone but must be considered in light of the parties' labor agreement and the practice of the parties. The Management Rights clause is broad and can only be specifically modified. That article without modification gives the City the right to assign officers to shifts as it wishes. Management would also have the right to determine the number of supervisors per shift. Thus, without 116, Management would have the right to determine how it was going to fill a shift shortage.

There is no issue that once the City decides to fill a shift shortage with off-duty officers 116 applies. The Directive clearly defines who and how the off-duty officers will be given the opportunity to work. Directive 116 was modified and became effective on January 29, 1996. This revision added language controlling the filling of a shift shortage in an anticipated situation where the previous 116 only covered emergency and unanticipated situations. [Footnote omitted] The Union argues in its brief that under Articles X and XIII of the labor contract, it would have filed a grievance if it had thought it was giving up the right to have off-duty officers called in under the revised 116 that added the language about anticipated shift shortages. [Footnote 3 from the original text] There is, however, no evidence as to the Union's understanding of 116 other than the instant grievance. The Union did not offer any evidence that the City always filled shift shortages under 116 and never transferred officers to fill a shift shortage so the City would not have to incur overtime. The Union concedes that the City can do as it wishes when lieutenants fill in for other lieutenants. [Footnote omitted] The Union further argues both at the hearing and in its brief that there is no need to consider what went before the current 116 because it is only since the current 116 that anticipated shift shortages were covered. [Footnote omitted]

[/Footnote 3 from the original text] The Union has the right under Article XIII to challenge directives of management through the grievance procedure. Article X is essentially a maintenance of benefits or standards article.

. . .

To rule in favor of the Union's interpretation in this case would mean that in every situation where there was a shift shortage, the City would be obligated to incur overtime. The record does not support this interpretation. The contract itself gives the City discretion as to how it will fill shift shortages. The evidence of practice establishes that the City generally exercised that discretion by transferring officers to avoid overtime. In this context, it is unreasonable to conclude that in a unilaterally promulgated directive, the City would give up its discretion to avoid overtime obligations where possible. If it did give up its right, it is the Union's burden to prove that it did, and the Union failed to do so.

Directive 116 states as its objective "Standardization of procedures for overtime assignments." The word assignment is critical. It implies that first there has to be an assignment. The Management Rights clause absent a specific exception gives management that right; the Union, in this case, did not offer evidence or argument otherwise. The arbitrator finds that without more it is just too large a leap to say that the City is required in every shift shortage situation to assign overtime. The more persuasive result, based on the record, is that the City can fill shift shortages by transferring on duty officers to another shift, but when that is not possible and it is necessary to call in off-duty officers to an overtime situation, then the procedures of Directive 116 apply. . . .

. . .

In Article XVI of the labor agreement, the parties have agreed that "[The] decision of the arbitrator shall be final and binding on the parties, subject to judicial review." The plain meaning of this language is that once an issue has been submitted to arbitration, and an arbitrator has interpreted the contract, the parties are bound to that interpretation, unless the Award is overturned by a court. This presumption is strengthened considerably where the parties subsequently negotiate a successor agreement without changing the language underlying the Award. Here the Hahn Award was not overturned by a court and the parties negotiated a 1998-2000 contract that leaves all of the relevant language intact. Thus, unless there are compelling distinctions between this case and the Duff case, the Arbitrator is bound to follow the prior arbitrator's holding.

The Union urges that the Award in the Duff case is not controlling for two reasons. First, because it deals with sergeants, who are called upon to fill in for lieutenants and act as shift commanders, while this case deals with routine patrol. Second, because Arbitrator Hahn did not have the benefit of Policy 200 in the record before him when he ruled that shift assignments were subject to the unfettered discretion of the City. Thus, he may have been right on the record before him, but his result is wrong when all of the facts are known.

With respect to the argument that the Duff case is distinguishable from this one because it involved sergeants, this is the classic distinction without a difference. Reading the record in both cases, it is apparent that sergeants may be called upon to work shift commander and supervisory overtime that is not available to patrol officers. However, that merely goes to whether an employee is qualified to work the available hours, not to the employee's right to claim or refuse those hours. Sergeants and officers are both in the bargaining unit and neither Directive 116 nor the labor agreement makes any distinction between the rights of sergeants and the rights of officers where overtime procedures are concerned. The type of work that is available to each set of employees may differ, but the basic rules governing the assignment and/or claiming work for which the employee is qualified are identical. It is those rules that Arbitrator Hahn interpreted in his Award and there is no apparent basis for distinguishing between ranks in applying his Award.

The argument that Arbitrator Hahn did not have Policy 200 in the record of his case is slightly more substantial. While the Chief of Police testified before Arbitrator Hahn that shifts are claimed by seniority bids and are permanent assignments, the record in that case did not include the documentary basis for the practice. Arbitrator Hahn's Award contains some language that can be read as holding that there is no limitation on the City's right to change officers' shift assignments. Obviously, in light of Section 200.05 of the Policy, any such reading of the Hahn Award is too sweeping. That Section makes reference to "established shifts" and to shift assignments "based upon seniority, officer preference and Departmental needs." The Policy contemplates that officers will claim their regular shifts by exercising seniority rights and that is what in fact happens in the Department. Officers are not routinely moved from shift to shift and even when changes are made, as in this case, the hours are offered on a seniority basis and, if there are no takers, the least senior officers are assigned. Thus, the City does not have carte blanche in the method it uses to adjust coverages in the schedule.

While the fact that Arbitrator Hahn did not have Policy 200 in the record may serve to limit his dicta somewhat, I am not persuaded that it invalidates his essential holding. Policy 200 contemplates that there will be established shifts and that officers will claim shift assignments on the basis of seniority. As noted, the Chief testified in the Duff case to the practice of making permanent shift assignments by seniority. Arbitrator Hahn was not unaware of the overall substance of Policy 200 when he made his ruling that the City had the right to avoid overtime by adjusting shift hours. The Union reads the Policy as a guarantee that the shift claimed by seniority will be the hours worked by every officer, every day, no matter what the workload is and no matter what circumstances dictate. That reading effectively deletes the words "and Departmental needs" from the list of criteria for making shift assignments under Policy 200. Certainly if the City routinely adjusted officer hours, there might be an argument that seniority rights under Policy 200 were being ignored. That is not the case. All parties agree that an involuntary change in shift hours is an exceptional event in this Department.

The parties have agreed that an arbitrator's award will be final and binding. Arbitrator Hahn ruled in 1997 that the City had the right to adjust an employee's shift hours to avoid paying overtime. The language and rules underlying his Award are unchanged from that time, even though there have been intervening negotiations. The fact that Hahn's Award dealt with sergeants while this case involves patrol officers, does not undercut his reasoning. Neither is the basic holding of his Award affected by the fact that he had the substance of Policy 200.05 in the record, but not the specific verbiage of the Policy. Because I conclude that the parties and the Arbitrator are bound by the prior interpretation of the contract and because there are no material distinctions between this grievance and the one submitted by Sergeant Duff, I accordingly find that the grievance must be denied.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The City did not violate the Contract and/or Directive 116 on May 12, 2000 when it adjusted the work hours of Officer Harvot rather than offering the hours to off-duty second shift officers.
2. The grievance is denied.

Dated at Racine, Wisconsin, this 5th day of December, 2000.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator