

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
DePERE POLICE BENEVOLENT ASSOCIATION
and
CITY OF DePERE

Case 70
No. 60420
MA-11606

Appearances:

Parins Law Firm, S.C., by **Mr. Thomas J. Parins**, on behalf of the DePere Police Benevolent Association.

Ms. Judith Schmidt-Lehman, City Attorney, on behalf of the City of DePere.

ARBITRATION AWARD

On April 9, 2001, the DePere Police Benevolent Association, hereinafter the Association, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the City of DePere had committed certain prohibited practices in violation of the Municipal Employment Relations Act. Thereafter, the City of DePere, hereinafter the City, filed an answer denying it had committed any prohibited practices and requested that the complaint be dismissed and the matter deferred to the parties' contractual grievance procedure. The undersigned, David E. Shaw, was subsequently appointed as Examiner in the matter and a hearing was scheduled. At hearing before the undersigned, the parties mutually agreed to defer the matter to grievance arbitration and requested that the hearing proceed as a grievance arbitration hearing with the undersigned to proceed as the Arbitrator. The City also waived any technical objections it might have to the grievance proceeding to final and binding arbitration. Hearing was held before the undersigned on July 18, 2001, in DePere, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs by October 29, 2001.

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and stipulated that the Arbitrator would frame the issues to be decided.

The Association proposed the following statement of the issues:

Whether the last paragraph of Article 8 of the contract which addressed requests for off time, holiday time, and vacation has a meaning as set forth in the past practice of the parties in administering this provision to allow officers to take off time, holiday time, and vacation as long as it does not reduce the staffing level below minimum staffing, with the exceptions of the bicycle patrol and special events, in the manner testified by Sergeant Stephenson.

The City offered the following statement:

Whether the City may unilaterally increase staffing levels pursuant to Articles 3 and 8 of the Collective Bargaining Agreement.

The Arbitrator concludes that the issues may be stated as follows:

Did the City violate Article 8 of the parties' Collective Bargaining Agreement when it denied the requests of Sergeant Thompson and Officer Van Price to take compensatory time off at the times in question?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE 3

Management Rights

The Association recognizes that, except as otherwise provided in this agreement or as may affect the wages, hours, and working conditions of the members of the Association, the management of the City and its business and the direction of its work force is vested exclusively in the employer in that all powers, rights, authority, duties, and responsibilities which the City had prior to

the execution of this agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulations, and laws, and not the subject of collective bargaining under Wisconsin law, are hereby retained. Such rights include, but are not limited to, the following:

- a. To direct and supervise the work of its employees;
- b. To hire, promote, and transfer employees;
- c. To lay off employees for lack of funds or other legitimate reasons;
- d. To discipline or discharge employees for just cause;
- e. To plan, direct, and control operations;
- f. To determine the amount and quality of work needed;
- g. To determine to what extent any process, service, or activity shall be added, modified, or eliminated.
- h. To introduce new or improved methods or facilities;
- i. To schedule the hours of work;
- j. To assign duties;
- k. To issue and amend reasonable work rules;
- l. To require the working of overtime hours when necessary in the performance of City business.

. . .

ARTICLE 8

Hours of Work

The established schedule of work for shift employees shall consist of six (6) workdays followed by three (3) off days on a repeating cycle, with each day consisting of an eight (8) hour shift. The established schedule for personnel

assigned to non-shift duties shall be five (5) eight (8) hour workdays scheduled Monday through Sunday. The schedule of work for probationary police officers participating in the Field Training Program shall be established by the Chief or the Chief's designee. Probationary officers shall not work alone or fill staffing needs while in the Field Training Program.

Employees in the classification of patrol officer assigned to duties of Police School Liaison Officer or Community Policing Officer shall receive 9 "schedule equalization days" off per year. Such days will be prorated the first and last calendar year of the assignment. Days earned but not taken in the same calendar year cannot be accumulated and will be paid out with the last payroll of that calendar year. Employees shall be entitled to take schedule equalization days with the approval of the Chief or the Chief's designee and in accordance with personnel requirements of the Department.

The annual signing of shift assignments will be followed as closely as possible; however, the Administration reserves the right to assign manpower to fit the needs of the department.

Needs of the department for purposes of this Article include, but are not limited to, situations involving training programs, schools, special assignments, long-term absences or vacancies, vacations, long-term illness, special events, officer requests, and discipline problems.

Movement of officers from regularly assigned shifts will not create overtime unless it causes more than 8 hours of work in a 24 hour period as defined in Article 9.

An employee shall be entitled to change hours of work when the employee is able to secure another employee to work in that employee's place provided:

- (1) The employee's request for vacation, holiday, or compensatory time off has been refused;
- (2) Substitution does not impose any additional costs on the City;
- (3) The Chief of Police or the Chief's designee is notified and approves of the substitution;

- (4) Neither the department nor the City is held responsible for enforcing any agreement made between employees. It is understood that the employee's first responsibility is to the employee's position with the City.

Shift Replacement

Six day block vacations.

Whenever a shift drops below minimum staffing because of vacation, it will be increased to the minimum staffing in the following manner:

The junior officer in the same group number from a shift with manpower above the minimum will be reassigned to the shift that is below the minimum.

If two shifts have manpower above the minimum, then the needs of the department will determine from which shift the officer will be reassigned.

Less than six day block vacations.

In cases where less than six day block vacations have been signed in the vacation book and approved and it causes the staffing levels to drop below the minimum, the Administration reserves the right to reassign staff giving due consideration to overtime required and then seniority.

Emergency situations.

The Chief reserves the right to assign staff to fit the needs of the department when the Chief or the Chief's designee determines that an emergency situation exists.

Extended Sick Leave.

Any sick leave of three days or more will be considered extended sick leave and staff will be reassigned to meet the minimum staffing level in the same manner as the six day block vacation.

Short Term Sick Leave.

If an officer calls in sick and his/her shift is not below the minimum staffing level, then the shift will work with the staff available on that shift. If an officer calls in sick and his/her shift would drop below the minimum staffing level, then a replacement will be called by using the call-in book in the Communications Center. If no officer volunteers to work, then the junior officer from the preceding shift will be held over for four hours and the junior officer from the next shift will be notified to come in four hours early.

Off Time, Holiday Time, Schedule Equalization Days, and Vacation Days not Signed in Vacation Book.

Requests for off time, holiday time, and vacation days not signed in vacation book will be addressed as to the minimum staffing for the shift requested off. Staff will not be reassigned to accommodate off time, holiday time, schedule equalization days or vacation days not signed in vacation book.

The parties also cite an Addendum to their Agreement which reads, in relevant part, as follows:

ADDENDUM

This 19th day of December, 19 95, the City of De Pere and the De Pere Police Benevolent Association, as a term and condition of settlement of the attached Agreement Between the City of De Pere and the De Pere Police Benevolent Association for years 1994 through 1996, hereby agree as follows:

1. That the following amendment be made to the Policies and Procedures Manual of the De Pere Police Department under the understanding that such amendment shall not be unilaterally changed but shall remain in effect during the term of this contract unless such modification is collectively bargained by the parties:

MINIMUM STAFFING

- (1) There shall be a minimum of three (3) patrol officers on duty at all times during the power shift (generally 7:00 p.m. to 3:00 a.m.) when the minimum number of patrol officers on duty shall be four (4). On evenings when Municipal Court is in session, the power shift shall be scheduled to commence at the same time as

Municipal Court and the four (4) person minimum shall apply during the rescheduled power shift. For purposes of this amendment, "on duty" shall include, as determined under the reasonable discretion of the Chief, circumstances where the officer is performing duties related to patrol duties or where such officer is available for timely response. In addition, the Chief shall have the authority from time to time to assign officers not within the bargaining unit (i.e., Captains or Chief) as one of the above described officers on duty at the time that such non-union member is regularly scheduled to work, provided, however, that any person so assigned shall be prepared and able during the shift in question to respond to any request for assistance in the same manner and effect as a member of the Association would. In addition, it is understood that uniformed sergeants will be considered "patrol officers", officers performing Municipal Court duty, officers at Brown County Court for testifying purposes, officers delivering prisoners to Brown County Jail, and other similar patrol related duties, shall be considered "on duty" for purposes of determining minimum staffing levels. It is also understood that investigators (plainclothes personnel performing investigatory functions) shall not be included in the minimum staffing level requirements of this provision.

BACKGROUND

The City maintains and operates the DePere Police Department and David Tellock is the Chief of Police. The Association represents the Department's protective occupation personnel for purposes of collective bargaining and contract administration.

In 1991, the parties agreed to an addendum setting minimum staffing levels for the shifts and who would be counted or not counted toward those levels, and providing that the Chief could assign himself or Lieutenants to be an officer on duty to meet the minimum staffing requirements. In December of 1995 the addendum was amended, in part in recognition that the position of Lieutenant had been eliminated and replaced with Captain, and was made part of the parties' 1994-1996 Agreement which was reached in 1995. 1/ Also agreed upon for inclusion in that Agreement was the wording that is now the last paragraph of Article 8 and which is in issue in this case.

1/ The City noted that the addendum was not attached to the current agreement, but posited that this was simply an oversight. That is consistent with the Chief's testimony in that regard, and both parties take the position they are still bound by the 1995 Addendum.

The parties reached agreement on their current Agreement in October of 2000. Subsequently, there were discussions and written communications between the Association and the Chief regarding changing the work schedule. The Association also requested a change in the number of officers allowed off on vacation; from two in a 24 hour period to 1 off per shift. The Chief eventually implemented a new work schedule and on December 6, 2000, Captain Koser issued the following memorandum which reads, in relevant part, as follows:

To: All Patrol Personnel

From: John R. Koser, Captain

Date: 12/6/2000

Subject: 2001 Shift Bulletin

Attached with this memo is the revised shift bulletin for 2001. Please sign the bulletin as directed by the procedure noted on the bottom of the shift bulletin. You will also need to be made aware of issues not addressed on the bulletin itself.

. . .

The new shift bulletin allows for one officer to be "off" per shift. The 8pm to 4am shift is to be counted with the 10pm to 6am shift. For the purposes of this directive, "off" time is considered vacation, holiday, compensatory or sick time. At times, this may include long term illness.

As of January 1, 2001, the effective date of this shift bulletin, if one officer is already "off" on a shift and another officer calls in "sick" on the same shift, the shift supervisor of the previous shift may use discretion to replace the "sick" officer based on his/her awareness of current call volume, types of calls, and overall need of the presence of another officer. Supervisors should not go below known acceptable department staffing minimums as per contract. We will evaluate the effectiveness of this practice and possibly make modifications as needed.

Vacation will be signed per shift with one officer off per shift. No more than two sergeants may be on vacation at any given time. Again, the 8pm to 4am shift is to be signed and counted with the 10pm to 6am shift.

We hope this new shift bulletin more adequately addresses our department needs for 2001.

This dispute involves the denial of requests to take compensatory time off. On December 31, 2000, Grievant Sergeant Thompson submitted a request to take 24 hours of compensatory time off for his regularly scheduled shifts on January 29, 30 and 31, 2001. On January 2, 2001, Sergeant Thompson's request was denied by Captain Koser on the basis of "staffing needs". On January 4, 2001, Grievant Officer Van Price submitted a request to take 8 hours of compensatory time off on January 10, 2001. On January 5, 2001, Officer Van Price's request was denied by Captain Koser on the basis that "minimum non-sick shift staffing levels for 2 p.m. to 10 p.m. is 4 officers." Both Sergeant Thompson and Officer Van Price grieved the denial of their requests as a violation of the last paragraph of Article 8. There is no dispute that granting either request would not have resulted in falling below the minimum staffing level required in the addendum, nor was there any special event or circumstances taking place on either day that would have required additional staffing above the usual level.

Association witnesses testified that prior to this, requests to take compensatory time off were routinely granted as long as it did not result in falling below the minimum staffing level on the affected shift, except in the case of "special events" that required higher staffing levels or if the officer had already been placed on the schedule for Bike Patrol for the time the officer was requesting to take off. According to those witnesses, what the parties agreed constituted such "special events" were for the most part holidays and events such as "Celebrate DePere", and similar events that brought large gatherings of people into the City or created potential problems requiring more staffing.

Chief Tellock and Captain Janz testified that in the past management had made the decision to grant or deny requests to take compensatory time off based upon the staffing needs of the Department, as determined by management. Chief Tellock conceded that it was "generally true" requests for compensatory time off had been granted as long as doing so did not result in falling below the minimum staffing levels, absent specific events or circumstances that required additional staffing.

Chief Tellock conceded that the Grievants' requests to take compensatory time off were denied on the basis of the policy of allowing only one officer to be "off" per shift as set forth in the December 6, 2000 memorandum and that there were no special events or circumstances that occurred on those days.

The parties attempted to resolve their dispute through the contractual grievance procedure, but were unsuccessful and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association takes the position that the Grievants' requests to take compensatory time off should have been granted, as doing so would not have resulted in falling below the minimum staffing levels and there were no special events or circumstances on the days in question that would have required higher staffing levels. In support of its position, the Association asserts that the language of the last paragraph of Article 8 is ambiguous with regard to when requests for off time will be granted, stating that such requests "will be addressed as to the minimum staffing for the shift requested off." There is no dispute as to how that language has been administered in the past. Absent special events or circumstances, requests for compensatory time off were granted as a matter of course, as long as it did not bring the number of officers on the shift below the minimum staffing levels. Chief Tellock testified that such requests were granted on a "automatic" basis prior to the December 6, 2000 memo from Captain Koser.

Arbitrators have consistently held that where past practice has established a meaning for ambiguous language, that practice becomes part of the contract language itself and can only be terminated by mutual agreement, i.e., by rewriting the ambiguous language of the agreement. As the language of Article 8 is ambiguous as to how requests for compensatory time off will be "addressed" regarding minimum staffing, and the practice of the parties addresses that ambiguity, the practice of automatically granting such requests, if it does not drop the number of officers on the shift below minimum staffing, absent special events or circumstances, must be maintained.

The Association does not dispute the City's right under Article 3, Management Rights, to establish (increase) staffing levels, however, that does not give the City the right to unilaterally change the contractual right of officers to take time off. Article 3 contains an exception to the Management Rights, stating: ". . . Except as otherwise provided in this Agreement or as may affect the wages, hours and working conditions of the members of the Association. . . ." Thus, while the City may establish staffing levels that are above the minimum staffing levels in the contract, it may not use its management rights to unilaterally make other changes in the benefits and contractual rights in the Agreement.

While the witnesses agreed that special events or circumstances that require additional police officers to be on duty have been exceptions to the right of officers to take compensatory time off down to the minimum staffing level, it is also clear that what constitutes "special events" and circumstances was subject to negotiations. Sergeant Stephenson testified that the practice has been that the City articulated a legitimate reason for the need for additional staffing on a particular shift, and if there was disagreement, the parties met and worked out the

differences. While the City disputes this and argues that management unilaterally made those decisions as a matter of management rights, the only evidence the City was able to offer that this occurred in the past was City Exhibit 10, a letter from Chief Tellock to the Association's attorney in November of 1995, referencing a disagreement as to whether or not "bike patrol" was to be considered a special event or circumstance that would prevent an officer from taking compensatory time off. The Chief rejected the grievance on the basis that management could make those decisions without conferring with the Association. However, Chief Tellock conceded that after the letter was sent, the City changed its position and he sat down with the Association and worked out a mutually acceptable solution. The duty to meet and confer before denying a request for time off is an enforceable right. ONEIDA COUNTY (SHERIFF'S DEPARTMENT), Arbitrator Jones, 1/2000.

In its reply brief, the Association first asserts that the City concedes that the Grievants' requests for compensatory time off were denied on the basis of the staffing requirements set forth in Captain Koser's December 6, 2000 memo. The staffing level in that memo is different from the staffing level set forth in the 1995 addendum to the Agreement (City Exhibit 3) which, according to the City, sets forth staffing requirements that are controlling. As the City concedes that Captain Koser's memo set staffing level requirements in excess of the minimum staffing requirements agreed to in the Agreement, and that the Grievants' requests were denied on the basis of the staffing levels in the memo, and as the Chief testified that the requests would have been granted under the wording of the Agreement, the grievances should be upheld.

The Association also asserts that the City cannot rely on the last sentence of the last paragraph in Article 8, as it has no relevance to the issues in this case. That language must be read in conjunction with other provisions of Article 8 relating to the subject matter of "shift replacement". The language simply makes clear that an officer's compensatory time off request will not be granted where it would drop the staffing levels below minimum staffing, even though potentially an officer could be reassigned from another shift to bring staffing levels up to minimum staffing.

The Association disputes the assertion that the City's right to determine staffing levels above the contractual minimum is at issue. While the City may establish how many officers it has on duty at any given time, this does not give it the right to change the terms of the labor agreement. Whatever decisions the City makes regarding staffing levels must be administered under the terms and conditions of the Agreement. The December 6 memo is a unilateral change in contractual language. Further, the Agreement itself provides that the City cannot unilaterally change staffing levels. The 1995 addendum establishes minimum staffing requirements under the Agreement and reads, in relevant part:

“1. That the following amendment be made to the Policies and Procedures Manual of the DePere Police Department under the understanding that such amendment shall not be unilaterally changed but shall remain in effect during the term of this contract unless such modification is collectively bargained by the parties:”

Captain Koser’s December 6, 2000 memo unilaterally changes minimum staffing levels in violation of the above provision.

Finally, the City’s assertion that the past practice claimed by the Association is unclear and unenforceable is simply wrong. The City argued that there was no clear standard as to what constituted a special circumstance that would justify no compensatory time off. As previously argued, when special events or circumstances occurred that required staffing above the minimum, compensatory time off requests were not allowed and when there was disagreement in that regard, the parties met and conferred and worked out a mutually-agreeable methodology. Chief Tellock conceded that was the case. While Captain Janz was more equivocal in that regard, essentially testifying that management decided when and under what circumstances such requests were honored, his testimony must be taken with a “large grain of salt.” Janz testified that he oversees compensatory time off records, however, he knew of no officer or date where a compensatory time off request had been turned down, and he testified that he did not even know why the Grievants’ requests were turned down. The only evidence the City produced that showed any disagreement between the Association and the City was with regard to the Bike Patrol. The testimony regarding that agreement established that the parties met and conferred, and worked out a mutually-agreeable solution. While the City claims that this “standard” is not sufficiently clear to be enforceable, that is not the law. Most importantly in this case, there were no discretionary standards needed or employed for either request. The testimony was clear that the requests were turned down solely because of the one officer off at a time rule of the December 6, 2000 memo and that there were no special needs for police services on the days in question. That being the case, the only question as to the granting of the time off requests in this case is what minimum staffing level was to be used. The City used the “only one off at a time” minimum staffing standard in Captain Koser’s memo, but should have applied the minimum staffing level of the Agreement.

The Association requests that the grievances be sustained, and that the City’s actions be found to have violated the parties’ Agreement.

City

The City first notes that it and the Association are parties to a collective bargaining agreement and are further subject to a minimum staffing agreement appended to their agreement since 1991, and that they have continued operating and interacting as though the addendum still controls, even though it is not officially appended to their current agreement. The City further notes that in 1997 the City commissioned a staffing study to evaluate staffing service levels in the City and that the result of that study was a recommendation to implement four new patrol officer positions. The City's Common Council adopted the study and has increased staffing positions by three to date. In December of 2000, the Police Department administration implemented a new shift staffing bulletin, the effect of which was to permit one officer off on vacation per shift. This was an increase from what had been permitted off in the past, which was only two officers off in a 24-hour period. The change was requested by Association members, however, the new shift bulletin also implemented a new staffing level requirement in excess of the minimum staffing addendum. This resulted in a maximum of one officer off on vacation, comp time, holiday, or other accrued leave per shift. The City acknowledges that the Grievants' request for compensatory time off were both denied based upon the staffing needs of the department, as set forth in the December 6, 2000 memorandum.

The City notes that the Association argues that its members have the right under Article 8 of the Agreement to take compensatory time off, subject to limited exceptions, and provided minimum staffing levels are met. This alleged right is predicated upon a combination of contract language (Article 8) and an alleged "past practice" which allowed comp time off when minimum staffing was met, subject to "agreed upon" exceptions. In order for the Association to prevail, it must first show that the contract language is ambiguous. If it is able to do so, then to establish a binding past practice to clarify ambiguous contract language the Association must show that the alleged practice is: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice of the parties. *CELANESE CORP. OF AMERICA*, 24 LA 168, 174 (Arbitrator Justin, 1954).

The City first asserts that the contract language at issue is not ambiguous; rather, it supports the City's contention that the provision does not equate with an automatic right to compensatory time off provided minimum staffing levels are met. The second sentence of the last paragraph of Article 8 is instructive, and provides, "Staff will not be reassigned to accommodate off time, holiday time, schedule equalization days or vacation days not signed in the vacation book." If, as the Association claims, the reference to minimum staffing in that last paragraph were intended to mean that all requests would be granted so long as minimum staffing was maintained, the above-cited sentence would not be needed. The City notes that the Association stipulated that it is not claiming that the minimum staffing requirement is a required or "maximum" staffing level. The City asserts that the above sentence is meant to

restrict one's ability to use comp time. The Association's position ignores the sentence in arguing that no maximum or required staffing levels are implicated by their theory that the language of the last paragraph creates a qualified right to compensatory time off. While they argue that the Department could call in officers on overtime if they wanted higher staffing levels than the minimums, that is exactly the situation the sentence cited above does not require. Minimum staffing, as it relates to compensatory time off under Article 8, must be looked at in terms of a discretionary right in management to grant with a minimum not to go below, and not as a required number to look at.

As to the alleged practice, the Association relies upon a verbal "agreement" with the City to assert that a past practice exists which requires requests for compensatory time off to be granted, with limited exceptions for special events. Testimony was to the effect that there is no clear standard for what would constitute a special circumstance which would justify not giving compensatory time off, and that every situation was to be considered by itself. Other testimony was presented to the effect that the agreement was, in effect, a requirement that the administration "justify" the need for additional staffing to the Association. Thus, the record is not clear, even among Association members, as to the parameters of any so-called "agreement". Further, an agreement to approve compensatory time off on a case-by-case basis is not the same as a right to take compensatory time off, Officer Dahl having testified that whether a special circumstance warrants denial of compensatory time off depends upon the circumstances.

According to the City, management has not interpreted and administered the language in question to mean that there is no right to compensatory time off; rather, the staffing needs of the Department is the determining factor in evaluating a request to take compensatory time off. According to the City, the record is replete with clear instances where management consistently utilized its prerogative to manage the Department and set staffing levels consistent with the direction of the Common Council. Examples included the Bike Patrol, as well as "Celebrate DePere", Y2K, and the county fair. Further, management has on schedule postings indicated "no more off" even when staffing levels are above the minimums. The Association's recognition of management's authority to deny time off in those circumstances is inconsistent with its position that there is a right to take that time off in other circumstances. Each time management exercised its rights to staff the Department there was a protest by the Association. It was only after such protest that the City would discuss the need for the additional staffing and in some circumstances (bike patrol) work out an accommodation whereby Association concerns were addressed while the additional staffing was added. If there is any practice then, it is a practice of management consistently exercising its authority to determine the staffing needs of the Department.

The City concludes that even under the Association's interpretation of the "agreement", it is neither unequivocal nor clearly enunciated or acted upon, even by their own testimony over as to what has occurred over the past 10 years. The best that can be said as to the parameters of the so-called "agreement" is that it "depends on the circumstances." Clearly, such parameters as "it depends" cannot support a finding of a binding past practice to take compensatory time off.

In its reply brief, the City reasserts that the Association has failed to establish the necessary elements for finding a binding past practice, and asserts that the Association itself cannot decide whether the practice alleged was one of an "automatic right" to compensatory time off, provided minimum staffing levels are met, or whether the practice was a "duty to meet and confer." Absent an unequivocal, clearly enunciated mutual practice, there is no "past practice" by which to measure the City's conduct in this case. Further, the Association seems to argue that lack of specificity over when they believe they have a right to compensatory time off somehow brings about an "abuse of discretion" analysis. The Association fails to realize that absent specificity and mutuality regarding the details of the alleged practice, there is no practice. The issue is not an abuse of discretion; the issue is whether there is a binding past practice sufficient to govern the conduct of the parties in the absence of clear contract language. The Association has failed to show that such a past practice exists other than the City's practice of invoking its management discretion to determine the staffing needs of the Department.

Last, the Association misquotes Chief Tellock in describing his testimony. Rather than conceding a "automatic" right to compensatory time off, the Chief's testimony, read in its entirety, underscores the discretionary nature of determining the staffing level needs of the Department on any given day, and any given shift. The Chief's position on the non-automatic nature of the use of compensatory time off is best described in his November 6, 1995 letter to the Association attorney. The City concludes that the Association has failed to establish a binding past practice that would require the City to grant compensatory time off upon demand, assuming minimum staffing levels are met. The City requests that the grievances be denied.

DISCUSSION

The first issue in dispute is whether or not the wording of the last paragraph of Article 8 is clear and unambiguous. The City asserts the language is not ambiguous and essentially argues that it leaves to management the discretion to grant or deny requests to take compensatory time off based upon what it determines is the needed staffing level for the shift in question. The Arbitrator disagrees. The wording of the first sentence simply states that such requests "will be addressed as to the minimum staffing for the shift requested off." "Minimum staffing" could mean (1) the minimum staffing levels set forth in the 1995 addendum to the Agreement; or (2) the minimum staffing level management determines is

needed for that shift based upon special circumstances, e.g., special events or holidays; or (3) it could mean, as the City asserts, whatever staffing level management decides to provide. The parties intent in this regard, and the degree of discretion, if any, management may exercise if the minimum staffing level would be met if the request was granted, is not so clear from the wording in question that past practice, if it exists, is to be disregarded.

The Association asserts that “minimum staffing” refers to the minimums in the 1995 addendum and that management must justify denying a request to use compensatory time off where those minimums would be maintained if it were granted, and relies upon past practice to support its contention. The evidence in the record with regard to past practice is the testimony of a number of Association witnesses who testified that an officer’s request to take compensatory time off was granted unless it would result in being below the minimum staffing level for that shift (set forth in the 1995 addendum), or unless there was a special event that would justify requiring a staffing level above the minimums in the addendum, or the requesting officer was already in the schedule for Bike Patrol on the requested day off. The Chief conceded in his testimony that that had been “generally true” prior to the December 6, 2000 memorandum, although he attempted to describe it more as an exercise of discretion on management’s part. Captain Janz testified that whether the minimum staffing level would be met was only one of the factors he looked at in deciding whether to grant a request to take compensatory time off, and that it also depended upon the service level he wanted to provide at that time.

From the testimony, it is concluded that there has been a practice that requests to take compensatory time off were generally granted if it would not result in falling below the minimum staffing level set forth in the 1995 addendum for the shift in question, absent special events or circumstances that management determined would require staffing above the minimum. 2/ It also appears that there has developed a common understanding or “agreement” between the parties that certain events, e.g., Celebrate DePere, constitute such a “special event”. There was also an understanding or “agreement” as to how the Bike Patrol would be handled with regard to granting or denying such requests. As the Association asserts, a past practice that gives meaning to ambiguous contract language may not be unilaterally altered or terminated.

2/ While witnesses acknowledged that Captain Janz would at times note “no more off” on the schedule, the only evidence as to specific instances (City Exhibits 9, 11 and 12), show this occurred when there were special events scheduled on the shift in question or it was a holiday.

The undersigned does not agree, however, that a history of the parties’ working out disputes when there has been disagreement as to whether an event or circumstances justified denying requests to take compensatory time off amounts to a binding “practice” of meeting and

conferring. Such instances are examples of management exercising its right under Article 3, Management Rights, and Article 8, paragraph 4, to determine the staffing needs of the Department in a given situation. Management exercises its discretion and the Association exercises its right to challenge the reasonableness of management's decision as it affects the rights of officers to take time off. While it appears that they have usually been able to reach an accommodation when this has occurred in the past, that reflects a good functional relationship, but does not necessarily create a contractual right.

The City's interpretation of the last paragraph of Article 8 appears to be that it simply makes clear that compensatory time off will not be granted in any case if it would result in falling below the minimum staffing level for that shift, and creates no right in the employee to take the time off even if it would not result in falling below the minimum. That interpretation is too narrow. The first sentence states that, "Requests for off time . . . will be addressed as to the minimum staffing for the shift requested off." If the parties intended this to mean that such requests will be granted or denied at management's discretion based upon its determination of the Department's staffing needs, they seemingly would have stated that. The reference to the "minimum staffing" in the first sentence, along with the second sentence, does make clear that such requests will not be granted if doing so would result in falling below the minimum staffing level (in the 1995 Addendum) and that officers will not be reassigned in order to increase staffing on that shift in order to grant the request ^{3/}. However, it also infers that if granting the request would not cause the staffing level to fall below the minimum for that shift, it will generally be granted, and the practice reflects this has been the parties' interpretation. It is not, however, an "automatic" right to have the request granted, as management has reserved the right, both in Article 8 (where "needs of the Department" are defined) and in Article 3, Management Rights, to determine whether there are circumstances that will require a higher staffing level on a given shift or day. Again, that determination is subject to challenge based upon its reasonableness.

3/ This clarification in the second sentence is necessary as reassignment is utilized in some cases of signed vacation and sick leave under other provisions of Article 8.

The City asserts it made a determination that the City has grown in area and population such that a staffing level higher than the contractual minimums is now required on an everyday basis. While management has the right to determine the level of services it will provide (i.e., the general staffing level), as it impacts the ability of officers to take compensatory time off under the last paragraph of Article 8, the contractual minimum staffing level set forth in the 1995 Addendum remains the standard by which requests to take compensatory time off will be granted or denied, absent special events or circumstances that would require a higher level of staffing on the shift or day in question. To conclude otherwise would make meaningless the reference to "the minimum staffing for the shift" in that provision of Article 8, and would also

effectively unilaterally amend the minimum staffing levels set forth in the 1995 addendum, contrary to paragraph 1 of that addendum. 4/

4/ While the parties had discussed work schedule changes and changes in vacation procedure prior to management implementing the changes and the new policy of only one "off" per shift, it is clear neither party considered those discussions to be "negotiations" or the change to have been mutually agreed upon.

In summary, the last paragraph of Article 8 infers that a request to take compensatory time off will generally be granted if it will not result in falling below the minimum staffing level for that shift, unless management determines there are special circumstances that will require a staffing level above the minimum for that shift. As with any management decision, such a determination is ultimately subject to challenge on the basis of its reasonableness under the circumstances. 5/ This is consistent with both the wording and the practice of the parties.

5/ If there is a dispute in that regard, as with other disputes over their respective contractual rights, the parties might be able to reach a mutually-agreeable accommodation as they have at times in the past, or it may have to be resolved through their grievance procedure.

In both instances in issue in this case, it is undisputed that management's denials of the requests to take compensatory time off were not based not upon a determination that there were special circumstances requiring a higher staffing level on those days, but upon the new policy of only one "off" per shift. As Chief Tellock concedes that the requests were denied on the basis of the new policy, and not on any special circumstances that required a staffing level above the contractual minimum for the shifts in question, and given that granting the requests would not have resulted in falling below the minimum staffing levels for those shifts, it is concluded that denial of the requests violated the last paragraph of Article 8 of the Agreement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievances are sustained. The denial of the requests of Sergeant Thompson and Officer Van Price based upon the policy of only one “off” per shift, without any other circumstances to justify a need to deny the requests, violated Article 8, Hours of Work.

Dated at Madison, Wisconsin, this 1st day of February, 2002.

David E. Shaw /s/

David E. Shaw, Arbitrator

